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FIRST DISTRICT—SAN FRANCISCO

Division 1

Presiding Justice

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Associate Justices

LOUIS H. WARD - - - - - - - - - - - - San Francisco
A. F. BRAY - - - - - - - - - - - - - - San Francisco

Division 2

Presiding Justice

JOHN T. NOURSE - - - - - - - - - - - - San Francisco

Associate Justices

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MAURICE T. DOOLING, Jr. - - - - - - - - - Hollister

Clerks

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W. B. Sullivan - - - - Deputy Clerk - - - San Francisco
Harry M. Gardiser - - - Deputy Clerk - - - San Francisco

SECOND DISTRICT—LOS ANGELES

Division 1

Presiding Justice

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Associate Justices

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THOMAS P. WHITE - - - - - - - - - - - Los Angeles

Division 2

Presiding Justice

MINOR MOORE - - - - - - - - - - - - - Los Angeles

Associate Justices

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EMMET H. WILSON - - - - - - - - - - - Los Angeles

DISTRICT COURTS OF APPEALS—Cont'd.

Division 3

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PARKER WOOD	Los Angeles

Clerks

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John W. Shenk III	Deputy Clerk	Los Angeles
Wm. E. Doran	Deputy Clerk	Los Angeles

THIRD DISTRICT—SACRAMENTO

Presiding Justice

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Associate Justices

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PAUL PEEK	Long Beach

Clerks

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FOURTH DISTRICT

Fresno—San Bernardino—San Diego

Presiding Justice

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Lloyd E. Hidden	Deputy Clerk	San Bernardino
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George J. Kobelin	Deputy Clerk	San Diego

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LOS ANGELES COUNTY

PRESIDING JUDGE

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JUDGES

EDWARD T. BISHOP - - - - - - - - - - Los Angeles
JESS E. STEPHENS - - - - - - - - - - Los Angeles

CLERK

JEROME B. WILLIAMS - - - - - - - - - - Los Angeles

SAN FRANCISCO COUNTY

PRESIDING JUDGE

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JUDGES

EDWARD P. MURPHY - - - - - - - - - - San Francisco
ALFRED J. FRITZ - - - - - - - - - - - San Francisco

CLERK

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SAN DIEGO COUNTY

PRESIDING JUDGE

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JUDGES

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ROBERT B. BURCH - - - - - - - - - - - San Diego

CLERK

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SACRAMENTO COUNTY

PRESIDING JUDGE

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JUDGES

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CALIFORNIA REPORTER

179 PACIFIC REPORTER

SECOND SERIES

78 Cal.App.2d 950

PARIS v. LOS ANGELES RY. CORPORATION et al.
Civ. 15346.

District Court of Appeal, Second District, Division 1, California.
April 8, 1947.

Rehearing Denied April 25, 1947.
Hearing Denied May 29, 1947.

1. Street railroads 🔑114(5, 13, 21)

In action against street railway company for injuries sustained when plaintiff, who had gone to assistance of woman who was struck by one of two passing streetcars on a clear night during a wartime "dimout" was struck by a third streetcar, evidence warranted finding that company was negligent and that such negligence was proximate cause of injury and that plaintiff was not contributorily negligent because he acted recklessly.

2. Street railroads 🔑117(35)

In action against street railway company for injuries sustained when plaintiff, who had gone to assistance of woman who had been struck by one of two passing streetcars on a clear night during a wartime "dimout" was struck by a third streetcar, submission of case to jury upon doctrine of last clear chance was not error.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Personal injury action by Ellis D. Paris against Los Angeles Railway Corporation, known as Los Angeles, Transit Lines, and another. From a judgment for the plaintiff, the defendants appeal.

Affirmed.

Gibson, Dunn & Crutcher, of Los Angeles (Philip C. Sterry, of Los Angeles, of counsel), for appellants.

Chase, Barnes & Chase and Donn B. Downen, Jr., all of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal by defendant in an action for damages for personal injuries wherein plaintiff recovered judgment.

A jury trial resulted in a verdict for plaintiff. Motions for a nonsuit and a directed verdict during the course of the trial were denied. A motion for judgment notwithstanding the verdict was also denied. Following an unsuccessful motion for a new trial, defendant appealed from the judgment.

The injuries resulted from an accident which appellant describes as follows:

"The accident occurred between 12:30 and 1:00 A.M. and because of the 'blackout' which prevailed during the war street lights were hooded. Prior to the accident plaintiff, as he was crossing Broadway in an easterly direction at the south side of 47th Street observed a '7' line car at about 47th Place which was northbound and which passed him as he reached the east curb. When he stepped upon the curb he observed a woman standing between the north and southbound streetcar tracks at a point approximately 50 feet north of the north crosswalk of 47th Street facing west and also observed another '7' line car, which was southbound, approaching the place where she was standing and about 10 to 20 feet north of her position in the street. By this time the northbound '7' line car had crossed 47th Street and he observed the woman start to step backwards and then the northbound car cut off his view. After the two '7' line cars had passed each other he observed the body of the woman on the street very close to or on the southbound rail. He immediately started running towards the deceased and for the first time observed a southbound '8' line car approaching from 46th Street. He reached the deceased's body when this '8' line car was 10 to 15 feet from it and tried to pull the body from the track but, according to his testimony, was struck by the '8' line car which stopped 6 to 10 feet south of the woman's body."

It will be seen from the above that a woman was injured by one of two passing streetcars and that when plaintiff went to her assistance, a third car approached and, striking plaintiff, caused the injuries complained of.

It is contended by appellant that, "There is no evidence to sustain the implied finding of the jury that defendant was negligent or that negligence, if any, upon its part, proximately caused injury to the plaintiff" and that, "The court erred in submitting the case to the jury upon the doctrine of the last clear chance".

Before giving consideration to the above contentions, it should be noted with regard to the evidence that what appellant refers to as a "blackout" may be more accurately described as a "dimout". The record reveals that the street light standards located at the four corners of the intersection were lighted as well as other similar standards located about half way between the intersections. About one-half of the top portion of the lights were hooded so as not to reflect the light upward. Also that various places of business located at or near the intersection had small store display lights in the windows. The weather was clear.

[1] In connection with the first above mentioned contention appellant argues that, "The conclusion that Enders (the operator of the streetcar) was guilty of negligence, could only be reached by indulging in pure speculation" and with regard to plaintiff's efforts to rescue the woman, "Whether the car was 10 feet or 3 feet away he nevertheless knew that it was in motion and having full knowledge of that fact and the fact that it might not be able to stop he nevertheless dropped to his knees directly in front of the oncoming streetcar. We submit that in so doing he acted with a recklessness which would not be warranted under the circumstances in the judgment of a reasonably prudent man. There is very grave doubt that plaintiff was struck by the car. * * *"

Without going into further detail, it is sufficient to note that as a matter of law the evidence supports the verdict and judgment.

[2] As to the last clear chance doctrine submitted to the jury appellants submit that, "The instruction, as a general statement of the law, correctly sets forth the various elements necessary to bring the last clear chance doctrine into play. The vice of the instruction lies in the fact that there is no evidence establishing any of these elements." It is urged that the foregoing instructions conflicted with one requested by defendant and given. There is no merit to the contention, which appears to be based on an exaggerated notion as to the effect of the instructions.

There being no prejudicial errors in the record, the judgment and orders are affirmed.

YORK, P. J., concurs.

WHITE, Justice (concurring).

I concur. In the case of Henshaw v. Belyea, 220 Cal. 458, 462, 31 P.2d 348, 349, it was held that in an attempt to rescue a person from serious injury or imminent death one is required to exercise a reasonable regard for his own safety, but that "the law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons." The instant case presents a situation where it was a question for the jury to determine whether or not, under all the circumstances, respondent acted rashly or recklessly. It was also a question for the jury to determine whether or not the admitted failure of the motorman to heed the warning flashlight of respondent prior to a time when said motorman was too close to the injured woman to bring his car to a stop constituted negligence on his part. There is substantial evidence to support the implied finding of the jury on these and other issues as to negligence raised by the evidence.

With reference to the claimed error in the giving of an instruction on the last clear chance doctrine, I am persuaded, in view of several instructions given at the request of appellant with respect to the duties and obligations resting upon respondent in order to avoid being guilty of contributory negligence, it cannot reasonably be inferred that the jury was, as appellant claims, confused to the extent that they were led to believe that any and all contributory negligence on the part of respondent was removed by the giving of the challenged instruction on the doctrine of last clear chance. Furthermore, in the light of the evidence contained in the record herein, it must be held that the instruction, even if erroneously given, did not result in a miscarriage of justice within the meaning of section 4½ of Article VI of the Constitution of this state.

Hearing denied; SCHAUER, J., dissenting.

79 Cal.App.2d 79

PEOPLE v. McRAE.

Cr. 2094.

District Court of Appeal, Third District, California.

April 11, 1947.

Bail 🔑73
Indictment and Information 🔑144

The dismissal of information without an order authorizing district attorney to file a new or amended information, and without an order for resubmission of the cause, entitled defendant to be discharged and to have his bail money refunded to him, and an appeal by the People from order dismissing the information would not automatically stay the judgment and authorize retention of bail money until appeal had been finally determined. Pen.Code, §§ 995, 997, 1009, 1242, 1273.

Appeal from Superior Court, Sacramento County; Raymond T. Coughlin, Judge.

Proceeding by the People of the State of California against Robert V. McRae. From the judgment, the People appeal. On defendant's petition to exonerate his cash bail bond.

Motion granted.

Fred N. Howser, Atty. Gen. and Ruth Bernfeld, Deputy Atty. Gen., for appellant.

Peter Mannino, of Sacramento, for respondent.

THOMPSON, Justice.

The respondent, Robert V. McRae, petitioned this court to exonerate his cash bail bond in the sum of $2,000, which was deposited under Section 1273 of the Penal Code for appearance in the Superior Court on a charge of violation of Section 288a of that code. An information was filed. The defendant moved that court under Section 995 to set aside the information on the ground that he had been committed by the magistrate without probable cause. The motion was granted and the information was dismissed. The trial court neither ordered a new information to be filed, nor that the bail be exonerated, as provided by Section 997 of the Penal Code. From the order dismissing the information the People have appealed. That appeal is now pending in this court, but it is not involved on this motion.

The Attorney General contends that the appeal by the People from the order dismissing the information automatically stays the judgment and authorizes retention of the bail money by the court until the appeal has been finally determined. We think not.

When an information is dismissed a defendant is entitled to be discharged from custody, and his bail *must* be exonerated unless the court "directs that * * * [a new or amended] information be filed by the district attorney." (Secs. 997 and 1009, Penal Code.) Section 997 provides that: "If the motion is granted, the court *must* order that the defendant, if in custody, be discharged therefrom; or, if admitted to bail, that his bail be exonerated; * * * unless it *directs* that * * * [a new or amended] information be filed by the district attorney." (Italics added.)

Section 1009 of the same code provides that: "If the court does not permit the information to be amended, nor direct that an information be filed, or that the case be resubmitted, * * * the defendant, if in custody, must be discharged, * * * or, if he has deposited money, * * *, the money must be refunded to him, * * *."

The order dismissing the information, without an order authorizing the district attorney to file a new or amended information, and without an order of resubmission of the cause, is a judgment in favor of the defendant, until it has been reversed on appeal. (Section 1242, Penal Code.) The last mentioned section provides that: "An appeal taken by the people *in no case stays or affects the operation of a judgment* in favor of the defendant, until judgment is reversed." (Italics added.)

It follows from the clear provisions of the foregoing sections of the code that the dismissal of the information in this case without an order authorizing the district attorney to file a new or amended information, and without an order for resubmission of the cause, entitles the defendant to be discharged, and to have his bail money refunded to him. People v. Seitz, 100 Cal. App. 113, 116, 279 P. 1070.

It is ordered that defendant's bail be and it is hereby exonerated, and that the bail money deposited by him be refunded to him.

ADAMS, P. J., and SCHOTTKY, J. pro tem., concur.

AVOSET, Inc., v. BROCK, Director of Agriculture, et al.

Civ. 7311; Sac. 5794.

District Court of Appeal, Third District, California.

April 8, 1947.

Hearing Granted May 8, 1947.*

Food 🔑1

The provision of the Agricultural Code requiring that food products manufactured from milk or cream be made from that classified as Grade A is not unconstitutional because a food product manufactured from milk or cream which was not Grade A is as wholesome and healthful and free from deleterious or contaminated elements, as if it were made from Grade A milk or cream. Agricultural Code, § 553.5.

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

On petition for rehearing.

Petition denied.

Prior opinion 178 P.2d 56.

Fred N. Howser, Atty. Gen., and Walter L. Bowers, Asst. Atty. Gen., for appellants.

Robinson & Cornell, of Merced, for respondent.

PER CURIAM.

Upon petition for rehearing it is contended that the court overlooked a purported stipulation that "Avoset is equally as wholesome, nutritious, healthful, and sanitary when made from manufacturing cream as when Grade A is used."

By reference to the record it appears the foregoing language was not stipulated to, but defendants did agree that whatever the Doctor Roadhouse report showed would be deemed to be the facts with relation to Avoset.

This court did not overlook the stipulation referred to, for we stated that: "It may be conceded that such products * * * may also be wholesome and free from deleterious or contaminated elements." But it is immaterial whether Avoset is equally as wholesome, nutritious, healthful or pure as when made from Grade A milk or cream. That fact alone would not render the challenged section unconstitutional. We have held that the act is valid in spite of the wholesomeness of the product. Avoset is not manufactured from Grade A milk or cream, as required by the act. That was the chief issue in the case.

The petition for rehearing is denied.

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*Judgment vacated, action dismissed.

79 Cal.App.2d 1

ALWARD et al. v. PAOLA et al.

Civ. 3534.

District Court of Appeal, Fourth District, California.

April 9, 1947.

Hearing Denied June 3, 1947.

1. Appeal and error 🔑1064(1)
Automobiles 🔑246(22, 37)

In action for damages sustained in automobile collision, general instructions, applicable under evidence, on doctrines of unavoidable accident and sudden peril, were not erroneous or prejudicial to plaintiffs.

2. Automobiles 🔑246(37)

An instruction was not erroneous as telling jury that automobile operator, under sudden peril doctrine, is not guilty of negligence, if he exercises ordinary care in his choice of action, whereas such duty continues at all times notwithstanding such choice.

3. Automobiles 🔑246(44)

Evidence justified instruction that when motor vehicle is purchased from reputable manufacturer, no other examination thereof by owner or operator than such as is practicable and usual among ordinarily prudent operators or owners of similar vehicles is required, and owner or operator is not legally responsible for defects therein, nor for accident resulting solely and proximately therefrom, when such examination would not have disclosed defect.

4. Evidence 🔑553(1)

A hypothetical question to expert witness may be based on any theory logically deducible from evidence, and considerable latitude is allowed in choice of facts on which to base question.

5. Evidence 🔑553(2)

Hypothetical questions to mechanical experts as to cause of failure of automobile brakes to operate properly were not objectionable because of failure to include facts in evidence as to presence of brake marks on highway and method used in operating automobile, though owners thereof contended that such marks were not those of such automobile.

6. Evidence 🔑558(9)

Wide latitude should be allowed in cross-examination of expert witness to determine whether omission of any evidentiary facts in hypothetical question asked witness on direct examination might change his opinion.

7. Evidence 🔑555

The fact that expert witness' opinion was not founded on all facts goes to weight of such evidence, not to its competency or materiality.

8. Appeal and error 🔑930(1)

All conflicts in evidence must be resolved in favor of, and all legitimate and reasonable inferences indulged to uphold, judgment appealed from.

9. Appeal and error 🔑930(1), 996

All intendments are in favor of judgment on jury's verdict based on conflicting testimony, and where contradictory inferences can reasonably be drawn from facts in evidence, appellate court will not substitute inferences or its own judgment for those of jury.

10. Appeal and error 🔑1003

On appeal from judgment on jury's verdict, appellate court cannot weigh evidence.

11. Appeal and error 🔑1001(1)

In action for damages sustained in automobile collision, evidence that foot brake of defendants' automobile would not function because of defect in automobile sustained jury's finding, implied from verdict for defendants, that defendant driving such automobile was not negligent in losing control thereof.

12. Automobiles 🔑244(42)

In action for injuries sustained in head-on automobile collision, evidence supported jury's implied finding of contributory negligence of one of plaintiffs in driving automobile in center lane of three lane highway while not overtaking and passing any other automobile proceeding in same direction. Vehicle Code, § 526.

◆

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action by Vesta K. Alward and others against Nick Paola and wife for personal injuries and property damages sustained in an automobile collision. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Schmidt & Catalano, Oscar F. Catalano and Walter Maas, all of Bakersfield, and Herbert Chamberlin, of San Francisco, for appellants.

Borton, Petrini, Conron & Borton and P. R. Borton, all of Bakersfield, for respondents.

GRIFFIN, Justice.

This action for damages arose out of an automobile collision happening on May 20, 1945, at about 11:30 a. m. on a clear day, on U. S. Highway 99, over the "Five Mile Grade" about 15 miles north of Castaic.

Plaintiff alleges negligence of defendants and defendants claim defenses of contributory negligence, joint enterprise, and unavoidable accident.

The three-lane highway at the place of the accident runs north and south. Each lane was 10 feet in width with a four-foot shoulder on each side. There is a canyon on one side and a bank on the other. The roadway is posted with signs reading "Use center lane for passing only." The road descending from the top of the "Five Mile Grade" to the point of collision contains a large number of curves. In the immediate vicinity of the collision, however, the road was comparatively straight for a distance in excess of 450 feet.

Defendant Bessie Paola left Bakersfield in a 1940 model Buick automobile owned by her and her husband, defendant Nick Paola. She followed her husband, who was driving his sister's car to Los Angeles to be stored. After going up a hill and starting down the "Five Mile Grade" at a speed of about 40 miles per hour, she testified that her Buick appeared to be gaining on her husband's car; that she attempted to apply her brakes to retard the speed but that the foot brakes failed to function and the Buick continued to gain speed; that she became excited and tried to prevent a collision by driving in the center lane; that she proceeded down the grade, passing and overtaking cars in this manner, with the car out of control, for about two miles; that she gained speed up to 60 miles per hour and finally struck the rear left fender of a light-colored car proceeding in the same direction when endeavoring to turn out and pass it; that soon thereafter she struck plaintiffs' car, a Dodge sedan, approaching her from the south; that she observed lots of cars proceeding in both directions but, in the stress of her emotions, she did not recollect seeing any specific automobiles or in which lane she or they were traveling, including the ones she came in contact with; and that during this entire period she did not remember "whether or not she attempted to use the handbrake or sound the horn."

Plaintiffs were traveling northerly. They had been to Los Angeles shopping and plaintiffs Alwards, who were seated in Regan's car, had purchased three four-gallon cans of light-colored paint for their use. This paint was in the back seat portion of the car. Each occupant testified that the driver, Mr. Regan, was proceeding in the easterly northbound lane, at about 45 miles per hour when the accident happened. Mr. Regan testified that up to one week before the trial, he was not positive whether the accident occurred in the center lane or partially there, but that after he went back and observed the paint spilled in the roadway he concluded that the accident happened completely over in his easterly lane. He testified that he was not then nor had he been overtaking any other car proceeding in the same direction necessitating his traveling in the center lane; that while he was traveling upgrade defendants' car came around a curve about 400 feet north of him at about 60 miles per hour; that it hit the rear of a portion of another car traveling in the same direction and then careened across the highway and collided with his Dodge sedan; that the right front portion of the Buick struck the right front portion of his Dodge; that the force of the impact knocked the tops off of the paint cans and scattered the contents over the car and pavement, and the paint leaked out of the right-hand or easterly side of the Dodge down onto the pavement. The Dodge was almost a complete wreck and debris was scattered over the highway. Each occupant thereof was knocked unconscious and was seriously injured.

Two highway patrolmen arrived at 11:45 a. m., investigated, and noted the physical facts. One testified that the paint ran out of plaintiffs' car near its right front door onto the pavement and in the northbound lane; that the highway sloped in a westerly direction; that some of the paint "dripped over in the center lane" i. e. "run into the center lane"; that there were continuous brake marks north of the accident for 108 feet on the west side, commencing in the westerly portion of the center lane, and 100 feet on the east side of the center lane down to the paint spots; that there were two sets of brake marks in the northbound lane 42 to 49 feet in length running in a northeasterly direction toward the easterly shoulder of the road. He testified that within an hour after the accident he tested the foot-brakes of the Buick and there was "pedal pressure there * * * after pushing the pedal down about one-half way"; that the master brake cylinder was about one-half filled with fluid. Another test was made while the Buick was being towed to the garage with a like result. The brake lining was also examined and there was no failure of brakeage. Some of the debris from the impact (headlight glass, taillight glass, and pieces of metal) were found in the center of the center lane just north of the paint spots.

Mrs. Paola signed a written statement, obtained by the officer, in which she stated that "the brakes would not hold"; that she "tried to stop and couldn't, so I tried to stay in the middle lane and was going faster all the time. After hitting the other car I could see myself going over the bank, was knocked to the bottom of my car. I took hold of the wheel and turned it toward the bank to stop the car."

The officer further testified that there was a head-on collision between the two cars; that the Dodge, plaintiffs' car, came to rest facing in a northeasterly direction and that it was partially in the northbound lane with its left rear wheel extending "2-½ feet into the center lane" and the Buick, the defendants' car, was on the westerly side of the highway on the shoulder, facing south, and about 156 feet beyond the Dodge.

Defendants then produced two witnesses who admittedly qualified as expert mechanics specializing in braking systems of automobiles. Questions were propounded to them (over objections as to the form of question) based upon the evidence above set forth. Each testified that in the "1940" model Buick there was a "bug" in the construction by the manufacturer in that the master cylinder of the brake system was placed within three inches of the exhaust pipe; that as a result thereof, occasionally, on climbing a hill, when the exhaust became hot from the combustion of gas in the motor, the brake fluid would boil so that vapor or gases would be present in the brake lines; that such condition rendered the braking system inoperative until such time as the vapors or gases in them cooled (a matter of a few minutes), permitting condensation to a liquid, and then there would be brakes present again. In response to the hypothetical question, as submitted, they gave the opinion that this is what occurred in the Buick automobile on the day in question; and that there was no way to anticipate or foretell that it would occur.

There was evidence that the Buick had been checked as to its braking capacity and other running qualities a short time before the accident and that, so far as defendants knew, the car was in first-class running condition.

In addition to the general instructions on negligence and contributory negligence, at the request of defendants, the court gave an instruction on the doctrine of sudden peril and unavoidable accident. This instruction was followed by the instruction (No. 32) that:

"You are instructed that the law recognizes what is known as an unavoidable accident in which there is no legal responsibility of any of the parties thereto to respond in damages to the other.

"You are further instructed in this connection that an accident, the sole cause of which is the failure of a mechanical function of an automobile of which the driver or owner was not aware and which he could not have anticipated in the excercise of ordinary care, is an unavoidable accident."

It then instructed the jury (instruction No. 33): "You are instructed that when a motor vehicle and the devices and appliances attached thereto have been purchased and procured from reputable manufacturers, then no other examination or inspection is required of the same by the owner or operator thereof other than such as is practicable and usual among ordinarily prudent operators or owners of similar vehicles, and the owner or operator is not legally responsible for defects or faults therein nor for an accident resulting solely and proximately therefrom, when such examination or inspection as is practicable and usual among ordinarily prudent operators or owners of similar vehicles would not have disclosed the defect or fault in question * * * It is a question for the jury to determine whether or not there was a mechanical defect or failure in this car."

This was followed by the instruction (No. 34): "The jury is instructed that a person who, through no fault of his own, is confronted with a sudden and dangerous emergency, is not held to the same degree of care in his choice of action, in relation to such emergency, as would be one who had due time for calm thought and consideration. It might be that, of several different expedients with which to meet the situation, he might overlook one entirely, or choose unwisely one less adequate to avoid the accident than others open to him, or even a course of action necessarily resulting in an accident. Notwithstanding this, such person would not be guilty of negligence unless, in his choice of action, it could be said that he did not use the same degree of care that an ordinarily prudent person would have used in the same situation and confronted by the same emergency."

Upon this evidence and under the instructions given, the jury found in favor of defendants. A motion for new trial was denied.

It is argued on this appeal that the jury was misdirected by the instructions given, to plaintiffs' prejudice, and that the evidence did not warrant the giving of such instructions on the doctrines above mentioned; that instruction No. 33 expounded the law applicable to the purchase of a new automobile from the manufacturer and that since the Buick was of a somewhat ancient vintage, that doctrine did not apply, citing Whitechat v. Guyette, 19 Cal.2d 428, 436, 122 P.2d 47; Davenport v. Stratton, 24 Cal.2d 232, 254, 149 P.2d 4; Scandalis v. Jenny, 132 Cal.App. 307, 313, 22 P.2d 545; Hyman v. Market Street Ry. Co., 41 Cal.App.2d 647, 650, 107 P.2d 485.

In connection with instruction No. 34, it is further argued that that instruction told the jury that under the doctrine of sudden peril the operator of an automobile would not be guilty of negligence if he exercised ordinary care, in his choice of action when confronted by a sudden and dangerous emergency; that the duty to exercise ordinary care is a continuing one under the sudden peril doctrine and that that duty does not begin and end with the choice of action, but continues and persists at all times without and notwithstanding the choice, citing Reuman v. La Monica, 58 Cal.App.2d 303, 305, 136 P.2d 81.

[1, 2] The general instructions on the doctrines of unavoidable accident and sudden peril, if applicable under the evidence, are not erroneous or prejudicial, nor is instruction No. 34, when read and considered in its entirety, fairly susceptible of the interpretation placed upon it by plaintiffs. The courts have approved instructions substantially similar to the one here in question in regard to the term "choice of action". Mortensen v. Fairbanks, 1 Cal.2d 489, 492, 35 P.2d 1030; Olsen v. J. J. Jacobs Motor Co., 99 Cal. App. 423, 434, 278 P. 1051; Girard v. Irvine, 97 Cal.App. 377, 275 P. 840; Galwey v. Pacific Auto Stages, Inc., 96 Cal.App. 169, 273 P. 866.

The instruction in Reuman v. La Monica, supra [58 Cal.App.2d 303, 136 P.2d 82], was criticized due to the wording, which wording permitted the person in a position of sudden peril to do "the best he could under the circumstances to avoid the accident", and that case held the true rule to be that such person was required to do what a reasonably prudent person would have done under similar circumstances. The criticized instruction here involved placed that same standard of care upon defendants.

[3] As to instruction No. 33, there is evidence that some 1940 Buicks came from the manufacturer with a defect in construction in reference to the braking system and that this "bug" was not such as to be discoverable by an ordinary lay person or by any ordinary, reasonable inspection; that such defect came about through original design and construction by the manufacturer and was not due to any wear or tear, age or use while in the hands of the ultimate user. There is no evidence anywhere in the record, nor has it ever been contended that any reasonable inspection of any kind by the owner or operator of the vehicle would have led to the discovery of the defect of the original manufacturer. There was sufficient evidence justifying the trial court in giving that instruction. Brandes v. Rucker-Fuller Desk Co., 102 Cal.App. 221, 282 P. 1009.

This case is factually different from the case of Whitechat v. Guyette, supra. Even in that case it was held that the reasonableness of the efforts of the operator to ascertain the existence of the possibility of mechanical failure was a question for the jury to determine.

In Jones v. Yuma Motor F. Terminal Co., 45 Cal.App.2d 497, 500, 114 P.2d 438, 439, it was said: "In passing upon the question whether the record contained sufficient evidence to justify the giving of the last clear chance doctrine (that same rule would apply here), we must consider all of the evidence before the court regardless of which party presented it and, disregarding conflicts, must view the evidence in the light most favorable to the contention that the doctrine is applicable, indulging every reasonable inference supporting the application of the doctrine. If under any reasonable view of the evidence the doctrine could apply it was proper to give instructions on the subject."

[4-7] Objection is next made to the ruling of the court in reference to the hypothetical questions propounded to the mechanical experts in relation to their opinion as to the cause of failure of the brakes on the Buick car to operate properly. It is contended that counsel for defendants failed to include in the question certain evidence relating to the presence of "brake marks" on the highway, and in reference to the method used in operating the car. It is defendants' contention that the "brake marks" described by the officer were not brake marks from defendants' car. In propounding the question defendants had the right to base that hypothetical question on any theory which might be logically deduced from the evidence, and considerable latitude is allowed in the choice of facts as a basis on which to frame such a question. Treadwell v. Nickel, 194 Cal. 243, 267, 228 P. 25. Measured by the rule set forth in that case, the question as propounded was not objectionable. Wide latitude in cross-examination should be allowed under such circumstances, to determine whether the omission of any facts in evidence might change the opinion of the expert. Plaintiffs were offered this opportunity. An opinion not founded on all of the facts goes to the weight of the evidence and not to its competency or materiality. Matthiesen v. Smith, 16 Cal.App.2d 479, 60 P.2d 873. The jury was instructed on the question of the weight and credibility of witnesses. We perceive no error in the court's ruling. Forbis v. Holzman, 5 Cal.2d 407, 55 P.2d 201.

[8, 9] As to the sufficiency of the evidence to support the judgment for defendants, a more serious question arises. We, at the outset, find ourselves bound by the familiar rule that all conflicts in the evidence must be resolved in favor of the judgment and all legitimate and reasonable inferences indulged in to uphold it. All intendments are in favor of the judgment arrived at on conflicting testimony, and where the facts are such that contradictory inferences can reasonably be drawn from them, the appellate court will not substitute inferences or its own judgment for those adopted by the jury. Arundel v. Turk, 16 Cal.App.2d 293, 60 P.2d 486, and the many cases therein cited.

[10, 11] There was evidence produced by defendant driver that her footbrakes would not function, and her expert wit-

nesses did testify to a plausible reason, if believed by the jury, why those brakes failed to function. Mrs. Paola's testimony as to the condition of her footbrakes, to us, loses some force by reason of the testimony of the traffic officer that there were two "brake marks" for a distance of nearly 108 feet on the highway at the scene of the accident which corresponded to the path taken by her car. Likewise, her explanation as to her apparent failure to apply the emergency brakes, which she testified had been in good working condition prior to the accident, to us, casts some doubt on the conclusion reached by the jury that she was not negligent. However, it is not within our province to weigh the evidence, and it cannot be said that there is no evidence to sustain the implied finding that Mrs. Paola was not negligent. Moreover, we are confronted with the claim of contributory negligence. There was some substantial evidence, if believed by the jury, that might indicate that the collision occurred in the center lane of the three-lane highway and that at that time plaintiff driver was not overtaking and passing any other car proceeding in the same direction.

[12] In addition to other requirements, section 526 of the Vehicle Code contains a clause providing that "Upon a roadway which is divided into three lanes a vehicle shall not be driven in the center lane except when overtaking and passing another vehicle where the roadway ahead is clearly visible and such center lane is clear of traffic within a safe distance * * *". The jury may have concluded that plaintiff driver violated that section and was negligent and that such negligence contributed proximately to the accident by reason of the fact that plaintiffs' car blocked the center lane of the highway to the use of the Paola vehicle descending the grade out of control and in an effort by the driver to go around the light-colored vehicle proceeding in the same direction ahead of her. The question of contributory negligence and joint enterprise were submitted to the jury under proper instructions and it found adversely to plaintiffs on those issues. There was sufficient evidence to support the conclusion reached.

The question of the sufficiency of the evidence to support the judgment was again submitted to the trial court on a motion for new trial. If the trial court, sitting as a thirteenth juror, was of the opinion that the evidence was insufficient, and that an injustice resulted, it was its duty to grant a new trial. Great latitude is allowed by appellate courts in upholding trial judges who, in their sound discretion, grant such motions, even in the face of verdicts by the jury. People v. Cesena, 18 Cal.App.2d 727, 64 P.2d 732; Sassano v. Roullard, 27 Cal.App.2d 372, 81 P.2d 213. We are not confronted with this same discretionary power, but are guided by the rules above mentioned. The trial judge denied the motion for a new trial after a full hearing. We are unprepared to hold that there was not sufficient evidence as a matter of law to support the judgment.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

78 Cal.App.2d 888

PEOPLE v. O'NEILL.

Cr. 4083.

District Court of Appeal, Second District,
Division 2, California.
April 3, 1947.

1. Criminal law 🔑641(1)

Defendant's voluntary dismissal of public defender who had represented defendant by appointment of court, was a waiver of defendant's constitutional right to be represented by counsel. Const. art. 1, § 13.

2. Criminal law 🔑641(1)

An accused's constitutional right to be represented by counsel may be either expressly or impliedly waived. Const. art. 1, § 13.

3. Criminal law 🔑641(1)

When the public defender is appointed to represent a defendant, the public defender is the defendant's attorney for all purposes of the prosecution to the same extent as an attorney regularly retained and employed by a defendant.

4. Criminal law 🔑1166½(1)

Defendant was not entitled to reversal of conviction because of trial court's alleged failure to appoint suitable counsel to represent defendant, where, prior to trial, defendant appeared before court and without apparent reason terminated services of public defender who had been acting as his counsel, and, when case was called for trial, defendant stated that he was ready to proceed. Const. art. 1, § 13.

5. Criminal law 🔑589(1)

Where a defendant, without apparent good reason, terminates the services of a public defender who has been acting as his counsel, denial of defendant's motion for continuance to obtain counsel, is not error. Const. art. 1, § 13.

6. Criminal law 🔑641(1)

In robbery prosecution in state court, Sixth amendment was not applicable. U.S.C.A. Const.Amend. 6.

7. Criminal law 🔑662(1)

The constitutional right of a defendant to be confronted with witnesses is the right to have witnesses testify in his presence and the right to cross-examine them, and is not a requirement that all witnesses or persons who may have knowledge of the crime be produced in court or be called to testify. U.S.C.A. Const.Amend. 6.

8. Criminal law 🔑1109(1), 1114(1)

Defendant's objection to record that transcript of trial was incorrect in certain particulars, and argument on matters that found no support in the record, would not be considered.

9. Criminal law 🔑1114(1)

District Court of Appeal could not entertain defendant's assertions of irregularity that did not appear in transcript of trial.

10. Criminal law 🔑260(11)

The alleged fact that before opening of court prospective jurors intermingled in court room with witnesses against defendant, was immaterial, where defendant waived trial by jury.

11. Criminal law 🔑738

The absence of motive does not as a matter of law establish innocence nor does it necessarily raise a reasonable doubt of guilt.

12. Robbery 🔑1

Robbery conviction would not be reversed because no evidence was introduced to prove a motive for the robbery

Appeal from Superior Court, Los Angeles County; Elmer W. Heald, Judge.

Frank W. O'Neill was convicted of robbery with two prior convictions of felonies, and from the judgment of conviction and order denying a new trial, he appeals.

Judgment and order affirmed.

Frank W. O'Neill in pro. per.

Fred N. Howser, Atty. Gen., and John F. Hassler, Deputy Atty. Gen., for respondent.

WILSON, Justice.

Appellant was charged with the crime of robbery with two prior convictions of felonies for each of which he served a term of imprisonment in the state prison. Upon his arraignment he was without counsel and the public defender was appointed by the court to represent him. Subsequently, with his counsel present, he pleaded not guilty and denied the prior convictions. Several days before the day set for his trial, pursuant to appellant's personal request made in open court, the public defender was relieved from further service as his counsel and thereafter he appeared in propria persona. When the case was called for trial he requested and was granted a continuance for the reason that certain witnesses desired by him were not present because they had not been served with subpoenas. On the day to which the trial was continued appellant withdrew his denial of prior convictions and admitted both, to wit, assault with a deadly weapon and petty theft with a prior felony, both convictions having been in the State of California. He then announced that he was ready for trial, waived a jury and consented to a trial by the court. He made no request for the appointment of an attorney and conducted his own defense. The court found him guilty as charged and denied his motion for a new trial. The appeal is from the judgment of conviction and from the order denying a new trial.

[1-5] As one of the grounds of appeal appellant asserts that he was denied due process of law by reason of his having been placed on trial without benefit of counsel. Since he waived his right to counsel by voluntarily dismissing the public defender who had represented him by appointment of the court the objection now made is without avail. While a person charged with crime is entitled to representation by counsel, Const. Art. I, sec. 13, the right is one that he may waive. In re Connor, 16 Cal.2d 701, 709, 108 P.2d 10. An express waiver is not necessary, an implied waiver being sufficient. In re Jingles, 27 Cal.2d 496, 499, 165 P.2d 12; In re Connor, 15 Cal.2d 161, 165, 99 P.2d 248. The minutes of the court recite that: "Pursuant to a personal request by the defendant, the Public Defender is relieved as his counsel, the defendant now appearing in Propria Persona." Appellant had been twice convicted of felonies before his trial upon the present charge and it would be assumed "that he was not unfamiliar with court proceedings and that there is no injustice to him to apply the rules of waiver to his case in view of his undoubted familiarity of such matters and his attitude in court." In re Connor, 15 Cal.2d 161, 165, 99 P.2d 248, 250. When the public defender is appointed to represent a defendant in a criminal case, he is the attorney for the accused for all purposes of the action to the same extent as an attorney regularly retained and employed by a defendant. In re Hough, 24 Cal.2d 522, 529, 150 P.2d 448. A defendant cannot urge as a ground for reversal that the trial court failed to appoint suitable counsel to represent him where prior to the trial he appeared before the court and without apparent good reason terminated the services of the public defender who had been acting as his counsel and when the case was called for trial stated that he was ready to proceed. People v. Cortze, 108 Cal.App. 111, 112, 290 P. 1083. Appellant did not ask for a continuance for the purpose of obtaining counsel and if he had done so the trial court would not have erred in the circumstances existing here in refusing to grant the request. People v. Russell, 156 Cal. 450, 455, 105 P. 416.

[6, 7] Appellant complains that in violation of the Sixth Amendment to the Constitution of the United States certain witnesses were not called by the prosecution, whereby he was denied the right of confrontation. That amendment is applicable only to proceedings in federal courts and not to those in state courts. People v. Wallach, 79 Cal.App. 605, 607, 250 P. 578; People v. Wilson, 26 Cal.App. 336, 338, 146 P. 1048. Furthermore the right to be confronted with witnesses by a person charged with a criminal offense is the right to have witnesses testify in his presence and the right of the accused to cross-examine them. People v. Schwarz, 78 Cal.App. 561, 579, 248 P. 990. There is no requirement in either the federal or the state constitution that all witnesses or persons who may have knowledge of the crime be produced in court or called to testify.

[8, 9] Appellant contends in his brief that the transcript of the trial is incorrect in certain particulars and argues matters that find no support in the record. Neither his objection to the record nor his argument on matters not contained in it will be considered by an appellate court since it is presumed that all proceedings were regular. People v. McKenzie, 86 Cal.App. 432, 434, 260 P. 912; People v. Gonzales, 88 Cal. App. 245, 247, 262 P. 1115. We cannot entertain appellant's assertions of irregularity that do not appear in the transcript of the trial. People v. Lytle, 34 Cal.App. 360, 361, 167 P. 552.

Appellant complains that certain witnesses for whom he had requested subpœnas did not appear for the reason that they were not served with process, the sheriff having noted on his return that one or more were out of town or not found. There is nothing in the record to impeach the sheriffs' return nor is there anything to show that the absent witnesses were material or that they would have given evidence relative to the case.

Obviously the court did not commit error in refusing to believe those portions of appellant's evidence that were contradicted by other witnesses.

Defendant admitted having taken the money referred to in the information from his victim, Walker, but testified that the latter was a bookmaker and that the money had been wagered with Walker on horse races. Appellant contends that he was retaking money wagered by him in an illegal game, relying on People v. Rosen, 11 Cal.2d 147, 78 P.2d 727, 116 A.L.R. 991. Walker testified that he was not a bookmaker, that he never at any time received a wager from appellant, and that he did not owe the latter any money. The court refused to believe appellant's testimony and did believe Walker's. The Rosen case therefore is inapplicable.

[10] Appellant asserts that on the morning of his trial and before the opening of court the prospective jurors were in the court room intermingled with the witnesses against appellant. If this situation would have constituted error in the event that appellant had been tried by a jury composed of persons referred to the error was disposed of by appellant's waiver of a trial by jury.

[11, 12] Finally appellant asserts that the judgment must be reversed for the reason that no evidence was introduced to prove a motive for the robbery. The evidence shows that appellant entered an office where Walker was seated and while about a foot or 18 inches from the latter drew out a knife with an open blade and said, "This is it. Give me your money." Walker laid his wallet on the table and said, "There it is." This was followed by a fight between the two men after which appellant took the money and left the office. Walker's evidence was corroborated by another witness who was present. The absence of motive does not, as a matter of law, establish innocence nor does it necessarily raise a reasonable doubt of guilt. Its effect is a question for the trier of facts to decide. People v. Bauweraerts, 164 Cal. 696, 702, 130 P. 717. Proof of motive is never essential. The perpetration of the crime by appellant having been established, evidence of the motive for its commission becomes unimportant. Such evidence is never indispensable to conviction. People v. Durrant, 116 Cal. 179, 208, 48 P. 75. Appellant's motive was that which is usual in cases of robbery—the obtaining of money or property of another by means of force or threats.

Appellant's criticisms of the trial judge are couched in such language that severe punishment for contempt of court would follow were it not for the fact that he is now and for a long time will be incarcerated in the state prison.

The judgment and the order denying a now trial are affirmed.

MOORE, P. J., and McCOMB, J., concur.

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79 Cal.App.2d 71

WILTSEE v. UTLEY et al.

Civ. 7334.

Sac. 5809.

District Court of Appeal, Third District, California.

April 11, 1947.

1. Pleading ⚷129(1)

Failure to deny in answer certain paragraph in complaint, was an admission of the allegations of that paragraph.

2. Appeal and error ⚷882(3)

A party who has tried his case in the trial court on one theory must adhere thereto on appeal.

3. Appeal and error ⚷882(3)

Where action was treated in the trial court as an action to determine title to mining claim, and not as an action in ejectment, and judgment rendered was that plaintiff had title, defendants could not assert on appeal that complaint lacked necessary allegations for an action in ejectment. Const. art. 6, § 4½.

4. Mines and minerals 🔑25

Failure to do annual assessment work on a mining claim does not ipso facto forfeit the claim.

5. Mines and minerals 🔑24

There can be no abandonment of a mining claim without an intention to abandon, and intention to abandon is a matter of fact for the trier of the facts.

6. Mines and minerals 🔑24

Though failure to do annual assessment work on mining claim is an element to be considered in determining whether there has been an abandonment of the claim, it does not, of itself, compel a conclusion that there has been such abandonment, especially where work has been resumed.

7. Mines and minerals 🔑24

An abandonment of mining claim on the part of a cotenant does not affect an abandonment of the entire claim but will merely pass the interest of the abandoning cotenant to his cotenant.

8. Mines and minerals 🔑26

Where attempted relocation by a cotenant of mining claim was invalid, any assessment work done by cotenant thereafter was properly attributable to the prior valid location by him and his cotenant.

9. Mines and minerals 🔑24

The fact that no assessment work was done on mining claim by heirs of cotenant did not compel a conclusion that the heirs abandoned the rights to which they succeeded on cotenant's death.

10. Mines and minerals 🔑38(21)

The fact that cotenant's administrator included mining claim in cotenant's estate and that claim was thereafter distributed to the cotenant's heirs as property, was some evidence of an absence of an intention to abandon the claim.

11. Mines and minerals 🔑38(14)

In action for a judgment that plaintiff had title to mining claim, burden was not on plaintiff to show that there had been no abandonment of the claim, but was on defendants who were asserting an abandonment.

12. Mines and minerals 🔑38(21)

In action to have title to mineral claim adjudged to be in plaintiff, evidence sustained finding that there was no abandonment of claim by plaintiff's predecessors in title.

13. Mines and minerals 🔑38(13)

Where action was tried solely as an action to quiet title to mineral claim, alleged fact that there was no sufficient allegation and no proof that defendants ousted plaintiff from the premises, was immaterial.

◆

Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

Action by E. A. Wiltsee against A. H. Utley and Hattie E. Utley for a judgment declaring that title to a certain mining claim is in the plaintiff. From a judgment, the defendants appeal.

Judgment affirmed.

R. H. Schwab, of Sacramento, for appellants.

T. L. Chamberlain, of Auburn, and Henry S. Lyon, of Placerville, for respondent.

ADAMS, Presiding Justice.

Appellants, defendants in the court below, have appealed from a judgment for plaintiff which adjudged that, subject to the paramount title of the United States of America, plaintiff is the owner and entitled to possession of a mining claim known as the Junction Bar Placer Claim, and that the defendants have no right, title or interest in said property.

Plaintiff's complaint alleged (par. II) that plaintiff was the owner and entitled to the possession of said property (describing it); that (par. III) theretofore while plaintiff was in lawful possession of said claim, and during the absence of plaintiff, defendants unlawfully entered thereon, purported to make discovery of valuable placer deposits, and to locate same; that (par. IV) said property was not then open to location because it had been withdrawn from entry by the Federal government as valuable for a power site; that (par. V) plaintiff was the successor in interest of J. A. Shields and W. E. Polifka who had located the claim in May, 1916, and that at the date of withdrawal of the land from entry said Shields and Polifka were in possession and were owners of said claim by reason of said location in 1916; that (par. VI) prior to the filing of the complaint plaintiff had caused to be served upon defendants a notice to vacate said premises, that defendants had failed to do so, and unless restrained would continue in possession and remove gold, etc., therefrom.

[1] A demurrer to the complaint having been overruled, defendants answered denying the allegations of paragraphs II, III, IV and V, but, by failure to deny, admitting the allegations of paragraph VI. They did not allege any title or right to possession in themselves.

The action proceeded to trial before the court without a jury. Plaintiff offered evidence of the location by Shields and Polifka, whereupon the validity of that location was admitted by defendants, Mr. Schwab, counsel for defendants, saying that there was no question that Shields and Polifka located the property in 1916, and adding: "I say this location was good." Plaintiff thereafter introduced evidence that Polifka had worked the said claim from time to time up to 1935 in which year he died. Plaintiff also introduced various Proofs of Labor, and notices of intention to hold filed during years when assessment work was not required, same having been filed by Shields and Polifka. Plaintiff also produced proof that on the death of Polifka his estate, including the claim in controversy, had been distributed to certain heirs and that conveyances from these heirs to plaintiff, together with a conveyance from Shields on August 29, 1942, had been executed. He also introduced Proofs of Labor and notices of desire to hold filed by plaintiff thereafter.

The evidence does not show that assessment work was done every year after the original location was made or that notices of intention to hold were filed during all the years in which labor was not required to be done; therefore, defendants contended before the trial court, on a motion for a nonsuit, that plaintiff had failed to prove title in that an intention on the part of the original locators and their successors in interest to abandon should be presumed. The motion having been denied, defendants then introduced a notice of location of certain mining land, including a portion of the claim in controversy, made in 1930, by Shields and seven others, and certain notices of desire to hold filed by Shields and one of the other locators covering the years from 1933 to 1936. It was conceded that the aforesaid location was invalid because made after the land had been withdrawn from entry, but the evidence of location by Shields, and his subsequent notices of desire to hold, were introduced for the stated purpose of showing abandonment of the original location by Shields.

No other evidence was introduced by defendants, who rested their case upon the proposition that, though the original location made by Shields and Polifka was valid, plaintiff had failed to show ownership or right to possession in himself because there was sufficient evidence to prove an abandonment of the claim.

The trial court found against this contention of defendants, finding that plaintiff is the owner and entitled to the possession of the property in controversy, that the allegations of paragraphs III, IV and V of plaintiff's complaint are true, that neither plaintiff nor his predecessors in interest had ever forfeited or abandoned the said mining location, and that defendants had no right, title or interest in same, or any portion thereof.

On this appeal defendants assert that plaintiff's complaint lacks the necessary allegations for an action in ejectment in that it fails to allege possession by defendants at the commencement of the action, ouster by defendants, and continued possession by them. Also that plaintiff failed to prove that he is the owner of the claim in that he failed to prove that the claim had not been abandoned by Polifka and Shields and that plaintiff failed to prove that defendants had ousted plaintiff from the premises.

Regarding appellants' present contention that plaintiff's complaint was insufficient to state a cause of action in ejectment, scrutiny of the record in the case indicates that it was tried solely as one one to determine plaintiff's title. And that title was considered the sole issue in the case is evidenced by numerous statements in the record to that effect. Mr. Schwab stated at the beginning of the trial: "To make my position clear, plaintiff depends upon a title which he has to prove before he is entitled to any consideration at all. There is no question about the original location having been made. The question that will develop is whether that location by Polifka and Shields has been brought down to date without any interruption." Later he stated: "You allege ownership, and that the defendants have no right, title or interest in the property. Essentially, that is the whole complaint. This is similar type of action in most respects to a suit in ejectment. The allegations are exactly the same"; and at the time of submission of the case to the trial court he said: "All that is before the court is the question as to whether or not the plaintiff in this action has title. Has proven a right to possession? That is all."

It is therefore apparent that defendant did not urge before the trial court the question of the sufficiency of the complaint to state a cause of action in ejectment; and it is also apparent that the judgment does not purport to adjudge anything but that plaintiff is the owner and entitled to possession and that defendants have no right, title or interest.

[2, 3] A party who has tried his case in the court below on one theory must adhere thereto on appeal. In Merrill v. Kohlberg, 29 Cal.App. 382, 387, 155 P. 824, 856, where this rule was applied, the court quoted from Lebcher v. Lambert, 23 Utah 1, 63 P. 628, to the effect that: "To permit a party who has tried his case * * * wholly or in part on a certain theory, which theory was acted on by the trial court, to change his position and adopt another and different theory on appeal would not only be unfair to the trial court, but manifestly unjust to the opposing litigant; and especially would this be true where, as in the case at bar, respondent insisted in the lower court on trying the case on the theory now contended for * * * by appellant, but, in pursuance of objections made by her, was overruled by the court." Also see Hayward Lumber & Investment Co. v. Ford, 64 Cal. App.2d 346, 354, 148 P.2d 689; Title Ins. & Trust Co. v. Graham, 44 Cal.App.2d 660, 662, 112 P.2d 935; Ralph v. Anderson, 187 Cal. 45, 49, 200 P. 940.

The reason for such rule, as stated in Drullinger v. Erskine, 71 Cal.App.2d 492, 499, 163 P.2d 48, 52, is that "It is apparent that if the defendants had suggested those defects of pleading, in the course of the trial, the plaintiff, upon application therefor, would have been granted leave to amend the complaint." Also as stated in that case, Art. VI, section 4½, of the Constitution provides that no judgment shall be set aside in any case for any error as to any matter of pleading unless the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. Certainly here no such result would follow, for appellants have not urged any right or title in themselves or any possession by them, and therefore cannot be said to be injured by a failure of the complaint in the respects of which they complain.

As for appellants' contention that plaintiff failed to prove ownership, their argument in this connection is based upon an erroneous conception of the law, to wit: that in order to show such title it was incumbent upon plaintiff to prove, in addition to the concededly valid location of the premises in 1916, that assessment work was done every year, or that during periods when such labor was not required, the alternative intention to hold was filed; and that it was also incumbent upon said plaintiff to show affirmatively that there had never been any abandonment by the locators or their successors.

[4] Such, however, is not the law. Failure to do annual assessment work does not ipso facto forfeit a claim. It was said in Ickes v. Virginia-Colorado Development Corporation, 295 U.S. 639, 645, 55 S.Ct. 888, 889, 79 L.Ed. 1627, 1629: "The character and extent of the right which plaintiff acquired by virtue of its location of the mining claims, in 1917, are well established. Re-stating the rule declared by many decisions, we said in Wilbur v. United States ex rel. Krushnic, 280 U.S. 306, 316, 50 S.Ct.

103, 74 L.Ed. 445, 449, that such a location, perfected under the law, 'has the effect of a grant by the United States of the right of present and exclusive possession. The claim is property in the fullest sense of that term.' It is alienable, inheritable, and taxable. * * * Under section 2324 of the Revised Statutes (30 U.S.C. § 28 [30 U.S.C.A. § 28]), the owner is required to perform labor of the value of $100 annually, but a failure to do so does not ipso facto forfeit his claim, but only renders it subject to loss by relocation. The law is clear 'that no relocation can be made if work be resumed after default and before such relocation.'" Also see 1 Lindley on Mines, 2d Ed., p. 728, sec. 405; 17 Cal.Jur., p. 402, sec. 78; Temescal Oil etc. Co. v. Salcido, 137 Cal. 211, 69 P. 1010; Ames v. Empire Star Mines Co., 17 Cal.2d 213, 223-224, 110 P.2d 13.

In the instant case the record shows that, while there were apparently intervals during which no annual assessment work was performed, such work was thereafter resumed, and that no relocation by any other person or persons intervened. While, as above stated, evidence of a relocation by Shields and others in 1930 was introduced, it was conceded that such attempted relocation was ineffective because the land had then been withdrawn for power purposes (subject, of course, to the valid prior location), and defendants stated that they were introducing such evidence solely for the purpose of showing an abandonment of the prior location by Shields.

[5, 6] On the subject of abandonment the rule of the law is that there can be no abandonment without an intention to abandon. Del Giorgio v. Powers, 27 Cal.App.2d 668, 680, 81 P.2d 1006; Crane v. French, 39 Cal.App.2d 642, 655, 104 P.2d 53; Templar Mining Co. v. Williams, 23 Cal.App.2d 45, 50, 72 P.2d 566. Intention to abandon is, of course, a matter of fact for the trier of the facts. Appellants themselves cite authorities which so hold. See Myers v. Spooner, 55 Cal. 257, 260; Del Giorgio v. Powers, supra. They also concede in their brief that "abandonment is a question of fact." And while failure to do annual assessment is an element to be considered in determining whether there has been an abandonment (Del Giorgio v. Powers, supra), it does not, of itself, compel a conclusion that there has been such abandonment, especially where, as here, work has been resumed. In Crane v. French, supra, the court said that absence from a claim, even for a period of five years, does not operate as an abandonment in the absence of proof of intent; and that intent to abandon must be established by clear proof. In this case, the trial court has found that "neither plaintiff or [his] predecessors in interest have ever forfeited and or abandoned said mining location"; and said finding is conclusive upon this court since there is ample evidence in the record to justify it.

[7-10] Furthermore, in so far as the relocation by Shields and his associates in 1930 is relied upon by appellants as evidence of abandonment by Shields, such action cannot be said to have constituted an abandonment on his part, especially as against Polifka and his successors in interest; and even if it were construed as an abandonment on his part, it would not have effected an abandonment of the entire claim but would merely have passed Shield's interest to his cotenant, Polifka. Crane v. French, supra, 39 Cal.App. at page 656, 104 P.2d 53, citing 40 C.J. 842, and Worthen v. Sidway, 72 Ark. 215, 79 S.W. 777. And since the attempted relocation by Shields and others was invalid, any assessment work done by Shields thereafter is properly attributable to the prior valid location by him and Polifka. Temescal Oil etc. Co. v. Salcido, supra, 137 Cal. at page 213, 69 P. 1010. Nor does the fact that no assessment work was done by the heirs of Polifka compel a conclusion that they abandoned the rights to which they succeeded on his death. The very fact that Polifka's admininstrator included the claim in the estate and that it was thereafter distributed to the heirs as property, is some evidence of the absence of an intention to abandon. Crane v. French, supra, 39 Cal.App. at page 656, 104 P.2d 53.

[11, 12] Appellants make some contention that the burden was on plaintiff to show that there had been no abandonment

of the claim; but such burden is, on the contrary, imposed upon the party asserting it. See 2 Lindley on Mines, 3d Ed., p. 1600; Callahan v. James, 141 Cal. 291, 294, 74 P. 853. But wherever the burden lay in this case, it cannot be said that there is insufficient evidence to support the finding of the trial court that there was no abandonment.

[13] Appellants finally urge in their brief that there is no sufficient allegation, and no proof whatever, that defendants ousted plaintiff from the premises. But we are unable to see that this contention has any significance in the case. The case was tried solely as an action to quiet title. And while the complaint contained some allegations that defendants had failed to vacate the premises and unless enjoined would continue in possession and remove gold and other metals therefrom, which allegations (par. VI of plaintiff's complaint) were not denied, the trial court made no finding thereon, and in its judgment merely quieted plaintiff's title, and adjudged that defendants have no right, title or interest in the premises. It did not purport to eject defendants from the claim, or to enjoin them in any respect.

We find no merit in the appeal, wherefore the judgment is affirmed.

SCHOTTKY, J. pro tem., and PEEK, J., concur.

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78 Cal.App.2d 864

PIRRONE v. NUCCIO et al.

Civ. 15574.

District Court of Appeal, Second District, Division 1, California.

April 1, 1947.

1. New trial 🔑6

The matter of granting or refusing to grant a motion for new trial is largely discretionary.

2. New trial 🔑72

In passing on motion for new trial, trial court is not bound by rule of conflicting evidence as is the appellate tribunal, but must weigh and consider the evidence for both parties, and determine for itself the just conclusion to be drawn from it, and, if satisfied that jury's finding is contrary to weight of evidence, it may grant a new trial.

3. Appeal and error 🔑1015(1)

Where there is no substantial conflict in the testimony on material issues, and the evidence as a whole would be insufficient as a matter of law to support a verdict for party moving for new trial, order granting new trial cannot be sustained.

4. Negligence 🔑134(5)
New trial 🔑70

In action by restaurant operator against hotel operator for injuries sustained by restaurant operator when plaster fell from restaurant ceiling because of leakage of water in hotel above restaurant, evidence sustained verdict for restaurant operator, and granting of new trial to hotel operator was error.

◆

Appeal from Superior Court, of Los Angeles County; Ingall W. Bull, Judge.

Action by Joe Pirrone against Mary Nuccio, Dora B. Hoxie, John Doe, and Jane Doe, to recover for injuries sustained by plaintiff. During the course of the trial a motion for judgment of nonsuit was granted as to Mary Nuccio. From an order granting Dora B. Hoxie a new trial after judgment was entered on a jury's verdict against her, the plaintiff appeals.

Order reversed.

John J. Craig, of Los Angeles, for appellant.

Sidney A. Moss, of Los Angeles, for respondent.

YORK, Presiding Justice.

The instant action is for the recovery of damages on account of injuries to person and property alleged to have been sustained by the plaintiff.

It is alleged in the complaint that beginning on May 1, 1944, plaintiff operated a cafe on the ground floor of a four-story brick building in Los Angeles owned by defendant Mary Nuccio; that defendant Hoxie operated a hotel on the upper floors of said building; that the portion of the second floor directly over the premises occupied by the plaintiff consisted of hotel rooms, a bathroom and toilet facilities; that on and prior to July 22, 1944, the defendants "maintained, operated and repaired" the premises over and above the ground floor of said building in such a negligent, careless and reckless manner that as a direct and proximate result thereof "a great mass of water, plaster and rubble fell with great force upon the plaintiff and upon his steam table where was located his prepared food, and upon various other stock and equipment," whereby he sustained grave personal injuries, suffered loss of trade and damage to clothing, food and equipment.

During the course of the trial a motion for judgment of nonsuit as to defendant Mary Nuccio was granted. At the conclusion of the trial defendant Hoxie's motion for a directed verdict, on the ground that the evidence failed to show any negligence on her part, was denied. The jury returned a verdict against defendant Hoxie assessing the damages sustained by plaintiff at $1,000, and judgment thereon was duly entered. Thereafter, on motion of defendant Hoxie, the trial court entered its order granting a new trial on the ground that the "Evidence is insufficient to sustain the verdict and the same is against law."

This appeal from such order is prosecuted by plaintiff.

Appellant specifies abuse of discretion on the part of the trial court in granting a motion for a new trial because the evidence "clearly establishes a case for plaintiff * * *

"1. Upon the theory of res ipsa loquitur.

"2. Upon the theory that the defendant, having knowledge that water was leaking into the restaurant of the plaintiff, negligently failed to take steps to remedy same."

Respondent Hoxie, who was called as a witness by appellant under section 2055 of the Code of Civil Procedure, testified that she operated a hotel in the building in question and employed Carrie Wallace as manager; that he husband Will Wallace assisted her; that "if something was out of order and I was not there, she (Mrs. Wallace) had the right to call a plumber"; that as a rule, she (Mrs. Hoxie) checked the hotel every day, but occasionally missed a day; that she "would check the hotel through to see that everything was in order and take care of all the outside matters pertaining to the operation of the hotel." Further, that she learned of the accident the day after it occurred; that the difficulty arose in connection with "a bathroom on the first floor of the hotel which was stopped up, the drain was stopped up"; that this bathroom was the only one for the fifteen rooms on the first floor of the hotel; that the toilet facilities were in separate rooms "the bathroom to the left and the toilet to the right and the washroom across from that."

Mr. Wallace, one of the managers of the hotel, testified that sometime in the morning of July 22, 1944, the day on which the accident occurred, he investigated a report made by a guest and found that the bathtub in the bathroom on the first floor was stopped up; that there was about two gallons of water in the tub and no water on the floor; that he was told that "they had already made a telephone call for a plumber," who came the next day; that the plumber "told me that some debris had gotten down inside the drain and stopped it up. Q. Was that before this accident was reported to you? A. Yes, sir. * * * Q. Did you see him fix that before this accident? A. Well, I saw him working there and he told me what it was and he was working on it, and I suppose he fixed it, I don't know; I left him there working." This witness also testified, on cross-examination, that after he called the plumber, he reported the matter to Mrs. Nuccio, to-wit:

"The next day I went down and saw her and told her that we would have to have a plumber because the bathtub was stopped up and we couldn't get it to run, and of course it cost us eighteen or twenty dollars every time she called one and the next day when Mrs. Hoxie saw me I told her about the condition of the bathroom, what it was, and that it was stopped up, and she said and I knew that it cost eighteen or twenty dollars every time we called the plumber in but she said we would have to get him in, so he did come in that very day. * * *

"Q. By Mr. Craig: Do you know whether or not water ran into Mr. Pirrone's restaurant? * * * A. No, sir, not at that time I didn't. * * *

"Q. By Mr. Craig: Is that the first time the bathtub was filled up or ran over or was plugged up? * * * A. By the witness: You mean was it stopped up before this one occasion?

"Q. My Mr. Craig: Yes, that is right. A. One time.

"Q. When was that? A. I don't remember. * * *

"Q. By Mr. Craig: Well, did Mr. Lopez tell you at any time prior to the 22nd of July that water was coming through the ceiling into the Pirrone restaurant? * * * A. One time, yes. * * *

"Q. And at that time did you go in and look to see if the water was coming from the bathroom, or was it water coming from there? A. Not the bathroom.

"Q. Where was it then? * * * A. The toilet room. * * *

"Q. Did that toilet overflow at any time to your knowledge? * * * A. Yes, several times. * * *

"Q. By Mr. Craig: But whenever the toilet, or whether it was the bathroom that overflowed, or if it was the bathroom or the toilet, you always called a plumber? A. Yes."

Louis Lopez, an employee of appellant, testified that he was working in the cafe on July 22, 1944; that about ten days before that he noticed on three different occasions spots on the ceiling, like water leaking; that occasionally water stood on the floor of the cafe when he was mopping; that he went upstairs and reported the matter to the Wallaces, "I just mentioned that it was leaking, probably from the bathroom, sometimes it was leaking, I didn't know what it was." This witness further testified that on July 22, 1944, he again noticed "there was water on the ceiling, and the ceiling came falling down, you know, on top of everything."

Appellant Pirrone testified that on July 22, 1944, "about two minutes of twelve, right at the lunch hour, and I was just making change at the cash register * * * somebody said 'Look out,' and before I could even get away from there to do anything, why, * * * a lot of water, * * * just large pieces of plaster and things * * * plaster from the ceiling and water * * * came right down on everything and on me when I was standing there, right down on my head and it hit me on the head and all around me and came down all over the cash register and all over the counter," injuring him and ruining the food in the steam table.

The doctor who attended appellant testified on cross-examination that he found "there was a subluxation of the cervical vertebra, resulting in a restriction of motion"; that subluxation "is the malposition of the vertebra, it is not strictly a dislocation but it is a condition where the vertebra has received such an injury that there is a limitation of motion under the normal motion and then there is an inclination for it not to go back to its normal and ordinary position when forcibly moved."

[1-3] It is established law that the matter of granting or refusing to grant a motion for a new trial is largely within the discretion of the trial court, and as was stated in de la Falaise v. Gaumont-British Picture Corporation, 39 Cal.App.2d 461, 467, 103 P.2d 447, 450, quoting from Moss v. Stubbs, 111 Cal.App. 359, 362, 295 P. 572, 296 P. 86: "'in passing upon such motion the trial court is not bound by the rule of conflicting evidence as is the appellate tribunal (Huckaby v. Northam, 68 Cal.App. 83, 228 P. 717; Smith v. Royer, 181 Cal. 165, 183 P. 660); but must weigh and consider the evidence for both parties and determine for itself the just conclusion to be drawn from it (Green v. Soule, 145 Cal. 96, 78 P. 337; Rudin v. Luman, 53 Cal.App.

212, 199 P. 874); and, if it is satisfied that the finding of the jury is contrary to the weight of the evidence, it may grant a new trial (Gordon v. Roberts, 162 Cal. 506, 123 P. 288). Even where the evidence is not conflicting and all the proof seems to be favorable to one or the other of the parties litigant, the question of the probative force or the evidentiary value of the testimony is nevertheless within the determination of the trial court in a proceeding on motion for a new trial. Otten v. Spreckels, 24 Cal.App. 251, 141 P. 224; Roberts v. Southern Pac. Co., 54 Cal.App. 315, 201 P. 958. But it is equally well settled that, where there is no substantial conflict in the testimony on material issues, and the evidence as a whole would be insufficient as a matter of law to support a verdict in favor of the moving party, an order granting a new trial cannot be sustained. Springer v. Pacific Fruit Exchange, 92 Cal.App. 732, 268 P. 951; Wendling Lbr. Co. v. Glenwood Lbr. Co., 153 Cal. 411, 95 P. 1029; Empire Inv. Co. v. Mort, 169 Cal. 732, 147 P. 960; Harvey v. Machtig, 73 Cal.App. 667, 239 P. 78, 82. * * * there is no substantial conflict in the evidence as to any of the essential facts * * * and the determinative question presented with reference to the evidence is therefore whether as a whole it would be sufficient as a matter of law to support verdicts in favor of (the moving parties), in the event that such verdicts had been found.' It was held in the cited case that the evidence was wholly insufficient as a matter of law to support verdicts in favor of the moving parties, and the order granting a new trial was reversed, the court commenting as follows, 111 Cal.App. at page 371, 295 P. at page 576: 'As was said by the court in Harvey v. Machtig, supra, in directing a reversal: "We are not unmindful of the reluctance with which appellate courts reverse orders granting or refusing new trials, nor of the rule that a trial court in passing upon such a motion is not bound by the findings of the jury if there is sufficient evidence to sustain a contrary finding. Huckaby v. Northam, 68 Cal.App. 83, 228 P. 717. Where, as here, however, there is no evidence upon which a contrary finding could be founded, the order granting a new trial cannot be sustained upon appeal." '

"The rule enunciated in the case of Moss v. Stubbs, supra, was followed in Seth v. Lew Hing, 125 Cal.App. 729, 732, 14 P.2d 537, 15 P.2d 190, the court citing as additional authorities to the same effect: Hitchcock v. Rooney, 171 Cal. 285, 288, 152 P. 913; Estate of Baird, 198 Cal. 490, 507, 246 P. 324; Vertson v. City of Los Angeles, 116 Cal.App. 114, 2 P.2d 411. See, also, Henderson v. Braden, 35 Cal.App.2d 88, 91, 94 P.2d 625."

[4] There appears to be no conflict in either the factual situation or the evidence adduced at the trial herein, it being conclusively established that respondent through her agent Wallace had notice that there was a leakage of water either from the bathroom or from the toilet room into the ceiling of the restaurant during the ten day period immediately preceding the deluge; and that while said Wallace investigated the complaint with respect to the stoppage of the bathtub drain and sent for a plumber, there is no indication that he inspected the toilet which had previously overflowed several times, or that he took any precaution to prevent another overflow from the same source. By her failure to use ordinary care in the inspection and repair of all toilet facilities provided for the occupants of the fifteen rooms on the second floor of the building directly over the premises occupied by appellant, respondent was guilty of negligence proximately resulting in the injuries and damage complained of. Viewed in its entirety, the evidence adduced at the trial would be insufficient as a matter of law to support a verdict in favor of respondent, consequently, the order granting respondent's motion for a new trial cannot be sustained.

For the reasons stated, the order is reversed.

WHITE and DORAN, JJ., concur.

79 Cal.App.2d 44

HOLLOWAY v. HOLLOWAY.

Civ. 15658.

District Court of Appeal, Second District, Division 2, California.

April 10, 1947.

1. Divorce 🔑236, 245(1)

A property settlement agreement containing provisions for support and maintenance of wife as part of the division of property of the parties is binding on the trial court in absence of fraud, duress, undue influence, violation of confidential relation or other circumstances showing the agreement to be inequitable, and after approval of trial court, such provisions cannot be modified by court without the consent of the parties.

2. Courts 🔑90(1)

A decision of the Supreme Court filed in another action during pendency of appeal in a similar case was applicable thereto.

◆

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Ruth A. Holloway against Bert W. Holloway for divorce, wherein there was an interlocutory decree of divorce entered ordering the defendant to pay plaintiff $35 per week for her support and maintenance until her death or remarriage. From an order denying defendant's application for a modification of such decree, the defendant appeals.

Order affirmed.

Ralph W. Miller, of Los Angeles, for appellant.

Lindstrom and Bartlett, of Los Angeles, for respondent.

McCOMB, Justice.

This is an appeal from an order denying defendant's application for a modification of the provisions of an interlocutory decree of divorce ordering him to pay $35.00 per week to plaintiff for her support and maintenance until her death or remarriage.

The undisputed facts are these:

Plaintiff and defendant were married on November 17, 1927. On December 8, 1939, they entered into a property settlement agreement.[1] This agreement provided that the property of the parties should be divided as follows:

A. Plaintiff was to receive (1) a 1938 automobile, (2) the household furniture, and (3) one half of the cash value of certain life insurance policies.

B. Defendant was to receive (1) a 1937 automobile and (2) the remaining one half of the cash value of the insurance policies mentioned above.

C. Defendant was to pay all outstanding bills and keep the insurance policies hereinabove mentioned in force with plaintiff as beneficiary until January 6, 1941, on which date they were to be cashed.

D. Each party agreed to relinquish all claims and all rights to any other property of whatsoever description or character which the other might acquire.

Plaintiff expressly agreed subject to the provisions of the agreement to waive any and all rights and claims for support and maintenance.[2]

On December 21, 1939, plaintiff commenced an action for divorce. The prop-

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[1] In the preamble to the agreement appears the following recitation:

"Said parties from time to time have been, and now are, husband and wife; and whereas, unhappily, certain marital differences have arisen and exist between them; and whereas, said parties desire by *agreement to settle and determine their marital property rights* * * *." (Italics added.)

[2] On this subject, Paragraph 10 of the agreement reads as follows:

"Subject to the terms and provisions of this agreement, and to strict performance thereof by party of the first part, each party hereto does hereby further waive and relinquish as against the other, any and all right or claim for support, maintenance, attorneys fees and/or court costs in any action now pending or which may be instituted by either party hereto against the other; provided, however, and it is further expressly agreed that in case any action or proceeding is necessary to enforce any of the terms or provisions of this agreement, in behalf of party of the second part, party of the first part further agrees that he will erty settlement agreement was attached to the complaint as an exhibit and was incorporated therein by reference. The prayer of the complaint asked the court to approve the agreement and order defendant to pay the sums as therein provided. Thereafter the action was tried as a default and on January 18, 1940, an interlocutory decree of divorce was granted which approved the agreement, incorporated it in hæc verba and ordered defendant to comply with all of its terms. The final decree was entered June 15, 1942 and by appropriate reference adopted the provisions of the interlocutory decree relative to the property of the parties and the support of their minor children. On April 8, 1946, pursuant to defendant's application plaintiff was directed to show cause why the order for her support and maintenance contained in the interlocutory decree should not be modified by terminating the provision for the support and maintenance of plaintiff. Thereafter the matter came on for hearing and the trial judge sustained an objection to the introduction of any evidence in support of the application on the ground that the court was without jurisdiction to modify the provision of the decree relating to the support and maintenance of plaintiff.

This is the sole question here presented: *Since the provision in the interlocutory decree for the support and maintenance of plaintiff was predicated upon a written property settlement agreement of the parties which had been approved by the court, was the trial court without jurisdiction to modify such provision?*

[1] This question must be answered in the affirmative and is governed by this settled rule: A property settlement agreement containing provisions for the support and maintenance of the wife as part of the division of the property of the parties is binding on the trial court in the absence of fraud, duress, undue influence, violation of the confidential relation, or other circumstances showing the agreement to be inequitable, and after approval of the trial court such provision for the support and maintenance of the wife cannot be modified by the court without the consent of the parties. (Adams v. Adams, 29 Cal.2d 621, 177 P.2d 265.)

Applying the foregoing rule to the facts in the instant case, it is apparent that since by the property settlement agreement, plaintiff was awarded money for her support and maintenance as a part of the division of the community property, the agreement having been approved by the court, and as the provision in the interlocutory decree ordering defendant to pay plaintiff certain sums of money was predicated on such agreement, in the absence of the consent of the parties the trial court was without jurisdiction to modify such provision. Therefore the trial court properly sustained an objection to the introduction of any evidence in support of plaintiff's application.

[2] A notice of appeal in the instant case was filed on June 21, 1946. On February 4, 1947, the Supreme Court filed the decision in Adams v. Adams, supra. In such case the facts are analogous to those in the instant case and the principle of law involved is identical; therefore the decision in such case is applicable to the instant case and the Supreme Court's decision in such cause holding that the trial court was without jurisdiction to modify a provision for support in an interlocutory decree is decisive of this case.

Such cases as Hough v. Hough, 26 Cal.2d 605, 160 P.2d 15, and McCahan v. McCahan, 47 Cal.App. 173, 190 P. 458, are cited and construed in the Adams case in support of the conclusions which we have reached in the present case. Any statement in prior opinions of the appellate courts of California contrary to those in Adams v. Adams are of course overruled by such decision. Likewise rulings from

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pay a reasonable attorneys fee to party of the second part to be determined by the court in such action or proceeding. It is further agreed that this agreement may be made a part of any proper decree or order of any court of competent jurisdiction entered in any such action now pending between, or which may hereafter be brought between the parties hereto."

other states are not helpful to us in view of the law as established by our own court.

For the foregoing reasons the order is affirmed.

MOORE, P. J., and WILSON, J., concur.

SHERMAN et al. v. QUINN, County Tax Assessor.*

Civ. 15688.

District Court of Appeal, Second District, Division 2, California.

April 8, 1947.

Hearing Granted May 22, 1947.

1. Vendor and purchaser ⇨54

One who has contracted for purchase of real property and entered into possession thereof is for all purposes owner, and vendor retains mere legal title.

2. Vendor and purchaser ⇨54

Payment or tender of entire purchase price by one entering into contract for purchase of real property is not essential to accomplish a conveyance of equitable title.

3. Vendor and purchaser ⇨54, 191, 192

The seller of realty under conditional sales contract retains title merely as security for payment of purchase price, and title retained by him does not entitle him to occupancy or use of property or even the right to enter it.

4. Vendor and purchaser ⇨191, 198

Under contract for purchase of real property, vendee assumes all burdens of ownership; he must pay all taxes and assessments levied against property and comply with all valid rules and ordinances promulgated by constitutional authority insofar as they relate to the property.

5. Specific performance ⇨65
Vendor and purchaser ⇨191

So long as purchaser of real property under conditional sales contract complies with terms and conditions of the contract, he is "lord of the manor", and upon final payment of purchase price may enforce delivery of a sufficient deed of conveyance.

6. Taxation ⇨79

When a statute requires that property be assessed to owner, it means the general and beneficial owner whose interest is primarily one of possession and enjoyment in contemplation of ultimate absolute ownership, and it does not mean a party whose primary interest is to enforce payment of money.

7. Taxation ⇨80, 219

A war veteran who purchased realty under conditional sales contract had a "property right" in the realty subject to taxation, and was entitled to have property assessed to him instead of vendor in order that he might have benefit of exemption from taxation afforded war veterans by constitution, even though he still owed greater portion of purchase price. Const. art. 13, § 1¼.

See Words and Phrases, Permanent Edition, for all other definitions of "Property Right".

8. Taxation ⇨219, 438

County tax assessor could not justify his refusal to cancel assessment of real property subject to conditional sales contract to vendor and to assess property to vendee in order that vendee might have benefit of veterans' exemption on ground that policy of assessing property subject to conditional sales contract to vendors was a reasonable regulation, since effect of such rule would be to deprive any veteran purchasing realty under conditional sales contract of vested rights. Const. art. 13, § 1¼; U.S.C.A.Const. Amend. 14, § 1.

9. Constitutional law ⇨14

In construing constitutional provision, courts must assume that the people gave to words used therein their natural and ordinary meaning.

10. Taxation ⇨219

The constitutional provision respecting exemption of property belonging to war veterans from taxation cannot be construed as not intending to include a veteran's property right as a purchaser under an executory contract for a grant deed. Const. art. 13, § 1¼.

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* Subsequent opinion 192 P.2d 17.

11. Evidence ⚷83(4)

It would be presumed that county assessor would perform his official duty as prescribed by law. Code Civ.Proc. § 1963, subd. 15.

12. Taxation ⚷497

Where petition for mandamus to compel county tax assessor to cancel assessment of realty subject to conditional sales contract to vendor and to assess property to vendee in order that he might have benefits of veterans' exemption sought a ruling for assessor's subsequent guidance as to assessments in future for benefit of other veterans similarly situated in addition to cancellation of assessment, mandamus was proper remedy, notwithstanding that assessor could not change his present rolls. Revenue and Taxation Code, § 5141; Code Civ.Proc. § 1963, subd. 15; Const. art. 13, § 1¼.

WILSON, J., dissenting in part.

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Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Petition by Arthur W. Sherman and Audrey R. Sherman for a writ of mandate to compel John R. Quinn, County Tax Assessor, County of Los Angeles, State of California, to assess property being purchased by petitioners under a conditional sales contract to petitioners in order that they might have benefit of the exemption provided for veterans by section 1¼ of article 13 of the Constitution. From a judgment of dismissal, following a ruling sustaining a general demurrer to amended petition without leave to amend, the petitioners appeal.

Reversed with instructions.

Zuckerman & Edmunds, Edward K. Zuckerman, Arthur E. Edmunds, and William E. James, all of Los Angeles, for appellants.

Harold W. Kennedy, Co. Counsel, and Gordon Boller, Deputy Co. Counsel, both of Los Angeles, for respondent.

MOORE, Presiding Justice.

The question for decision is whether a veteran who is a resident of California and a purchaser of real property under a conditional sales contract is entitled to a writ of mandate compelling the county tax assessor to cancel the assessment to the vendor in such agreement and to assess the property to the veteran in order that he might have the benefits of the exemption provided by section 1¼ of Article XIII of the Constitution.

Appellant Arthur W. Sherman is a veteran of World War II having been honorably discharged from the service on March 23, 1946. On February 20, 1946, he and his wife Audrey, both residents of California, purchased under a conditional sales contract from the Witmer Building Company, a corporation, hereinafter referred to as Witmer, lot 76 of tract 12,358 in Los Angeles county, together with the house and all other improvements thereon. The total purchase price was $8,850 of which appellants paid in cash $3,128.45. They are obligated by the contract to pay $40.47 monthly on account of principal and interest until the balance of $5,721.55 shall have been paid in full, at which time they are to receive a grant deed. They are required also to protect and preserve the property, to maintain it in good condition and to repair any damage thereto occasioned from any cause. Also, they must pay an additional sum of $11.53 per month which Witmer is to hold in trust for the purpose of paying taxes, assessments, and insurance premiums.

Their petition for writ of mandate alleges that appellants do not own property of the value of $5,000; that the assessed value of their improvements is $1,050 and the assessed value of the land is less than $1,000; that prior to the last Monday in June, 1946, Mr. Sherman again demanded that respondent cancel the assessment for taxes on lot 76 to Witmer and to assess the property to appellants; that he answered all questions and gave all information with reference to his claim for a veteran's exemption from taxation under section 1¼ and subscribed and swore to an affidavit containing such information, but that his demand for such exemption was rejected on the ground that it was the policy of respondent's office not to assess real property held under a conditional sales contract to the buyer, but that in all such cases it is assessed to the seller.

A general demurrer having been sustained to the amended petition without leave to amend, a judgment of dismissal was entered from which comes this appeal.

[1-5] Whether the tax assessor can be required to cancel an assessment on real estate against the holder of the legal or record title and to assess it to the buyer who has acquired it under a conditional sales contract has never been decided by an appellate court of this state. In the absence of such decision respondent has preferred to pursue the established policy of his office not to assess real property being purchased under conditional sales contract to the buyer but to assess it to the seller. In maintaining such custom and procedure respondent has ignored a more reasonable course and some respectable authority. It must be accepted as a truism that one who has entered into a contract for the purchase of real property and entered into possession thereof "is for all purposes the owner and the vendor retains mere legal title." Elliott v. McCombs, 17 Cal.2d 23, 31, 109 P.2d 329, 334. Payment or tender of the entire purchase price is not essential to accomplish a conveyance of the equitable title. Estate of Reid, 26 Cal.App.2d 362, 369, 79 P.2d 451. The seller retains the title merely as security for the payment of the purchase price, but such security for the payment of the purchase price does not entitle him to the occupancy or use of the property or even the right to enter it. The contract in effect grants to vendee the entire beneficial interest in the land. Orange Cove Water Company v. Sampson, 78 Cal.App. 334, 341, 248 P. 526. Under it he assumes all the burdens of ownership; he must pay all taxes and assessments levied against it and comply with all valid rules and ordinances promulgated by constitutional authority in so far as they relate to the property. So long as the buyer complies with the terms and conditions of his contract he is "lord of the manor," and upon final payment of the purchase price may enforce delivery of a sufficient deed of conveyance. Elliott v. McCombs, supra, 17 Cal.2d at page 31, 109 P.2d 329; Miller v. Waddingham, 91 Cal. 377, 380, 27 P. 750, 13 L.R.A. 680. So securely is he entrenched as owner that he cannot without the consent of his creditors give away his equitable title even though he may be in default in his payments. Retsloff v. Smith, 79 Cal.App. 443, 450, 249 P. 886. The vendor under such a contract has no greater rights than when he takes a grant deed of land as security for money due. Miller v. Waddingham, supra, 91 Cal. at page 381, 27 P. 750, 13 L.R.A. 680; First National Bank of Tulare v. Andreas, 92 Cal.App. 62, 63, 267 P. 937.

If the vendee under a conditional sales contract is the owner of land, why should the assessor levy assessments against it for taxes to one who will not pay? No sovereign rights can be impinged by assessing it to the party who owns it. No advantage is gained by the state in assessing it to him who has divested himself of ownership solely because he holds the record title. Whatever amount the tax he is not affected. But a detriment is suffered by a veteran whose entire capital may be invested in land so assessed. Appellants' right to an exemption from taxation of lot 76 to the extent of $1,000 is a vested right by virtue of the cited constitutional provision. They have already paid upon the purchase price a sum in excess of more than three times the amount to be exempted. The sum payable as taxes upon $1000 is property. By the arbitrary procedure followed by respondent appellants are deprived of such property. May this be done because the assessor prefers to maintain his "policy" rather than to confer upon the veteran what is his right under constitutional enactment? Such act is in effect a violation of the supreme law of the land which provides that no person may be deprived of his "life, liberty or property, without due process of law." Amendment XIV, sec. 1, Federal Constitution. The continuance by an executive office of an arbitrary policy inherited from former generations is not due process of law however sacrosanct the policy may seem to be.

[6, 7] While respondent maintains such traditional procedure with respect to contracts for the sale of real property a far different practice prevails in the assessments of movables. If John Doe should purchase a motor vehicle at the price of $5000 and pay ten per cent of that sum as the initial payment on a conditional sales contract, even though the vendor is registered as the legal owner the property tax is assessed to the buyer. This is the "established practice throughout the state, and is both sound and practical." County of San Diego v. Davis, 1 Cal.2d 145, 146, 33 P.2d 827. Such scheme of levying taxes is to be commended, for when a statute requires that property be assessed to the owner it means the general and beneficial owner whose interest is primarily one of possession and enjoyment in contemplation of ultimate absolute ownership. It does not mean a party whose primary interest is to enforce payment of money. Ex parte State, 206 Ala. 575, 90 So. 896. In this state a conditional sales contract was long ago held to be a "solvent credit." While by constitutional amendment all obligations secured by real property shall not be taxed, still the provisions with regard to taxing property are not otherwise altered. Whiting Finance Company v. Hopkins, 199 Cal. 428, 433, 249 P. 853. Since appellants' ownership of lot 76 is a property right it is subject to taxation and of course should be assessed to them.

Incidentally, the Alabama case involved personal property, but the holding with reference to the assessment to the vendee is followed by the declaration that "it is well settled that when the vendee of real property is in possession under an executory contract of sale, he is liable to be taxed as the owner. * * * It is, of course, to be conceded that the equitable ownership of an executory purchaser of realty is of a higher nature than is a like interest in personalty, and is more favored by the law; but for the purpose of taxation it is difficult to find any valid distinction." The same issue came before the Supreme Court of Wisconsin in an action to have assessments for taxes on "certain real estate" adjudged void. At the time of the assessment the land was occupied by Lodge 359, Loyal Order of Moose, under a contract of purchase. It was held that inasmuch as the lodge was vendee in possession under a contract which obligated it to pay the purchase money, it was owner within the meaning of the exemption statute; that since the contract clearly contemplated that the vendee should eventually acquire the legal title, it gave the lodge the right by continuing its payments ultimately to demand a valid conveyance of the title from the vendor; that therefore the lodge was the owner under the statute exempting a specified area of the real property of a fraternal society from taxation. "The retention of the title by the vendor," said the court, "is merely a security device. The vendee assumes all of the burdens of ownership, including the duty, as between it and the vendor, of paying taxes. While statutes exempting property from taxation are to be strictly construed, 'strict construction does not mean that we are not to search for and ascertain, if possible, the true meaning of the language used in the statute.'" Ritchie v. City of Green Bay, 215 Wis. 433, 254 N.W. 113, 95 A.L.R. 1081.

[8] Respondent contends in effect that the policy of the assessor is a reasonable regulation and that it should not be altered merely for the purpose of securing to veterans a property right vested in them by law. It should be a sufficient answer to such proposition to say that no customary procedure is reasonable if its effect is to deprive many persons of vested rights. However, respondent asserts that appellants as vendees under a conditional sales contract are not the owners because Witmer as holder of the legal title will continue to be owner of the lot during the 15 years required for appellants to pay $5,721.35, the "disproportionately greater balance" of the purchase price. But appellants are obligated to pay such balance. The holding of a lien for the major portion of the purchase price or of the value of a parcel of realty under a conditional sales contract makes of one no more the owner than would the possession of a mortgage or a trust deed or a vendor's lien note executed by the holder of the legal title. If it does then fiction has become reality and form means more than substance.

Respondent argues at length in support of the general rule that there is to be but one assessment of the entire estate in land. From analogy that land leased for years for usufructuary purposes is taxable only to the owner (Graciosa Oil Company v. Santa Barbara, 155 Cal. 140, 99 P. 483, 20 L.R.A., N.S., 211; San Pedro etc. Railroad Company v. City of Los Angeles, 180 Cal. 18, 179 P. 393; Hammond Lumber Company v. County of Los Angeles, 104 Cal.App. 235, 285 P. 896), he argues that a city lot cannot be assessed to both the seller and the buyer under a contract for purchase according to their respective interests. Such is not the demand of appellants. They ask that the assessments be made to them as owners instead of to Witner. As proof of the necessity for or propriety of the exemption, as a matter of justice and public policy they allege that thousands of veterans who are purchasing homes in Los Angeles county under conditional sales contracts will be deprived of their constitutional exemptions from taxation if respondent is permitted to continue his policy of assessing real property to the holder of the legal title only, despite the investments of such veterans. The demand of appellants alone is sufficient to evoke favorable judicial action, but when thousands are similarly situated—thousands who have served "in the army, navy, marine corps, coast guard, or revenue marine service of the United States in time of war * * *" (Const.)—a denial of the petition herein would be to scorn the command of the electorate.

[9, 10] Respondent cites many authorities to establish his contention that the phrases used in section 1¼ supra—to wit: "property in his own name"; "the property of the wife"; the "property * * * of the widow"; "owning property"; "owns property"; "property owned by"—contemplate property to which one holds legal title. He cites City and County of San Francisco v. McGovern, 28 Cal.App. 491, 152 P. 980, to the effect that courts must assume that the people gave to the words their natural and ordinary meaning. Undoubtedly that is a correct assumption. But neither in the McGovern case nor in the decison of State Land Settlement Board v. Henderson, 197 Cal. 470, 241 P. 560, is there any suspicion cast upon the ownership of a purchaser under an executory contract for a grant deed.

He cites numerous cases from other jurisdictions as further support for his contention. In People v. City of Toulon, 300 Ill. 408, 133 N.E. 707, land was purchased by a group of civic-minded citizens and the title was taken in the names of two trustees to be deeded to the city for park purposes. Since on "tax day" the title had not been conveyed by the trustees to the city, the land was held to be not exempt. That case furnishes no parallel. A change in plans might have rendered conveyance to the city impossible. In People v. St. Mary's Roman Catholic Hospital, 306 Ill. 174, 137 N.E. 865, it was held that a hospital owned by a religious corporation cannot be exempted as the property of a charitable organization on the ground that it is *equitably* owned by a hospital organization. The facts are that the hospital was situate on land of the church not used for religious purposes; that charges were made for its use by the public; that it was not chartered as a charitable institution and had severed its relation with the church. It was therefore subject to tax. In People v. Logan Square Presbyterian Church, 249 Ill. 9, 94 N.E. 155, the church had purchased certain land on contract, presumably to be used for religious purposes. The date of the contract is not disclosed. The petition of the church for exemption from taxes alleged that for a year it had been in possession of the premises which were used for "church purposes." The petition was heard July 23 but its status had to "be determined in reference to the statute in force on April 1, 1909, as that is the date upon which the lien for taxes attached to real estate." The court held that the petition should have been denied because (1) it did not disclose whether the property was actually and exclusively used for public worship; (2) the petitioner was not the owner by virtue of its contract for a deed; and (3) the title was not vested in the church on April 1 when the lien for taxes attached for the ensuing year.

In People v. Bennett Medical College, 248 Ill. 608, 94 N.E. 110, 111, 140 Am.St.

Rep. 237, the college held real estate under a lease for 99 years and used it in connection with its operation. On appeal from the order of the board of review the only question for consideration was whether the property held under a lease belonged to or was owned by the college within the meaning of the charter which exempted the lands of the corporation from taxation. It was held that the power to tax real property can only be surrendered by plain and explicit terms of a statute; that when words exempting property from taxation are susceptible of two constructions courts will resolve any doubt as to the meaning of the language in favor of the statute. The court determined that leased property did not *belong* to the corporation as contemplated by the language of the college charter which exempted "all property, real, personal and mixed, belonging to said corporation"; that "right of action, under the statute, to enforce a personal liability, only exists against the owner." Since the holding of that case is merely that a lessee of lands is not an owner in contemplation of the language of the corporate charter, it is not pertinent to the question before this court.

Similar holdings are found in the decisions of Wisconsin. In the case of Douglas County Agricultural Society v. Douglas County, 104 Wis. 429, 80 N.W. 740, the court held that land under lease to an incorporated agricultural society, used exclusively for fair grounds, is not owned by, nor is it the property of, such society so as to entitle it to be exempted from taxation under the statutes exempting from taxation lands owned and used by such society exclusively for fair grounds. In Katzer v. City of Milwaukee, 104 Wis. 16, 79 N.W. 745, a Bishop of the Roman Catholic Church held title absolute in fee in accordance with the law of that church, and by reason thereof the church sought to be exempted from taxation upon such land. The land was not owned in the sense of the exemption statute which exempted property "owned by any religious association." Neither is this case a precedent for the issue at bar for the reason that there was no certainty that the bishop might not transfer the property to another or that it might not be used for other than religious purposes.

The state of Ohio has a statute exempting "all buildings belonging to institutions of purely public charity, together with the land actually occupied by such institutions." Rev.St.Ohio 1860, c. 114, § 3, subd. 6. A charitable corporation leased a parcel of real estate with all of its improvements and covenanted to pay all taxes that might be assessed during the term. The corporation occupied the premises and in pursuance of its corporate design proceeded to shelter and provide for the persons mentioned in its charter. The lease provided for the payment of $3,000 per annum and the payment of all assessments and taxes levied during the term. It was proved that the members of the corporation had devoted themselves to carrying out the objects of the corporation by supporting 60 aged, dependent people. The court held that the property did not come within the exemption statute; that the word "belonging" means ownership and not leasehold. Humphries v. Little Sisters of the Poor, 29 Ohio St. 201, 206.

Despite the earlier cases of Wisconsin, Ohio and Illinois, as already observed, the Supreme Court of Wisconsin in the recent case of Ritchie v. City of Green Bay, supra, has held that the vendee in possession under a conditional sales contract is the owner in contemplation of the exemption statute. That decision was recently followed by the Supreme Court of Minnesota in Village of Hibbing v. Commissioner, 217 Minn. 528, 14 N.W.2d 923, 926; 156 A.L.R. 1294, which also held that the purchaser under a conditional sales contract is owner for purposes of taxation. The Benedictine Sisters Association held a contract dated January, 1941, whereby a hospital should be conveyed to them upon their payment of certain money and their agreement to maintain a public general hospital. Neither was title transferred to them nor did they occupy the property until February, 1942. An abatement of the 1941 taxes was upheld under a constitutional provision exempting public hospitals from taxation, because "on May 1, 1941, the association was the owner of the property within the meaning of the tax exemption provisions of the constitution and the statute. * * * In equity the purchaser is regarded, for purposes of taxation as well as for others, as the owner, subject to liability for the unpaid price, and the vendor as holding the legal title in trust for him." Under such holding a vendee under an executory contract for the purchase of land without title or possession may have the tax exemption despite the rule of strict construction of tax exemption laws. The court said: "The status of the title as between the vendor and vendee should be no obstacle to the exemption."

From the foregoing considerations the conclusion is unavoidable that the constitutional provision was intended to exempt, to the extent therein specified, all veterans residing in California from taxes on property they own; that *ownership* is not by section 1¼ classified as legal and equitable, but applies as well to him who occupies land under contract to receive a deed upon the payment of a small sum as well as to one who has already received a deed but still owes the greater portion of the purchase price.

[11, 12] Respondent contends that mandamus does not lie to compel the assessor to cancel an assessment made to the wrong party and to assess it to the true owner. This is a superficial view of the power of a court of equity. While the petition sought a judgment cancelling the assessment for 1946 and a new assessment to appellants for that year, there is no such restriction upon the superior court as to deprive it of the power to enter such judgment as may correctly guide the assessor in future assessments against the property.

In the absence of proof that the assessor altered his policy after his refusal to cancel the assessment and to reassess the property to appellant, it is presumed that such administrative policy has continued to exist. Code Civ.Proc. § 1963, subd. 32. From appellants' prosecution of this appeal it is a reasonable inference that they have not withdrawn their demand for the relief specified in the original petition as it relates to future years. Under the broad powers of equity the court may at the conclusion of a trial grant such relief as "may be deemed meet and proper" under the established facts, in conformance with the sentiments herein expressed. Such relief might include (1) a writ of mandamus requiring the assessor to cancel such assessments as may have been made to others than appellants, or (2) a writ of injunction inhibiting respondent from assessing the property to any person other than appellants so long as they demand such assessments as the equitable owners. Since the matter is of general interest, affecting the rights of many other veterans of California, there is no good reason why the superior court should not if the facts so warrant make an order in conformance with the petition, to the end that during subsequent years the veteran may enjoy the benefit of the constitutional exemption. Justice will thereby be more readily subserved and all the rights of respondent can be as well protected in this action as in another containing the same declarations but bearing a different number.

In Lockhart v. Wolden, 17 Cal.2d 628, 111 P.2d 319, in an original proceeding a woman veteran, owner of property worth $400 on May 31, 1940, requested the assessor to exempt all of it pursuant to Section 1¼. On October 15, 1940, that official refused her demand. In the original proceeding that ensued in the Supreme Court it was held that mandamus was a proper remedy for three reasons: (1) Because it was the only remedy that would afford the petitioner the relief to which she was entitled, namely cancellation of the assessment; (2) that a suit to recover the taxes paid under protest would not be adequate because petitioner in such a suit could not recover interest on the money paid; (3) because issuing a writ of mandate would prevent a multiplicity of suits. While the second reason for allowing the writ to issue has been eliminated by an amendment to the statute (Statutes 1941, p. 2113, Rev. & Tax.Code, sec. 5141) permitting the recovery of interest on taxes paid under protest, neither of the other reasons for issuing the writ has been disapproved by statute or decision. Judgment was entered on March 18, 1941. Such procedure was in keeping with the universal practice in equity and particularly in cases involving the public interest.

Inasmuch as an identical situation obtains in the cause at bar no good reason appears why the Lockhart opinion should not prevail herein. The fact that the assessor cannot perform one specific act designated in the petition affords no impassable barrier. Of course respondent cannot change his rolls for the year 1946, but the petition seeks a ruling for his later guidance as well. He will make assessments in the future for the benefit of other veterans similarly situated as well as for these appellants. It is a presumption that he will perform his official duty as prescribed by law. Code Civil Proc.1963, subd. 15. A like situation obtained in the Lockhart case in which the decision was unanimous that the remedy was proper and that the issuance of the writ would in fact accomplish the purpose sought by the petitioner and prevent further litigation. The only legal remedy suggested as an alternative to the instant action is that appellants pay the taxes under protest and then sue to recover. Such a proceeding does not afford adequate relief to litigants of limited means. The hardships of these appellants would be multiplied if forced to such action by reason of their contract to pay moneys to Witmer wherewith the seller shall pay all taxes.

The judgment is reversed with instructions to overrule the demurrer and thereafter to proceed as herein indicated.

McCOMB, J., concurs.

WILSON, Justice (dissenting in part).

I concur unqualifiedly in that part of the opinion of Mr. Presiding Justice MOORE holding that respondent has been in error in his theory that property sold under conditional sales contracts should be assessed to the vendor and not to the vendee, and holding that appellants are entitled to the exemption provided for in the Constitution.

I dissent from the conclusion that a writ of mandate should issue to the county assessor directing him to cancel the assessment of the property to appellants' vendor and to assess it to appellants. My abstention from concurring in the latter portion of the opinion is based on the grounds (1) that the writ would be without efficacy because respondent would be unable to comply; (2) that appellants have an adequate remedy at law; (3) the issuance of a writ in this proceeding would not necessarily prevent a multiplicity of actions; (4) appellants are entitled to the exemption even though the property is assessed to their vendor.

(1) The assessor is required to complete the assessment roll on or before the first Monday in July (Rev. & Tax. Code, sec. 616) and to deliver it as soon as completed to the clerk of the board of supervisors as ex officio clerk of the board of equalization. Sec. 617. On the third day after adjournment of the board the clerk must transfer the roll to the county auditor (sec. 1614) whose duty it is to deliver it to the tax collector on or before October 1. Sec. 2601. These steps are presumed to have been regularly taken in the tax proceedings in 1946. When the assessment roll passed out of the assessor's possession and control upon its delivery to the clerk of the board of supervisors it was thereafter beyond his power to make alterations in it. When the time has passed within which authority exists to make a change in the tax levy mandamus does not lie to compel officials to alter the tax rolls. McDonald v. Richards, 79 Cal.App. 1, 19, 248 P. 1049. A writ of mandate will not issue to compel the performance of an official act if when the writ is applied for the time limited for the performance of the act sought to be ordered by the writ has expired. A court of equity will refuse to issue such writ when it is useless, unenforceable or unavailing. Board of Education of City of San Diego v. Common Council, 128 Cal. 369, 372, 60 P. 976; Zagoren v. Hall, 122 Cal. App. 460, 462, 10 P.2d 202. A writ will not issue to compel a public officer to permit the inspection of public documents that had already been delivered to another public official, thus rendering it beyond the power of the defendant to comply with the order. McClatchy v. Matthews, 135 Cal. 274, 276, 67 P. 134. A writ to compel the levy of a tax was refused where the time provided by law for the making of the levy had passed. Board of Education v. Com-

mon Council, supra; Board of Education of City of San Diego v. Common Council, 1 Cal.App. 311, 312, 82 P. 89.

The inability of the assessor, after the assessment roll had passed out of his possession and his jurisdiction of its contents had ceased by operation of law, to cancel an assessment and to assess the property to another person was not considered in the opinion in Lockhart v. Wolden, 17 Cal.2d 628, 111 P.2d 319, upon which the majority opinion relies. An examination of the briefs in that case discloses that the question was not presented to the court. In the case of Babcock v. Goodrich, 47 Cal. 488, cited as authority in the Lockhart case, the relief sought was the drawing of a warrant on the treasurer for the amount that had been allowed by the board of supervisors. Manifestly, as the court stated, mandamus was the only remedy that would afford the petitioner the relief to which he was entitled, to wit, the drawing of the warrant in his favor.

(2) The amendments to the statute that have been adopted since the decision was rendered in Lockhart v. Wolden, supra, have removed the principal consideration impelling the conclusion reached in that case, to wit, that the petitioner did not have an adequate remedy at law for the reason that if he had paid the tax and sued to recover he would have been unable to obtain a judgment for interest on the amount paid. This was a cogent reason when the decision was rendered but it is no longer so. Neither the state nor any of its political subdivisions is liable for interest on money wrongfully collected or withheld unless the statute expressly so provides. Engebretson v. City of San Diego, 185 Cal. 475, 479, 197 P. 651; Birch v. Board of Supervisors, 191 Cal. 235, 237, 215 P. 903; Powell v. City of Los Angeles, 95 Cal.App. 151, 155, 272 P. 336. See also Hopkins v. Southern California Tel. Co., 275 U.S. 393, 399, 48 S.Ct. 180, 72 L.Ed. 329, 336.

Since the Lockhart decision was rendered the tax law has been amended so that a person who pays a tax under protest may, if he obtains judgment for the amount of the tax paid, recover interest thereon as well. Rev. and Tax. Code, sec. 5105, added by Stats.1941, ch. 664, p. 2114; sec. 5141 added by Stats.1941, ch. 663, p. 2112. The Lockhart case was decided in March, 1941, and since said sections of the Revenue and Taxation Code were added by the legislature during its 1941 session it may be assumed that they were enacted for the purpose of curing the defect theretofore existing in the tax laws to which attention was directed in the Lockhart opinion.

Appellants in the instant case, notwithstanding the assessment of the property to their vendor, are entitled to the veterans' exemption allowed by section 1¼ of Article XIII of the Constitution. They could have paid or may now pay the tax under protest and upon recovery will be entitled to interest on the illegally levied tax on their property to the amount of their constitutional exemption. Since an action to recover the tax is an adequate legal remedy mandamus is not available. A writ of mandate will issue where there is not a plain, speedy and adequate remedy in the ordinary course of law. Code Civ.Proc., sec. 1086. Mandamus is an extraordinary proceeding and may not be resorted to as a substitute for an adequate legal remedy. Northrup v. Haynes, 15 Cal.App.2d 665, 666, 59 P.2d 1056; Burbank v. Hamilton, 63 Cal.App. 745, 746, 219 P. 1047; Black v. City of Santa Monica, 13 Cal.App.2d 4, 6, 56 P.2d 256; Coon v. Biscailuz, 1 Cal.App.2d 346, 348, 36 P.2d 430. It will issue where a legal duty is established and no other sufficient means exist for its enforcement. Potomac Oil Co. v. Dye, 10 Cal.App. 534, 537, 102 P. 677. But it will not issue when the legal remedy that would have afforded adequate relief has been lost by neglect or delay. Ertman v. Municipal Court, 68 Cal.App.2d 143, 148, 155 P.2d 908, 156 P.2d 940; Andrews v. Police Court, 21 Cal.2d 479, 480, 133 P.2d 398, 145 A.L.R. 1042. An action at law to recover money owing from a political subdivision of the state "is equally convenient, beneficial and effective as a proceeding by mandamus, which therefore is not available" to appellants. Northrup v. Haynes, supra.

The allegations of appellant's petition are directed to the assessment roll for 1946 and not that of any subsequent year, and the prayer of the petition is for a writ based on those allegations. The alternative writ directs respondent to cancel the assessment to the vendor and to assess the property to appellants, or to show cause why he has not done so. The writ necessarily refers to an assessment previously made and not to one that is to be made in the future. A writ will not issue except upon an express demand for the performance of an act and a refusal to perform. Price v. Riverside Land & Irrigating Co., 56 Cal. 431, 434; Ferguson v. Board of Education, 7 Cal.App. 568, 570, 95 P. 165; Brown v. Superior Court, 70 Cal.App. 732, 737, 234 P. 409. Mandamus is never granted to compel the performance of an act until there has been an actual as distinguished from an anticipated refusal. Friedland v. Superior Court, 67 Cal.App.2d 619, 628, 155 P.2d 90; George v. Beaty, 85 Cal.App. 525, 531, 260 P. 386. It is a general rule that a peremptory writ follows the terms of the alternative writ. Gay v. Torrance, 145 Cal. 144, 153, 78 P. 540; Barry v. Board of Directors, 7 Cal.App.2d 412, 429, 46 P.2d 298. A writ of mandate in this proceeding could not command the manner in which an assessment should be made in a subsequent year. It must be assumed that the assessor will hereafter follow the law as construed in this proceeding. Moreover no demand or refusal has been alleged with reference to any year except 1946 and we shall not anticipate a refusal in future years if demand should be made. See Friedland v. Superior Court, supra.

(3) No doubt there are hundreds of persons whose property has been assessed in the manner complained of by appellants, but this does not purport to be a class action prosecuted on behalf of all other persons similarly situated. Appellants do not seek a writ requiring respondent to reassess all property belonging to other veterans and assessed in the same manner as that involved in this action. If a writ should issue it will be applicable only to this one assessment. It obviously will not command the assessor to cancel all like assessments and to reassess the various properties in the names of the veteran vendees. The rules laid down in the opinion of the Presiding Justice relative to the manner in which property should be assessed, in which I concur, will guide the assessor and there is no reason to assume that he will fail to adhere to those rules in the future.

Insofar as the assessment for 1946 is concerned any and all other veterans who are situated similarly to appellants must, if they desire to obtain relief equivalent to that sought in this proceeding, file and prosecute actions on their own behalf. The issuance of a writ in favor of appellants will therefore not prevent a multiplicity of actions.

(4) In the instant case the ultimate relief which appellants seek, and to which they are entitled, is the exemption from taxation afforded by section 1¼ of Article XIII of the Constitution and not the mere placing of their names on the assessment roll. The latter is only a means sought by appellants by which they may obtain the former. In the language of that section it is the "property of" the veteran that is exempt, not property assessed to him. If it is his property his exemption from taxation is assured. If it does not belong to him it is not exempt even though it is assessed to him on the assessment roll. If appellants are entitled to exemption they may attain their aim by means other than by resort to mandamus, as hereinbefore pointed out. Neither the hardship imposed on appellants nor the costs of suit would be greater in an action to recover the tax after payment than in a mandamus proceeding.

For the reasons stated I am of the opinion that appellants are not entitled to a writ of mandate. They are nevertheless entitled to their constitutional exemption

79 Cal.App.2d 216

DEMPSEY et al. v. MARKET ST. RY. CO.

Civ. 13267.

District Court of Appeal, First District, Division 2, California.

April 18, 1947.

Hearing Denied June 17, 1947.

1. Carriers ⚟316(1)

Where a passenger on a common carrier is injured as result of manner in which carrier is operated, an inference of negligence arises under the doctrine of "res ipsa loquitur".

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

2. Carriers ⚟316(3), 321(21)

Where passenger on street car seeking to recover for injuries sustained as result of fall therein testified only to a sudden and violent stopping of the car, "res ipsa loquitur" doctrine applied and refusal to instruct thereon was error.

3. Carriers ⚟321(21)

An instruction authorizing passenger on street car to recover for injuries allegedly sustained as a result of a fall therein if jury should find that in exercise of highest degree of care for safety of passengers the street car should not have been stopped in manner in which it was stopped, and that passenger did not by her negligence proximately contribute to the injuries, did not constitute a substantial res ipsa loquitur instruction.

4. Appeal and error ⚟1067

Where issue of negligence was submitted to jury as well as issue whether plaintiff actually sustained any injury in defendant's street car, and it could not be determined on which of the issues jury decided the case in returning verdict for defendant, refusal to give requested res ipsa loquitur instruction was not nonprejudicial error on ground that only question actually litigated before jury was question whether plaintiff received her injuries on defendant's street car.

5. Carriers ⚟321(1)

In action for injuries to passenger allegedly thrown to floor of defendant's street car when it stopped with sudden jerk, requested instruction that the law makes no requirement that a passenger who is injured by common carrier should give any notice of injury before filing suit should have been given.

◆

Appeal from Superior Court, San Francisco County; Frank T. Deasy, Judge.

Action by Ilma Dempsey and John Dempsey, her husband, against the Market Street Railroad Company for personal injuries to plaintiff wife as result of a fall in defendant's street car. From a judgment for defendant, the plaintiffs appeal.

Reversed.

George Olshausen and John K. Hagopian, both of San Francisco, for appellants.

Jesse H. Miller and Cyril Appel, both of San Francisco, for respondent.

DOOLING, Justice.

This is a second appeal, the supreme court having affirmed an order granting a new trial after a verdict and judgment for defendant in Dempsey v. Market Street Railway Co., 23 Cal.2d 110, 142 P.2d 929. The second trial resulted in a verdict for defendant and plaintiffs, who are husband and wife, testified that they boarded a street car operated by defendant and walked through the car to the front platform, Mrs. Dempsey preceding her husband, and that when Mrs. Dempsey was about to step down to the motorman's platform from the main body of the car the car stopped with a sudden and violent jerk throwing her forward onto the floor and causing the injuries complained of.

Plaintiffs proposed several instructions on res ipsa loquitor which the court refused to give. That this refusal was not an oversight is made clear by the following colloquy between counsel for plaintiffs and the court:

"Mr. Hagopian: May I call your Honor's attention to the fact that you probably overlooked some res ipsa loquitur instructions.

"The Court: No, I have considered that."

[1] It was error to refuse instructions on the doctrine of res ipsa loquitur. When a passenger on a common carrier is injured as a result of the manner in which the carrier is operated an inference of negligence arises under the doctrine of res ipsa loquitur. Rystinki v. Central California T. Co., 175 Cal. 336, 344, 165 P. 952; Mudrick v. Market Street Ry. Co., 11 Cal.2d 724, 730 et seq., 81 P.2d 950, 118 A.L.R. 533; Lynch v. Market Street Ry. Co., 130 Cal.App. 433, 438, 439, 19 P.2d 1009; Middleton v. California St. Cable Ry. Co., 73 Cal.App.2d 641, 644, 167 P.2d 239.

[2] Defendant argues that the case was not one for the application of the res ipsa loquitur doctrine, because plaintiffs' evidence, if believed, established the cause of the accident. This argument merits little comment. Plaintiffs testified only to a sudden and violent stopping of the car. The case is the typical one for the application of the res ipsa doctrine. See cases cited supra.

[3] It is also argued that the court substantially instructed the jury on res ipsa loquitur in the following instruction: "If you find from the evidence that plaintiff, Ilma Dempsey, was a passenger on the car of defendant and was proximately injured by being thrown to the front of the platform of the defendant's street car on which she was a passenger, by reason of the sudden and violent jerking of said car while it was being operated along and upon Haight Street in the City and County of San Francisco, if such you find to be the facts, and if you find from the evidence that said jerking was due to the manner in which the said car was being operated and stopped; *and if you further find from the evidence that in the exercise of the highest degree of care and caution for the safety of passengers upon said car, said car should not have been operated and stopped in the manner in which it was operated and stopped,* and that the plaintiff, Ilma Dempsey, did not by her negligence proximately contribute to said accident and her injuries, if any, then I instruct you that your verdict must be in favor of the plaintiff, Ilma Dempsey, and against the defendant, Market Street Railway Company."

We have italicized certain language from this instruction. This italicized language instructed the jury, in effect, that they must find "from the evidence" that in the exercise of the care required of it defendant should not have stopped the car in the manner in which it was stopped in order to bring in a verdict for plaintiffs. This is not a res ipsa loquitur instruction but the exact converse. It is the crux of the res ipsa loquitur doctrine as applied to this type of case that where the injury occurs from the manner in which the car is operated the inference of negligence arises. The jury, in the absence of explanation, is entitled to infer that in the exercise of the requisite care the car would not have been operated in such a manner as to bring injury upon the plaintiff. Far from so instructing the jury in the quoted instruction, the court told the jury only that if they found *from the evidence* that the car would not have been so operated in the absence of defendant's negligence a verdict for plaintiffs was proper. They were nowhere instructed that the fact that Mrs Dempsey was injured by the manner in which the car was operated itself raised the inference, i. e. was in itself evidence, of the carrier's negligence. A comparison of the instruction given with the three instructions approved by the court in Mudrick v. Market Street Ry. Co., supra, 11 Cal.2d 724, 730, 81 P.2d 950, 118 A.L.R. 533, will point up the essential difference in the instruction given and a correct res ipsa loquitur instruction.

[4] Finally defendant argues that the error in refusing instructions on res ipsa loquitur was not prejudicial. It was one of defendant's points on the trial that Mrs. Dempsey was not injured on their car at all and this theory was covered by certain instructions to the jury. The evidence on this question was circumstantial but in our judgment sufficient to take that question to the jury. The accident was not reported to defendant until the lapse of several days. Every operator of a car on that route whose car passed the point where the injury is alleged to have occurred within reasonable limits of time fixed by plaintiffs as the time of Mrs. Dempsey's injury was called as a witness and testified that the

car operated by him on that run was not stopped with unusual suddenness or otherwise than normally. Plaintiffs testified that on the car on which Mrs. Dempsey was injured there was a certain type of railing behind the motorman. Defendant's witnesses testified that no car on that run was equipped with this type of railing. This evidence, though circumstantial, was sufficient to support an inference by the jury, if they saw fit to draw it, that Mrs. Dempsey was not injured on a car on that street despite her testimony and that of her husband that she was.

Defendant takes the position that the only question actually litigated before the jury was the question whether Mrs. Dempsey received her injuries on one of their cars at all and says that if plaintiffs' testimony was believed by the jury defendant's negligence was practically conceded. An examination of the transcript does not support this statement. The jury was very fully instructed on negligence and proximate cause and was expressly instructed that no verdict could be returned for plaintiffs if the jury did not find that Mrs. Dempsey's injuries were proximately caused by defendant's negligence. The issue of negligence having been submitted to the jury we cannot know whether they decided the case on that issue. If they did decide the case on that issue it was prejudicial error to deprive plaintiffs of the benefit of the res ipsa loquitur doctrine.

[5] Plaintiffs proposed the following instruction which the court refused to give: "You are instructed that the law makes no requirement that a passenger who is injured by a common carrier should give any notice of the injury before filing suit."

One of the facts relied upon by defendant in its defense that Mrs. Dempsey's injuries were not received on its car as claimed was the failure of plaintiffs to give any notice to the operators of the car. The proposed instruction is a correct statement of law and should have been given. Defendant was entitled to, and doubtless did, argue the unlikelihood of plaintiffs leaving the car without in any way notifying the operators of Mrs. Dempsey's painful injuries. But plaintiffs were entitled to have the jury instructed that there was no duty imposed on them by law to give such notice.

Judgment reversed.

NOURSE, P. J., and GOODELL, J., concur.

Hearing denied; SHENK and TRAYNOR, JJ., dissenting.

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79 Cal.App.2d 85

UNITED STATES CREDIT BUREAU, Inc., v. CLAUS.

Civ. 3558.

District Court of Appeal, Fourth District, California.

April 11, 1947.

Rehearing Denied May 7, 1947.

1. Limitation of actions ⟹56(1)

Where agreement between contractor and surety on contractor's bond provided for indemnity against loss as well as against liability, an action, brought more than 4 years after liability had accrued but within 4 years after payments had been actually made to satisfy the liability, was not barred by limitations. Code Civ.Proc. § 337, subd. 1.

2. Bankruptcy ⟹425

A discharge in bankruptcy did not operate to release bankrupt from a debt which he scheduled as owing to a company which was not the creditor. Bankr. Act, § 7(8), 11 U.S.C.A. § 25(8).

3. Bankruptcy ⟹436(3)
Evidence ⟹317(12)

Where bankrupt listed a debt under the wrong name, his testimony that he had had a telephone conversation with an agent of the true creditor who said that he had notified the creditor of the bankruptcy proceeding was hearsay and insufficient to establish that the true creditor had actual notice of the bankruptcy proceedings, so as to entitle bankrupt to a discharge from such debt. Bankr.Act, § 7(8), 11 U.S.C.A. § 25(8).

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action by United States Credit Bureau, Inc., against Alvin O. Claus on a contract of indemnity entered into between defendant and plaintiff's assignor. Judgment for plaintiff, and defendant appeals.

Affirmed.

Edward J. Jose, of San Francisco, for appellant.

La Verne M. Hayes and S. Oliver Bletz, both of Los Angeles, for respondent.

MARKS, Justice.

This is an appeal from a judgment in the sum of $2566.65 obtained under a contract of indemnity between defendant and Indemnity Insurance Company of North America, the plaintiff's assignor.

In August, 1939, B. I. and Alice Anderson as owners entered into a contract for the construction of a dwelling, garage and water system by defendant as contractor. The Indemnity Insurance Company of North America became surety on the contractor's bond in the sum of $8000. An indemnity agreement between the surety and the contractor gave the surety the right of immediate action against the contractor for any "loss or liability when * * * paid, adjusted, incurred or assumed * * * whether the same shall have been actually paid or not."

Defendant defaulted on his contract in January, 1940, and the surety then proceeded under its liability on its bond and paid for the completion of the contract. Judgment was given against defendant for two payments made by the surety in completing the building contract. These payments were made on June 26, 1940, and July 30, 1940. Not included in the judgment were two payments made by the surety on March 13, 1940, and a third on August 27, 1940, totaling $265.85. The complaint in this action was filed on April 14, 1944.

The only questions argued here are (1) that the cause of action is barred by subdivision 1 of section 337 of the Code of Civil Procedure, and (2) that the debt was discharged under an adjudication of bankruptcy made on August 14, 1942, and a discharge of the bankrupt on October 22, 1942.

[1] Defendant's argument on the bar of the statute of limitations proceeds as follows: That the indemnity was against liability as well as against loss; that liability attached when defendant abandoned his contract in January, 1940, when the action could have been commenced, which was more than four years prior to the time suit was started.

The same arguments were made in the cases of Oaks v. Scheifferly, 74 Cal. 478, 16 P. 252, and Globe Indemnity Co. v. Larkin, 62 Cal.App.2d 891, 145 P.2d 633, 634, where indemnity contracts similar to the one before us were involved. In the Globe Indemnity case it was said:

"But Oaks v. Scheifferly, 74 Cal. 478, 16 P. 252, is the only case in point on the precise question before us and that case fully sustains the contentions of plaintiff. There, as here, the agreement had a dual aspect in that it purported to indemnify against liability as well as against actual damages suffered through payment of the liability; the action was brought more than four years after the liability had accrued but within four years after payment had been actually made to satisfy the liability; and the action was based upon the covenant to indemnify against such damages rather than upon the covenant to indemnify against liability. Contrary to the claim of defendant here, the court there recognized the dual aspect of the agreement and recognized that an action to recover upon the covenant to indemnify against liability could have been brought at any time after the liability had accrued and even prior to the actual payment of any loss. But the court treated the action, based upon the covenant to indemnify against damages, in the same manner as though such covenant had been contained in an agreement separate and apart from the covenant to indemnify against liability and held that the action to recover upon the covenant to indemnify against damages was not barred."

These cases dispose of the contention that the claim here is barred by the statute of limitations and support the finding of the trial court to the effect that there is no such bar here.

[2] In support of his special defense of the discharge of the indebtedness by the bankruptcy proceedings defendant introduced a certified copy of the order of "Discharge of Bankrupt" in which the following appears: "It is ordered that the said Alvin Oscar Claus be, and he hereby is, discharged from all debts and claims which are made provable by said act against his estate, except such debts as are, by said act, excepted from the operation of a discharge in bankruptcy."

Defendant argues that this evidence raised a prima facie presumption of discharge and that it was necessary for plaintiff to rebut that presumption by competent evidence in order to recover.

Plaintiff introduced in evidence a certified copy of what would appear to be the second page of "Schedule A–3. Creditors Whose Claims Are Unsecured," being part of a schedule filed in the bankruptcy proceeding. No claim of the Indemnity Insurance Company of North America is listed, but the following appears: "North American Bonding Co.—Obligation upon a Bond, contracts covering Anderson, Country Club Estate, Fresno, May, 1940, * * * above liability upon obligation unknown, but not in excess of $2600.00."

Defendant argues that this is not sufficient to overcome the presumption raised by the order of discharge because it affirmatively appears that $4558.40 in claims were listed on page 1 of the schedule which might have included the claim of the Indemnity Insurance Company of North America.

Plaintiff called defendant as a witness under section 2055 of the Code of Civil Procedure. The following is in his testimony:

"Mr. Claus, I will call your attention to the item, $2600.00, listed on the schedule of unsecured creditors' claims, which is 'North American Bonding Co.—Obligation upon a Bond, contracts covering, Anderson, Country Club Estate, Fresno, May, 1940; above liability upon obligation unknown, but not in excess of $2600.00.' Now, referring to that item, did you have in mind the item represented by the obligation sued upon in this action? * * * That is the obligation you had in mind, is it not? A. That is right."

This sufficiently identified the claim listed as that of the North American Bonding Company as the claim on which this action is brought, but listed under a wrong name.

In Van Denburgh v. Goodfellow, 19 Cal. 2d 217, 120 P.2d 20, 23, it is said:

"Section 7 (8), 11 U.S.C.A. § 25 (8) of the Bankruptcy Act requires a voluntary bankrupt to file with his petition 'a list of his creditors showing their residence, if known; if unknown, that fact to be stated.' The penalty for failure to schedule a debt properly is stated in section 17 of the act [11 U.S.C.A. § 35]: 'A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy * * *.'"

[3] Defendant argues that the Indemnity Insurance Company of North America had actual notice of the bankruptcy proceedings in time for proof and allowance of its claim so that the erroneous listing cannot aid it here.

The record does not bear out this assertion. Ralph Andrews was the Fresno agent of the Indemnity Insurance Company of North America and took the application for the bond in question here. He ceased to be such agent either on May 31, or June 1, 1942, and was not thereafter connected with the company. Mr. Claus testified over objection of plaintiff that about a month prior to the trial of this action on May 6, 1946, he had a conversation with Mr. Andrews who said he had notified the Indemnity Insurance Company of North America of the pendency of the bankrupt proceedings; that this statement was repeated over the telephone by Mr. Andrews a few weeks later. That the objection to this line of testimony should have been sustained is obvious. Mr. Andrews had no recollection of such conversations or of notifying that company of the pendency of the bankruptcy proceedings. This evidence would not have supported a finding of actual notice had one been made. The case of Van Denburgh v. Goodfellow, supra, is authority supporting this conclusion.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

79 Cal.App.2d 40

PELLEGRINO v. LOS ANGELES TRANSIT LINES.

Civ. 15525.

District Court of Appeal, Second District, Division 2, California.

April 10, 1947.

1. Appeal and error 🔑**931(1)**

Evidence was viewed in light most favorable to the appellees.

2. Carriers 🔑**318(9)**

In action by 78 year old passenger against street car company for injuries sustained when he fell from bottom step of street car while alighting, evidence sustained finding that motorman was not negligent.

3. Trial 🔑**395(5)**

The trial court, in a trial before the court, is not required to make findings as to probative or evidenciary facts, but it is sufficient if the finding is of an ultimate fact, since a finding of ultimate fact includes a finding of all probative facts necessary to sustain it.

4. Trial 🔑**395(1)**

Where court in trial of passenger's personal injury action against street car company, before court without a jury, found that company did not operate street car at time of accident in a negligent manner, and that accident was not due to any fault of company, there was an adequate finding that company's negligence did not cause the accident, without a specific finding that street car was or was not started while passenger was alighting from it.

5. Negligence 🔑**121(2)**

Generally, when a plaintiff, in his complaint, gives an explanation of the cause of the accident by setting out specifically the negligent act or omission which he claims caused the accident, the doctrine of res ipsa loquitur does not apply.

6. Carriers 🔑**316(3)**

In action against street car company for injuries sustained by passenger who fell from bottom step of street car while alighting, wherein passenger contended specifically that accident was caused because street car started up while passenger was still on bottom step, res ipsa loquitur doctrine had no application.

7. Appeal and error 🔑**1071(1)**

Where trial court, trying case without jury, found that defendant was free from negligence in accident causing plaintiff's injuries, alleged fact that evidence was insufficient to sustain finding that plaintiff was contributorily negligent, was immaterial, since an affirmative finding that plaintiff was free from negligence would not conflict with finding that defendant was free from negligence.

◆

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Antonio Pellegrino against the Los Angeles Transit Lines, a corporation, to recover for injuries suffered as result of a fall from defendant's street car. From a judgment in favor of the defendant after trial before the court without a jury, and from an order denying plaintiff's motion for new trial, the plaintiff appeals.

Judgment affirmed, and purported appeal from order denying motion for new trial dismissed.

Vetran Ricca and Nathan Newby, both of Los Angeles, for appellant.

Gibson, Dunn & Crutcher, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of defendant after trial before the court without a jury in an action to recover damages for injuries suffered as the result of plaintiff's falling from a streetcar, he appeals.

[1] The evidence being viewed in the light most favorable to defendant (respondent), the essential facts are:

On November 17, 1944, plaintiff was a passenger on a streetcar of defendant traveling in a southerly direction on San Pedro Street in Los Angeles. The car stopped at the intersection of such street and Twenty-First Street. Plaintiff, who was standing in the front part of the car which was crowded, pushed his way to the bottom step and when on the last step, while not holding on to anything, lost control and fell to the street suffering injuries. At the time of the accident plaintiff was 78 years of age and suffering from a hernia. He was not bumped or pushed as he endeavored to get off the car, nor was the car moved from the time it stopped until after the accident.

Plaintiff urges reversal of the judgment on four propositions none of which are tenable.

First: *There is insufficient evidence to support the trial court's finding that defendant was not negligent.*

[2] The evidence was sufficient to support the finding that defendant was not negligent. The motorman testified that after his car had stood five or ten seconds at 21st Street he observed plaintiff standing on the edge of the top step of the exit doorway; his attention was directed toward plaintiff by the vocal salutation addressed to him by an angry woman passenger; that she stood behind him but did not touch him as she was trying to get around him; that upon hearing a woman's scream he looked around a second time and saw plaintiff lying in the road face down; that he found the steps of his car dry and no foreign matter on them; that the car did not move from the time he first saw plaintiff standing on the top step until he saw him lying on the street; that the air brake remained on, and the control handle was not moved from its "off" position. Moreover, plaintiff testified that while he was alighting from the car he did not hold anything. Such evidence was substantial proof of a want of negligence on the part of defendant.

Second: *The trial court failed to make a sufficient finding upon the issue of defendant's negligence in that it did not specifically find whether defendant's streetcar was or was not started while plaintiff was alighting from it.*

The trial court's finding relative to the issue of defendant's negligence reads as follows:

"That the defendant Los Angeles Railway Corporation did not drive, operate or manage said street car at the time of said accident in a careless or unskillful or negligent or reckless manner; that it did use the proper degree of care; that said accident was not due to or caused by or contributed to by any fault, carelessness, negligence or recklessness of said defendant Los Angeles Railway Corporation, or of its successor corporation, Los Angeles Transit Lines, a corporation, or of any of their agents, servants or employees."

[3] Such finding was sufficient. It is established that it is not necessary for the trial court to make findings as to probative or evidentiary facts, it being sufficient if the finding is of an ultimate fact since a finding of ultimate fact includes a finding of all of the probative facts necessary to sustain it. (Klein v. Milne, 198 Cal. 71, 75, 243 P. 420. See also City of Signal Hill v. Wyse, 9 Cal.App.2d 641, 643, 50 P.2d 1076; Carlson v. Stanbitz, 7 Cal.App.2d 455, 457, 45 P.2d 820.)

[4] In the present case the trial court made an adequate finding that defendant's negligence did not cause the accident; hence it was not necessary in view of the foregoing rule to make any findings upon the evidentiary facts.

Third: *That the doctrine of res ipsa loquitur is applicable in the instant case.*

[5] It is the general rule that when a plaintiff in his complaint gives an explanation of the cause of the accident, that is, where the plaintiff instead of relying on the general allegation of negligence sets out specifically the negligent act or omission which he claims caused the accident, the

doctrine of res ipsa loquitur does not apply. (Davidson v. American etc. Corporation, 32 Cal.App.2d 382, 385, 89 P.2d 1103; Keller v. Pacific Telephone & Telegraph Co., 2 Cal.App.2d 513, 525, 38 P.2d 182; Jianou v. Pickwick Stages System, 111 Cal.App. 754, 756, 296 P. 108.)

[6] The present case falls within this rule. Defendant does not rely on an allegation of general negligence but in his complaint sets out specifically the acts of negligence which he alleges caused the injuries, the allegation being that while plaintiff was alighting from the streetcar of defendant, "the defendant Los Angeles Railway Corporation through and by its agents and servants did carelessly, and unskillfully operate said street car, and not using the proper degree of care and [sic] caused said street car to start up and as a direct and proximate cause of the negligence of the defendants as aforesaid plaintiff sustained an injured shoulder. * * *" An allegation of negligence in a complaint similar to that in the instant case was held insufficient as a predicate for the application of the doctrine of res ipsa loquitur in Davidson v. American etc. Corporation, supra, 32 Cal.App.2d at page 385 et seq., 89 P.2d 1103.

Fourth: *There is insufficient evidence to sustain the trial court's finding that plaintiff was contributorily negligent.*

[7] The trial court having found, supported by substantial evidence, that the accident was not due to defendant's negligence, it was immaterial whether plaintiff was contributorily negligent or not under the established rule that where the trial court finds that defendant was free from negligence an affirmative finding that plaintiff was also free from negligence would not conflict with the other finding of the court nor would it change the result of the trial. Hence it is immaterial whether the trial court's finding as to plaintiff's contributory negligence was or was not supported by the evidence. (Strauch v. Bieloh, 16 Cal.App.2d 278, 282, 60 P.2d 582. See also Hertel v. Emireck, 178 Cal. 534, 535, 174 P. 30; and Imperial Water Co. No. 1 v. Imperial Irrigation Dist., 62 Cal.App. 286, 291, 217 P. 88.)

The judgment is affirmed and the purported appeal from the order denying the motion for a new trial is dismissed.

MOORE, P. J., and WILSON, J., concur.

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79 Cal.App.2d 54

NG v. WARREN et al.

Civ. 13306.

District Court of Appeal, First District, Division 1, California.
April 11, 1947.

1. Appeal and error ⚷931(1)

Where trial judge viewed premises at request of parties, although what he observed was not a part of transcript of record, it was evidence which reviewing court was required to assume to have supported the findings.

2. Landlord and tenant ⚷188(2)

A covenant to repair and a covenant to pay rent are independent covenants, and, unless covenant repair is made a condition precedent to covenant to pay rent, breach of former does not justify refusal of lessee to perform latter.

3. Landlord and tenant ⚷188(2)

Provision of lease for proportionate payment of rent in the event of partial destruction of demised premises by fire did not make landlord's covenant to repair a condition precedent to payment of rent; hence, notwithstanding proportionate payment provision, lessee did not waive landlord's breach of covenant to repair by paying rental in full up to time of trial of lessee's action to enforce provisions of lease.

4. Landlord and tenant ⚷223(2)

When damages have been sustained by a lessee by breach of lessor's covenant, in lessor's action for rent, lessee may recoup damages from the rent or, at his election, he may bring a separate action for recovery of damages.

5. Landlord and tenant ⚷223(2)

Where lessor has breached a covenant to lessee's damage, the fact that lessee has paid rent for greater part of term does not deprive him of right to counterclaim his damages for entire term.

6. Landlord and tenant ⚷154(4)

The measure of damages for breach of landlord's covenant to repair is ordinarily the difference between rental value of premises with repairs and without repairs.

7. Landlord and tenant ⚷123

Rights and easements may pass to lessee by implication; but, where express words of grant are not sufficient, implication which supplies those words flows either from a reasonable necessity, or, considering all circumstances, from the manifest intention of the parties.

8. Landlord and tenant ⚷53(2)

Where lease of store designated a transfer of interest "together with appurtenances" and, at time lease was made, lessor showed driveway to lessees and explained its use for the delivery of merchandise, successors to original lessor could not contend, in lessee's action to enjoin interference with use of driveway, that driveway was not a necessary part of leasehold but merely a convenient mode of access for delivery men.

9. Appeal and error ⚷931(1)

Where lessors, in action by lessee to enjoin interference with use of driveway to rear of demised premises, alleged that width of driveway and height of rear doors to leased premises did not permit delivery through rear entrance and trial court inspected premises, reviewing court could not rule that, as a matter of law, trial court was incorrect in his findings in favor of lessee.

10. Landlord and tenant ⚷132(1)

Where lease of store building also included right to use a private driveway to rear of building, lessee's acquiescence to slight interference with right to use driveway, resulting from the construction of a stairway to second floor required by city fire authorities, did not bar lessee from objecting to complete obstruction of driveway by lessor by the erection of a building thereon.

11. Landlord and tenant ⚷53(2)

Where original lessor, with lessee's acquiescence, had constructed a stairway from second floor of lessor's building, thereby partially interfering with lessee's right to use driveway, new owners who purchased entire property from lessor could not be required to remove stairway because of their breach of lease by entirely blocking driveway by the erection of a building thereon, although they could be required to remove the building.

12. Appeal and error ⚷719(1)

Alleged errors not made a part of appeal will not be considered.

◆

Appeal from Superior Court, Alameda County; A. J. Woolsey, Judge.

Action by Ivan Ng against W. F. Warren and Beulah Warren for an injunction and declaratory relief relative to the blocking of a certain driveway by defendants, wherein defendants cross-complained. Judgment for the plaintiff, and defendants appeal.

Judgment affirmed as modified.

H. L. Richardson, of Los Angeles, for appellants.

Charles Reagh, of San Francisco, for respondent.

WARD, Justice.

This is an appeal by defendants in an action for an injunction and declaratory relief. The complaint asked for such other and further relief as equity may require. Plaintiff was awarded damages in addition to a judgment enjoining and restraining defendants from further blocking a certain driveway, and requiring them to remove all obstructions thereto, including a stairway.

The complaint alleged in substance that plaintiff was the lessee of certain store premises known as 1660 Seventh Street, Oakland, California, under a lease dated February 24, 1944, for a term of five years, commencing on March 1, 1944. Among the appurtenances to the premises described in the lease were a shed on the rear of the lot on which the store building rests, and the use of a driveway, located on the lot adjoining the lot on which is located the store occupied by plaintiff. The complaint further alleged that at the time the lease was executed both lots belonged to plaintiff's lessor; that defendants subsequently acquired both lots from the said lessor by virtue of one deed; that the use of the shed was of great advantage to plaintiff; that the use of the driveway is essential to the profitable operation of his business, as it is the only means of access to the rear of the store for the delivery of the incoming meat and other merchandise; that the front doors of the store are narrow and in use during delivery hours by patrons of the store; that in the month of June, or thereabouts, the shed was partially destroyed by fire without plaintiff's fault; that the total damage to the shed did not amount to 30% of the value of the premises, but the shed became utterly unusable because of such fire; that the value of the leasehold premises is upwards of $6,500. The complaint also alleged the tender to defendants of checks and a draft in payment of rental, and that a certain check in the sum of $240 was received by defendants but evidently was not presented to the bank for payment.

The defendants' answer denied most of the material allegations of the complaint except the allegation that the shed was partially destroyed by fire. In this regard the answer alleged that the value of the shed amounted to 30% and more of the value of the leasehold premises. The defendants also filed a cross-complaint by which they alleged that the lease had terminated in accordance with its provisions by virtue of the fact that more than 30% of the leasehold value of the premises had been destroyed by the fire. The plaintiff in his answer to the cross-complaint admitted the allegation of the value of the shed only to the extent of 25% of the value of his leasehold.

The premises were leased "together with appurtenances" for a term of five years, commencing on the first day of March 1944 and ending on the 28th day of February, 1949. Paragraph 3 of the lease provided: "In case the premises, or the building in which the same are situated, are totally destroyed by any cause whatever prior to the commencement of or during the term of this lease, then this lease shall thereupon immediately terminate and neither party hereto shall have any further rights or be under any further obligations on account of this lease, except Lessee for rent accrued; and if Lessee is not then in default in the performance of any of its obligations under this lease, Lessor shall refund to Lessee any unearned rents paid in advance by Lessee. For the purposes hereof, damage or injury to the extent of thirty per centum of the value of the premises shall constitute a total destruction thereof. In case the premises, or the building in which the same are situated, are partially destroyed by any cause whatever, Lessor with reasonable promptness and dispatch, shall repair and rebuild the same, providing the same can be repaired and rebuilt under State and Municipal laws and regulations within thirty working days, and Lessee shall pay rent during such period of repair or rebuilding in the proportion that the portion of the premises occupied by Lessee bears to the entire premises. For the purposes hereof, damage or injury which does not amount to thirty per centum of the value of the premises shall be considered as a partial destruction."

[1] The trial judge viewed the premises at the request of the parties. What he observed is not part of the transcript of the record, but it is evidence which this court must assume supports the findings. Gates v. McKinnon, 18 Cal.2d 179, 114 P.2d 576; Jones v. Bridges, 38 Cal.App.2d 341, 101 P.2d 91; Cornell v. Hearst Sunical, etc., Corporation, 55 Cal.App.2d 708, 131 P.2d 404; Noble v. Kertz & Sons Feed, etc., Co., 72 Cal.App.2d 153, 164 P.2d 257.

The court's narration of the facts in the findings, not only as they pertain to the premises, but as regards the interests of the parties in the property, is correct and complete except as to the date when the shed burned. The findings provide:

"1. On the 24th day of February, 1944, the plaintiff leased from Rose Anestis the store premises at #1660 - 7th Street, in the city of Oakland, county of Alameda, state of California, the said Rose Anestis being on said date the owner of said premises and having been the owner thereof for many years prior to said time.

"2. In the month of March, 1945, Rose Anestis conveyed the premises in question by deed to the defendants and the defendants have ever since been and now are the owners of the said premises. The lease mentioned in finding No. 1 covered the store premises known as #1660 - 7th Street, Oakland, California, together with the appurtenances thereof, and among the appurtenances to the said store were a shed at the rear of said store which the various tenants of said store had for many years used to store empty crates and other property, and also the use of a driveway immediately to the west of said store, which driveway was located on property of said Rose Anestis deeded to defendants and was owned by defendants and led to a side or rear entrance to said store, and which driveway had been used for upwards of twenty years to give access to the rear entrance to said store for the delivery of meat and groceries from wholesalers to the store premises and for removal of empty cartons, crates, garbage and such things from the store. The only other entry to the store is the front door thereof through which customers have to pass in order to enter and leave said store.

"3. In the month of March, 1945, the shed above mentioned was destroyed by fire so as to be useless, and the defendants have never reconstructed it nor has the plaintiff had the use of equivalent space. The defendants, as cross-complainants, allege in their cross-complaint that the said shed was in value more than 30% of the leasehold premises. In his answer to the cross-complaint, the plaintiff, as cross-defendant, admits said allegation of value only to the extent of 25% of the leasehold value, and, there being no evidence of the value of said shed, the court finds the same was and is in value equivalent to 25% of the demised premises and no more.

"4. The court finds that the use of the shed and the driveway above mentioned was and is necessary to the full enjoyment of the use of the plaintiff's property held by him under said lease and was and is an appurtenance to the use of said property.

"5. On or about the 1st day of September, 1944, the fire marshal of the city of Oakland, county of Alameda, state of California required said Rose Anestis, the then owner of said premises, the upper story of which was and is occupied as a multiple unit dwelling place, to construct a stairway from the upper part of said premises to the courtyard in the rear thereof, which said stairway as constructed slightly interfered with access by said driveway to and from the rear of the store and to and from the shed aforesaid. The plaintiff at that time made no objection to the construction of said stairway and the partial interference thereby with the use of said driveway.

"6. On or about the 1st day of July, 1945, the defendants began to construct a building completely across said driveway, making it impossible for the plaintiff to use the same. Plaintiff immediately remonstrated with the defendants concerning such conduct and when the defendants refused to clear the said driveway, the plaintiff brought this action against them with reasonable promptness. Notwithstanding the pendency of this action and their knowledge thereof, which the defendants acquired on the 14th day of September, 1945, by service of summons on them together with a copy of the complaint, the defendants continued the construction of said building and the blocking of said driveway.

"7. The plaintiff has paid to the defendants all rent that has accrued under the lease and is not in default in the performance of any term thereof, and the defendants have accepted the rents from the plaintiff up to the time of the trial of this action.

"8. At the time when the defendants purchased the property in question from Rose Anestis, the plaintiff was in possession of the store-building and was using the driveway and the defendants knew of the plaintiff's lease."

Upon the above facts the court concluded as a matter of law:

"1. The plaintiff is not in default under the terms of his lease and any claim of the defendants that plaintiff is in default thereunder up to the time of the trial of this case is without foundation.

"2. The leasehold value of the premises in question has been decreased 25% by the failure of the defendants to reconstruct the said shed, and thereby the plaintiff has been damaged to the extent of twenty dollars ($20.00) per month from January 1, 1945, and is entitled to judgment against defendants for said sum, to-wit: three hundred dollars ($300.00). Unless and until such shed is reconstructed, damage at said rate will continue to accrue to plaintiff.

"3. Plaintiff is entitled to an injunction against the defendants, enjoining and restraining defendants from further blocking the driveway aforesaid and requiring them to remove all obstruction thereto, including said stairway.

"4. The defendants lost the right to claim the acquiescence of the plaintiff in and waiver of the partial interference with the use of the driveway by the construction of said stairway when they completely blocked the said passage way, and therefore should be required to remove the said stairway and locate it elsewhere so that the store in said building may have the uninterrupted use of the said driveway.

"5. The cross-complaint herein is without equity and the cross-complainants are entitled to no relief in the premises."

Judgment was ordered in accordance with the foregoing.

Defendants contend that plaintiff is not entitled to a refund of rent previously collected, and that he is not entitled to a mandatory injunction for the reason that no right had been conferred on him to use the driveway, or, if it had, such right had been relinquished.

With reference to the first contention, it is the view of the defendants that after the destruction of part of the premises by fire, no demand was ever made to repair the damaged portion, and that rent was paid without diminution or request therefor. They cite Tatum v. Thompson, 86 Cal. 203, 24 P. 1009, wherein a lease provided "that if, by reason of fire, the premises herein leased shall become untenantable, no rent shall be charged or paid until they are made tenantable" by the lessor. A fire occurred, burning the flooring of the premises immediately over the lessee's premises, but the lessee remained on and continued to pay the usual rent until his premises were damaged by rain. In affirming the judgment for the lessor the Supreme Court said (86 Cal. at pages 208, 209, 24 P. at page 1010): "* * * this special provision of the lease did not bind the lessor to repair at all. Under the statute, he was bound to repair only upon notice from the tenant, and, if he then failed to do it, the limit of his liability was the right of the lessee to terminate the lease, or, at his option, to make the repairs to the extent of one month's rent, and deduct the cost thereof from the rent. Van Every v. Ogg, supra [59 Cal. 563]. Neither did the covenant in the lease amount to a warranty of anything except that, if the premises were untenantable, the lessee should not be required to pay rent. In regular course of business, the collector called for the rent. If the plaintiffs deemed the premises untenantable, it was their duty to say so, and refuse to pay the rent. But instead of that they promptly paid, without objection or protest, thus, in the most emphatic terms, assenting to the proposition that they had not become unfit for the purpose for which they were rented. Neither did they take any measures to assert their rights under the statute, but they remained in possession, and gave no notice to repair, or of intention themselves to make repairs." Unlike the situation in the Tatum case, the lease herein provides that in the event of partial destruction the lessor is under a duty to repair.

[2, 3] The court found that there was a partial destruction of twenty-five per cent. In addition to providing that it is the duty of the lessor to repair with reasonable promptness, the lease provides that it is the duty of the lessee to pay rent during the period of repair in the proportion that the premises occupied by the lessee after the fire bears to the entire premises. "A covenant to repair * * * and a cove-

nant to pay rent * * * are usually considered as independent covenants, and unless the covenant to repair is expressly or impliedly made a condition precedent to the covenant to pay rent, the breach of the former does not justify the refusal on the part of the lessee to perform the latter." Arnold v. Krigbaum, 169 Cal. 143, 145, 146 P. 423, 424, Ann.Cas.1916D, 370; 3 Williston on Contracts, pp. 2519-2521, sec. 890; Restatement of the Law, Contracts, sec. 290. Here the provision in the lease regarding the proportionate payment of rent cannot be considered as causing the covenant to repair to be a condition precedent to the payment of rent.

[4-6] The lessee did not waive the breach by paying the rental in full "up to the time of the trial of this action." As said in McAlester v. Landers, 70 Cal. 79, 84, 11 P. 505, 507: "When damages have been sustained by a lessee by a breach of the lessor's covenant, if an action for rent is brought, the lessee may recoup his damages from the rent, or, at his election, he may bring a separate action for the recovery of the damages. Kelsey v. Ward 38 N.Y. 83. And the fact that the lessee has paid the rent for the greater part of the term will not deprive him of the right to counter-claim his damages for the entire term. Cook v. Soule, 56 N.Y. 420." "The measure of damages for breach of the landlord's covenant to repair is ordinarily stated to be the difference between the rental value of the premises with the repairs and without the repairs." 1 Tiffany, Landlord and Tenant, 589, sec. 87(9); 28 A.L.R. 1448, 1495; 5 Williston on Contracts, Rev.Ed., 3914, sec. 1404.

[7] Defendants contend that the driveway was not a necessary adjunct to the leasehold because its use was an inconsequential privilege which had been acquiesced in by defendants' predecessors in title. In Mayor v. Hazzard, 10 Cal.App.2d 1, at page 4, 51 P.2d 189, at page 191, quoting from Harrison v. Ziegler, 51 Cal.App. 429, 196 P. 914, the court said: "'Rights and easements may and do pass to lessees by implication; "but, where the express words of the grant are not sufficient, the implication which supplies those words flows either from a *reasonable necessity*, or, considering all the circumstances from the *manifest intention* of the parties."'" See, also, 15 Cal.Jur. 624.

[8] There is no merit to defendants' argument that this driveway was not a necessary part of the leasehold but merely a convenient mode of access for delivery men. The lease designated a transfer of interest, "together with appurtenances." The driveway adjoined the leased premises at the date of the lease. In support of plaintiff's position is the fact that previously this portion of land had been used by a former lessor. Mrs. Anestis testified: "We used it 25 years in our business." The following also appears in the transcript of testimony:

"The Court: Well, what is there before the Court now?

"Mr. Reagh [attorney for plaintiff]: An objection to a question I asked Mrs. Anestis whether or not at the time she made the lease to Ivan Ng she showed him the driveway and told him that was for the delivery of meat and groceries in there.

"The Court: Objection overruled.

"Mr. Reagh: Is that right, Mrs. Anestis? A. Yes, I told him he could use the driveway, he could put his boxes back in the old baker shop, because there was ample—

"Q. That's the shed? A. Yes, and 4 or 5 trucks of the baker shop, they had their trucks there."

Mr. Anestis testified that he had been married to Mrs. Anestis for nine years and that during part of that time "there were 3 bakery trucks, they were high, they had them in there," and that the driveway was "passable by trucks." Subsequently when trucks were prohibited from using the driveway it was necessary to use the front door of the market to deliver meat, etc., and to discharge crates, garbage, etc., through the same door.

[9] Defendants strenuously insist that the width of the driveway and the height of the rear doors to the leased premises do not permit delivery through the rear entrance. The court gained his knowledge in this respect from an actual inspection of the premises. On these matters it is im-

possible for this court to rule that as a matter of law the trial court was incorrect in his findings. Gates v. McKinnon, supra; Noble v. Kertz & Sons Feed etc. Co., supra. There is no statement contained in the recent case of Von Rohr v. Neely, 76 Cal. App.2d 713, 173 P.2d 828, inconsistent with the holding herein.

The defendants also argue that the plaintiff relinquished the use of the driveway when, under the direction of representatives of the fire marshal of the City of Oakland, a stairway to be used as an exit for tenants of the second floor in case of fire was erected at the rear of one of the buildings.

[10] Under all of the circumstances of this case it appears that the trial court reached a reasonable conclusion, namely, that the acquiescence to a slight interference with his right to use the driveway should not bar the lessee from objecting to its complete obstruction by the erection of a building thereon. "A consent to a partial obstruction of an easement of light and air will not extinguish the remainder thereof." 142 A.L.R. 484; 28 C.J.S., Easements, § 53, p. 717.

[11] The trial court ordered the present owner to remove the stairway as well as the structure over the driveway. This portion of the decree is based on the conclusion that although the plaintiff, by his acquiescence, may have lost his right to object to this "slight" interference, defendants by their later actions lost the right to claim this right. An examination of the pleadings discloses that the removal of the stairway was not made directly an issue in the case. According to the findings, the stairway was constructed in September, 1944, without objection by the plaintiff. Defendants did not become the owners of the premises until March, 1945. Thus the findings indicate that when defendants purchased the property the stairway was constructed, and so far as the defendants were concerned, the only easement existing was the driveway subject to the stairway. Under these circumstances it would be most inequitable to deprive the defendants of their rights existing at the time they purchased the property because of their later inequitable actions.

The last point mentioned by defendants is in reference to a lease with the United States government, with the right to use the appurtenant driveway herein. This was a joint use of the right of way or appurtenance with plaintiff, and the point is therefore without merit.

[12] Defendants raised additional points on the trial, such as whether the testimony of the witnesses was introduced to vary the terms and conditions of a written instrument. As the alleged errors are not made a part of this appeal, they do not require consideration. Title Guarantee & Trust Co. v. Fraternal Finance Co., 220 Cal. 362, 30 P.2d 515, and cases cited therein.

The conclusions and judgment are modified by striking therefrom all reference to the removal of the stairway. As modified the judgment is affirmed; plaintiff to recover costs.

PETERS, P. J., and BRAY, J., concur.

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78 Cal.App.2d 834

BURCH et al. v. VALLEY MOTOR LINES, Inc.

Civ. 13075.

District Court of Appeal, First District,
Division 2, California.
April 1, 1947.

As Corrected April 3, 1947.

Rehearing Denied May 3, 1947.

Hearing Denied May 29, 1947.

1. Evidence 🔑471(1), 472(1), 505, 506, 507

Generally, witnesses must testify to facts and not to opinions, and whenever the question to be determined is result of common experience of all men of ordinary education, or is to be inferred from particular facts, inference is to be drawn by jury, and not by witness.

2. Appeal and error 🔑926(7)

On review of ruling excluding testimony of defendant's expert witness, District Court of Appeal would assume that expert, had he been permitted to testify, would have testified as indicated in defendant's offer of proof at time of exclusion of such testimony.

3. Evidence ⚷508

Under statute and at common law, opinion of witness is admissible on question of science, art, or trade in which witness is skilled. Code Civ.Proc. § 1870, subd. 9.

4. Evidence ⚷508

An expert's testimony is admissible because a man's professional pursuit, his peculiar skill and knowledge in some department of science, not common to men in general, enable him to draw an inference, where men of common experience, after all the facts proved, would be left in doubt.

5. Evidence ⚷514(1), 528(1, 2)

Generally, engineer or person having engineering skill derived from practical experience may state an inference or judgment as to matters within range of such knowledge or experience, such as manner in which certain devices or appliances operate, cause of certain occurrences, such as breaking of a structure or device, or effect or result of other phenomena.

6. Evidence ⚷546

Whether witness qualifies as expert is a matter within discretion of trial judge.

7. Appeal and error ⚷1067
Automobiles ⚷246(56)

In action for damages sustained when following tractor and semi-trailer collided with preceding tractor pulling two freight vans, refusal to charge statute relating to prima facie speed limits was prejudicial error, where other statutes referring to the prima facie speed limit statute were charged, and there was evidence upon which such an instruction could have been supported as conforming to appellant's theory. Vehicle Code, §§ 510, 511, 513, 701.

8. Automobiles ⚷244(12)

In action for damages sustained when following tractor and semi-trailer collided with defendant's preceding tractor pulling two freight vans, evidence warranted inference that driver of preceding tractor was negligent.

9. Evidence ⚷527

Testimony of a qualified metallurgist who had extensive experience in testing strength of metals and who had examined the cast steel drawbar by which second van was attached to the first van, and whose breaking caused collision should have been permitted to give his opinion as to what caused the drawbar to break, as relevant to the secondary inquiry, as to the manner in which the drawbar was broken, since the answer to secondary inquiry would have aided jury in answering first inquiry of whose negligence caused the collision. Code Civ.Proc. § 1870, subd. 9.

◆

Appeal from Superior Court, Alameda County; A. J. Woolsey, Judge.

Action by Ovel Elgin Burch and Art Baker, doing business as Art Baker Transportation Company, against Valley Motor Lines, Inc., a corporation, for personal injuries and for damages allegedly sustained in a truck collision. From the judgment, the defendant appeals.

Reversed.

Clark & Heafey and Yale S. Kroloff, all of Oakland, for appellant.

Fitzgerald, Abbott & Beardsley, of Oakland (Wood, Crump, Rogers & Arndt, of Los Angeles, and Guy Richards Crump, of Los Angeles, of counsel), for respondent.

GOODELL, Justice.

This appeal was taken from a judgment entered on a verdict in favor of respondent Burch for $15,000 and respondent Baker for $8,459.80.

Respondent Burch was driving a tractor and semi-trailer loaded with freight, which vehicles were owned by respondent Baker. One Mossman was driving a tractor pulling two loaded freight vans, all belonging to appellant Valley Motor Lines. A collision involving both trains of vehicles occurred in the underpass at San Leandro Boulevard and 105th Avenue in Oakland, at about 7 p. m. on February 15, 1943. The underpass is about 730 feet in length over-all, the tunnel part being 405 feet long, 264 feet of which are straight. The highway throughout the underpass is 21 feet in width with one lane for eastbound and one for westbound traffic. The underpass is in the shape of a modified "S". The incline on the west end is on a 4% grade and on the east a 2% grade.

Both trains of vehicles were in their right lanes traveling easterly, respondents' train behind that of appellant's.

Appellant's train consisted of a two-axle Sterling Diesel tractor pulling two vans, each 22 feet long, both loaded with about 15 tons of mixed freight. The front van was hitched to and rested on the bed of the tractor. The rear van had one axle, and its front end rested on a dolly (which took the place of the front axle and wheels) to which it was attached by a king pin. On the front of the dolly was a two-pronged tongue or drawbar of cast steel, about 36 inches in length, in the general shape of the letter "A", the base of which was a part of the dolly itself and the apex of which was attached to the rear end of the front van by a pin-and-eye connection locked by a heavy spring. A safety chain from 7 to 7½ feet long, attached to the dolly, passed through loops on the prongs or legs of the drawbar, then through a clevis on the rear of the forward van and then doubled back, its end being hooked onto itself at some point along the drawbar. The purpose served by the chain was "to hold the vehicle being towed in the event the drawbar or other regular connection should break or become disconnected" as required by sec. 701 of the Vehicle Code. There was about one foot of slack in the chain so in case the drawbar was broken and the rear van was held only by the chain, it would be trailing about 4 feet behind the front van. Air brake hoses extending from the tractor to the rear van had attached to them appliances known as "glad-hands" and if anything broke them or knocked them off, the brakes on the rear van would automatically lock.

Respondents' train consisted of a Diamond T. tractor and semi-trailer about 35 feet long, weighing about 15 tons, and it carried a cargo of metal barrels containing oil weighing nearly 14 tons.

While traveling in the tunnel the front end of the tractor driven by respondent Burch crashed into the back of appellant's rear van with tremendous force, the impact causing serious injuries to respondent Burch, and pinning him in his cab. No question is raised as to the extent or seriousness of his injuries. It also seriously damaged the Baker trailer.

Mossman testified that as he drove through the tunnel about midway therein a small dog which had been running along the curbing suddenly ran across his path, and to avoid hitting the dog he applied his brakes; that shortly thereafter he felt two bumps, one immediately following the other. He brought his truck to a stop, got out and ran back, finding his rear van at a standstill. The front end of respondents' tractor was two or three feet behind the detached van, both of them in the eastbound lane. The base part of the broken drawbar was hanging attached to the rear van and its apex part was hanging attached to the front van. The fracture was somewhat irregular and both severed parts of the drawbar were twisted and bent.

It was and is the theory of appellant as stated in its brief "that the collision occurred while the truck and trailer of defendant were connected by the steel drawbar, safety chain and air brake hoses, and just shortly after it had slowed down to avoid hitting a dog in the underpass. If the drawbar was broken by a rear end collision, it could only be broken by a compression force."

The respondents' theory as stated in their brief, "was, and is, that the trailer operated by Mossman, driver for defendant, was unhitched and standing still when struck by the truck operated by Burch, and that Mossman knew, or in the exercise of reasonable care and intelligence could or should have known, that the drawbar connecting his truck and trailer was broken before the collision occurred, and sufficiently in advance of the collision to have enabled him to avoid the accident had he used reasonable care."

Respondent Burch testified that because of the comparative darkness of the tunnel he could not and did not see the van ahead of him until too late. He testified that he first saw it when about 50 feet behind it, at which time he thought it was moving, but on getting closer (about 30 feet away) he saw it was stopped, and pushed his brake pedal down to the floor. Respondents' theory of course presupposes that both drawbar and chain had completely severed *before* the collision. Their basis for this contention is that Mossman had swerved to miss the dog at a point near the west entrance to the underpass and much farther westerly than Mossman placed the dog, and that in so swerving, the rear van had been jerked or whipped in such fashion as to break the drawbar and chain and break the "glad-hand" on the air hose, thereby automatically locking its brakes.

The foregoing statement fairly shows the conflicting theories on which the case was tried. There are of course many other facts in the case (including respondent Burch's testimony, denied by Mossman, that after the collision Mossman admitted that his rear van had become unhitched and was stalled before Burch hit it; also testimony of two witnesses driving in the opposite direction that the rear van was swaying badly when they passed it), but the facts stated are sufficient for an understanding of the principal question on this appeal. That question arises out of the court's refusal to admit certain opinion evidence.

Appellant's witness, Paul DeGarmo, is an associate professor of mechanical engineering on the faculty of the University of California, and his department is that of metallurgy. He testified to having had extensive experience in examining and testing metals, including their strength and behavior under complicated load conditions. The fractured drawbar was before the jury in two pieces, both distorted from normal shape. The purpose of the appellant clearly appears from its tender of proof which follows presently. After qualifying the witness and eliciting the answer from him that he had examined the drawbar and that it had no defects of any significance he was asked:

"Q. And did you also examine it for the purpose of determining what, in your opinion, caused it to break in that manner in which it is broken? A. I did; that was one of the primary purposes of the examination.

"Q. Now, in your experience I will ask you, Professor, whether or not you have conducted tests and whether or not you have examined metals in the past to determine the cause of any fracture that there may be in that metal? A. Yes, I have done so many times.

"Q. And after examining this drawbar, Professor, are you able to state to this court and jury what type of force it was that was necessary to cause this drawbar to be broken in the manner in which you see it. A. I can.

"Q. Will you kindly explain to the jury, please, Professor, the type of force necessary to break this drawbar?"

To this respondents objected that such opinion would be an invasion of the province of the jury. After hearing argument in chambers the judge stated that he believed there were "sufficient facts in the record now from which the jury may draw deductions, make conclusions and draw inferences, without the aid of an expert". The appellants then made an offer of proof to the effect that the witness had made an inspection of this drawbar and the manner in which drawbars are connected up between trucks and trailers and that he could give an opinion concerning the type of force necessary to break the drawbar in the manner in which it was broken; that it was "a compression force and that was such a force as would be created by the striking of the trailer by another truck in the rear." Further: "We will also prove through this witness that under no circumstances, by reason of the condition of this drawbar as it is today, * * * could that drawbar have been broken by the swaying of these vehicles. * * * Which would entirely negative the theory of the plaintiffs. In other words, he will testify that it could have been caused solely through a compression force and that it couldn't have been caused under any circumstances by the swaying of the vehicle on the highway, and we feel that is a matter that the jurors have no knowledge concerning."

There is no question raised as to the witness' qualifications, for before he left the stand appellant's counsel inquired if any point would be made in that behalf to which respondents' counsel answered in the negative saying that the only objection was that it was "within the province of this jury to determine what happened without having some thirteenth juror to come in and testify to what happened."

[1] The general rule is "that witnesses must testify to facts, and not to opinions, and that, whenever the question to be determined is the result of the common experience of all men of ordinary education, or is to be inferred from particular facts, the inference is to be drawn by the jury, and not by the witness." Sappenfield v. Main St., etc., R. R. Co., 91 Cal. 48, 59, 27 P. 590, 592.

The question presented for decision is whether the proffered testimony was within that rule or whether it was within the purview of section 1870, subd. 9, Code Civ. Proc., which provides that the opinion of a witness is admissible "on a question of science, art, or trade, when he is skilled therein", because it deals with "matters not presumably within the common knowledge of men" (Callan v. Bull, 113 Cal. 593, 607, 45 P. 1017, 1022), and "was proper and necessary to an enlightened consideration and a correct disposition of the ultimate issue". Fonts v. Southern Pacific Co., 30 Cal.App. 633, 641, 159 P. 215, 218.

[2] In the first place, it must be borne in mind that it has to be assumed for the purposes of this appeal that had the witness been permitted to testify, his testimony would have been as indicated by the tender. O'Conor v. Morse (Braly), 112 Cal. 31, 37, 44 P. 305, 53 Am.St.Rep. 155; 5 C.J.S., Appeal and Error, § 1556, p. 331.

"Expert testimony has been uniformly sanctioned as proper, if not, indeed, wellnigh indispensable in many instances, particularly in jury trials, to the crystallization of intelligent and just results. Under the common law the admissibility of the opinion of experts upon matters within the field of their knowledge was well established. * * *" 10 Cal.Jur. 957.

[3] It might be added that section 1870, subd. 9, is but a legislative enactment of the common-law rule. In re Estate of Toomes', 54 Cal. 509, 513, 35 Am.Rep. 83.

[4] The testimony of an expert is admissible "because a man's professional pursuit, his peculiar skill and knowledge in some department of science, not common to men in general, enable him to draw an inference, where men of common experience, after all the facts proved, would be left in doubt." 10 Cal.Jur. 958.

[5] The testimony sought from this admittedly qualified witness had to do with a mechanical appliance made of cast steel. The witness was a metallurgist who had examined it in a laboratory and who was prepared to state his findings and opinion based on that examination, and on the condition and appearance of the drawbar, as to how it had been fractured. The general rule with respect to such matters is stated at 32 C.J.S., Evidence, § 530, pp. 229, 230, as follows: "An engineer or a person having engineering skill derived from practical experience may state an inference or judgment as to matters within the range of such knowledge or experience, as, for example, * * * the manner in which certain devices or appliances operate; the cause of certain occurrences, such as the breaking of a structure or device, * * * or the effect or result of other phenomena; * * *".

There are numerous cases in this state holding that expert evidence should be admitted on such questions, among them the following: Callan v. Bull, 113 Cal. 593, 45 P. 1017 (involving the improper construction of trestle work); Chico Bridge Co. v. Sacramento Transportation Co., 123 Cal. 178, 55 P. 780 (collision of a barge with bridge pier); Silveira v. Iversen, 128 Cal. 187, 60 P. 687 (soundness of rope); McFaul v. Madera, etc., Co., 134 Cal. 313, 66 P. 308 (relative strength of wrought and cast iron); Snyder v. Holt Mfg. Co., 134 Cal. 324, 66 P. 311 (insufficiency of a bolt and nut connection on a harvester); Dyas v. Southern Pacific Co., 140 Cal. 296, 73 P. 972 (cause of fracture of a pivot on a derrick and insufficiency of counter-balance thereon); Berkovitz v. American River, etc., Co., 191 Cal. 195, 215 P. 675 (distance within which an automobile could be stopped traveling at a given speed, and whether certain damage to a truck could have been caused by an automobile traveling at a given speed); Bowen v. Sierra Lumber Co., 3 Cal.App. 312, 84 P. 1010 (bolts and mortises in bridge structure versus nails); McLain v. Dahlstrom, etc., Co., 19 Cal.App. 475, 126 P. 391 (insecure tying of a knot in elevator apparatus); Fonts v. Southern Pacific Co., 30 Cal.App. 633, 159 P. 215 (proper method of unloading a steel shaft from freight car); Lemley v. Doak Gas Engine Co., 40 Cal.App. 146, 180 P. 671 (cause of fracture of fly-wheel); Vedder v. Bireley, 92 Cal.App. 52, 267 P. 724 (inadequacy of automobile brakes); Young v. Bates Valve Bag Corp., 52 Cal.App.2d 86, 125 P.2d 840 (necessity for protection around electrical apparatus); Wallace v. Speier, 60 Cal.App.2d 387, 140 P.2d 900 (necessity for inspection of plumbing fixtures, and the frequency thereof).

The opinion in Fonts v. Southern Pacific Co., supra, contains a lengthy discussion of the rule and cites many cases from this and other states. In Wallace v. Speier, supra [60 Cal.App.2d 387, 140 P.2d 904], the court in speaking of subd. 9, section 1870, said: "To attach to that section limitations of the nature proposed by the defendants would be to unduly restrict the province of the opinion evidence, for if that section is to have any degree of efficacy, then of necessity it must be viewed in the light of liberality. It might be said with little fear of contradiction, that rarely, if ever, does an expression of opinion by a so-called expert not amount to that which either the court or jury might adopt as a basis for the ultimate decision in the case. However, that does not mean that the witness is deciding the case or that in so testifying he is usurping the functions of the jury. He is merely giving an opinion based upon his technical training which the court may or may not accept as testimony that 'was proper and necessary to an enlightened consideration and a correct disposition of the ultimate issue.' Fonts v. Southern Pacific Co., 30 Cal.App. 633, at page 641, 159 P. 215."

In Lemley v. Doak Gas Engine Co., supra, there is a lengthy discussion of the rule and (quoting from 1 Greenleaf on Evidence, 16th Ed., 551) the court holds that *if the witness can add instruction over and above what the jury are able to obtain from the data before them* the opinion should be received. Respondents concede that that case is authority in appellant's favor but they level a criticism against it which we do not consider valid. They point out that the witness who gave his opinion as to what caused the fly-wheel to break was "almost an eyewitness" who had been working at the scene all day. That is true, but still there is no escape from the fact that the part of his testimony which expressed his judgment as to the cause, was opinion evidence pure and simple. What he had observed that day might have helped to qualify him to give his opinion, but the fact that he could and did give eyewitness testimony as to facts and occurrences did not make him any the less an expert witness on the fly-wheel question. As we read Inyo Chemical Co. v. City of Los Angeles, 5 Cal.2d 525, 539, 55 P.2d 850, it recognizes Lemley v. Doak Gas Engine Co. as authority on the admissibility of expert evidence *generally*, for there was no hypothetical question involved in the Lemley case.

Lemley v. Doak Gas Engine Co. holds that expert testimony is not to be rejected simply because it goes to the ultimate issue in the case. In the case at bar the ultimate question which the jury had to answer (contributory negligence having been pleaded) was, *Whose negligence caused this collision or contributed thereto?* In seeking such answer the subsidiary and secondary inquiry was relevant and proper, i. e., *Whether the drawbar was broken by a side-to-side jerking, swaying or whipping motion on the one hand, or by a blow from the rear on the other,* provided the answer to this second question might aid in answering the first. We think it would have so aided.

The rejected testimony would not have been subject to the criticism that it coincided with the ultimate issue, for conceivably the jury might be convinced that the drawbar was fractured by a blow from the rear, and still conclude that appellant was guilty of negligence. The appellant concedes this. It is not necessary, therefore, to discuss Sim v. Weeks, 7 Cal.App.2d 28, 45 P.2d 350, or People v. Wilson, 25 Cal.2d 341, 153 P.2d 720, although it might be remarked that the latter case says there is no hard and fast rule on the subject.

Respondents also concede that Berkovitz v. American River Gravel Co., 191 Cal. 195, 215 P. 675, supra, is authority in appellant's favor, but they characterize the court's holding as "cryptic". The court there definitely held that it was error to shut out the expert evidence, and the basis for the holding seems to be that an opinion may be given based on reasoning from effect to cause. The piece of physical evidence there involved was the back of a truck and its rear axle. In further criticism respondents say that later cases are to the contrary, citing Fishman v. Silva, 116 Cal.App. 1, 2 P.2d 473, infra, and Johnston v. Peairs, 117 Cal.App. 208, 3 P.2d 617, infra, neither of which touches the point of the Berkovitz case for reasons given later on. Moreover, they are decisions which could not shake the authority of the higher court even if they were in point. The distinction between the Berkovitz case and cases like the two last cited is pointed out in Lawrence v. Butler, 79 Cal.App. 436, 249 P. 840, infra. The Berkovitz case has never been overruled.

The authorities hold that an expert medical witness may give his opinion as to the means used to inflict a particular injury, his reasoning being from effect to cause, the deduction being based on the condition and appearance of the wound itself. People v. Sampo, 17 Cal.App. 135, 118 P. 957; Dow v. City of Oroville, 22 Cal.App. 215, 134 P. 197; Perkins v. Sunset Telephone & Telegraph Co., 155 Cal. 712, 103 P. 190. In the Berkovitz case [191 Cal. 195, 215 P. 678] it was held that the court erroneously sustained an objection to expert testimony as to whether the damage to the truck as shown by the evidence in that case "could have been caused by the Dodge car traveling at a speed of 20 miles an hour". In so holding the court apparently drew an analogy from the three cases just named involving medical testimony, which cases it cites.

It is difficult to find any distinction between the testimony of a surgeon with an X-ray picture before him, pointing out to a jury a fracture and explaining the direction from which the force came which caused it, and the proffered evidence in this case, where the drawbar itself was before the jury and the witness was prepared to explain (so the tender showed) the kind of force or blow by which it was fractured, and to testify, also, as to what his laboratory examination of the drawbar disclosed and the conclusions he drew from such examination. Hence we cannot follow counsel's argument that "The drawbar was in court and the jury could look at it and inspect it, as well as could the so-called experts" and that "neither DeGarmo nor Larson did anything but look at the broken drawbar. This the jury could do and did. Hence both DeGarmo and Larson in effect were simply called as additional jurors". The point need not be labored that a doctor, engineer, or other skilled witness looks at a piece of evidence with trained and discerning eyes and can readily discover therein significant factors about which a lay juror would have no knowledge whatever.

In Callan v. Bull, 113 Cal. 593, at pages 606, 607, 45 P. 1017 at page 1021, supra, a case having to do with the construction of a trestle, the court said: "The matters sought to be shown by these witnesses—the weight of timber, the amount of strain to which a given piece of timber can be subjected before breaking, the difference of resistance to such strain between a cylindrical and a square piece of timber and between different kinds of timber, the amount of weight that would be concentrated at the different points of the stringers at which the cables suspending the mat were attached—were matters not presumably within the common knowledge of men, and were eminently proper to be shown by those who had made these subjects a matter of special study. Prendible v. [Connecticut River] Mfg. Co., 160 Mass. 131, 35 N.E. 675." Paraphrased and transposed to a steel casting instead of a timber structure, we think that statement might well be applied to the instant case.

Respondents rely on a number of California cases which they contend support the court's ruling. Fishman v. Silva, 116 Cal.App. 1, 2 P.2d 473, 476, supra, one of them, involved a collision between two automobiles on a wet highway. The appellant there tendered as an expert witness an experienced garage man and mechanic who had cleared away many wrecks, and whose opinion was sought "concerning the probable course the respective cars would take after the impact." The court said that "Experience has shown the futility of attempted demonstration in accident cases; there are too many varying factors. Among these variants we may class indefinite rate of speed, condition of the highway, judgment or lack thereof in the drivers, a direct blow or a glancing one, and the balance or equilibrium of each car at the time of impact." Later it remarked that no expert "can even venture an opinion as to what two different people might do in the management of a car in an emergency". These statements clearly show the reason why the tendered testimony was held improper.

That case is typical of a group of similar cases cited by respondents where there was an unsuccessful attempt to reconstruct what had happened, by persons who were not eye-witnesses and with nothing on which to base their opinions but the position of the cars after they had come to rest. This group consists of Johnston v. Peairs, 117 Cal.App. 208, 3 P.2d 617, supra; Rudat v. Carithers, 137 Cal.App. 92, 30 P.2d 435; Linde v. Emmick, 16 Cal.App.2d 676, 61 P.2d 338, and Moore v. Norwood, 41 Cal. App.2d 359, 106 P.2d 939, all of which follow Fishman v. Silva, and in several of which hypothetical questions were held improper for the additional reason that they omitted important elements. Moniz v. Bettencourt, 24 Cal.App.2d 718, 76 P.2d 535, is of the same type and applies the same rule without, however, citing Fishman v. Silva. With respect to opinions drawn merely from such "reconstruction", Holt v. Yellow Cab Co., 124 Cal.App. 385, 388, 12 P.2d 472, 474, says: "Too many factors enter into an automobile collision to give certainty to any such a conclusion". This concisely states the rationale of these decisions, and it is obvious that none of them has any application to the present problem.

Lawrence v. Butler, 79 Cal.App. 436, 249 P. 840, 842, supra, simply holds that certain objections to hypothetical questions were properly sustained because they omitted important elements. What the court superadds, by way of a dictum to the effect that the matter sought to be developed was problematical and not determinable "from like experiences or as a result of professional research, which is substantially the basis of expert testimony" places the case squarely within the category just discussed. The opinion distinguishes Lawrence v. Butler from the Berkovitz case, as already indicated, without questioning its authority.

Kroll v. Rasin, 96 Cal.App. 84, 273 P. 820, 821, is another case where an automobile repair man was asked for an opinion as to what had happened, based on the appearance of a radiator "whether or not any blow of great violence had been struck it". In holding the question improper the court said that the damage to the car was not confined to the radiator, and the damage which might be anticipated from the car striking two people was for the jury.

In Hughes v. Warman Steel Casting Co., 174 Cal. 556, 163 P. 885, the plaintiff had lost the sight of one eye by a flying nail from the casting on which he was working with a chisel and hammer. The defense, in attempting to prove contributory negligence by showing that he was standing in the wrong position at the casting, asked an expert witness whether it was "possible" or a "physical impossibility" for a flying nail to hit him if he was standing at the side instead of in front of the casting. The court held that it was not a matter of expert evidence whether it was "possible" for the plaintiff to be struck, such not being a question of science, art, or trade. When this objectionable question as to *possibility* is compared with the question held objectionable in Fishman v. Silva "concerning the *probable* course the respective cars would take after the impact" (emphasis ours) the reason for the exclusion would seem to be the same as that underlying the group of cases just discussed, particularly as there was eye-witness testimony that Hughes [174 Cal. 556, 163 P. 887] was standing at the side (as he had been instructed to do) and even then the nails "would fly in all directions—sometimes 20 feet—'just go wild,' * * * striking the windows and doors and walls of the working room".

Davis v. Connecticut Fire Ins. Co., 158 Cal. 766, 112 P. 549, 552, 32 L.R.A.,N.S., 604, simply holds that opinion evidence was inadmissible as to whether a building fell as the result of earthquake or of the fire which followed it. The discussion is very brief, the court saying that "the entire evidence showed conclusively that the earthquake caused the fall, and there was not even an attempt to show the contrary. The refusal to allow the question was therefore not injurious to the defendant."

In Hunton v. California Portland Cement Co., 50 Cal.App.2d 684, 696, 123 P.2d 947, the question ruled out was whether the shoulder of a highway could safely carry defendant's truck. The court held the ruling proper because this was observable by anyone and was a matter of common knowledge.

Hastings v. Serleto, 61 Cal.App.2d 672, 143 P.2d 956, holds that a person of ordinary intelligence, having opportunity for observation, is competent to testify as to the speed of an automobile.

Sappenfield v. Main St., etc., R. R. Co., supra, holds that the jury could judge with respect to the insecurity of a pin on a horse-drawn street car—a simple contrivance—just as well as an expert could.

[6] Hugo J. Larson, a witness for appellant, was the superintendent of the manufacturing department of Fruehauf Trailer Company (which had built the appellant's vehicles) and who had had 25 years' experience with tractors and trailers. He was asked for his opinion as to what caused this drawbar to break, based on his experience. The court sustained an objection, expressing the view that the question called for his conjecture or guess. A tender was made substantially the same as that heretofore discussed, and it was rejected. If this witness was held to be qualified—a matter within the discretion of the trial judge—then his testimony was just as admissible as that of Professor DeGarmo. There was not, however, the same admission respecting his qualifications as in the case of the other witness, and we therefore refrain from passing upon his qualifications.

[7] We are satisfied that the court erred in refusing the instruction tendered by appellant, which was based on a part of section 511 of the Vehicle Code.

The appellant tendered, but the court refused to give, the following instruction:

"You are instructed that the Vehicle Code of the State of California in full force and effect at the time of the accident in question, provided as follows:

"'511. Prima Facie Speed Limits.

"'(Speed not in excess of limits lawful unless clearly violative of basic rule.) The speed of any vehicle upon a highway not in excess of the limits specified in this section or established as authorized in this code is lawful unless clearly proved to be in violation of the basic rule declared in Section 510 hereof. * * *

"'(Prima facie limits: Applicability: Signs noticing changed limits.) The prima face limits referred to above are as follows and the same shall be applicable unless changed as authorized in this code and, if so changed, then only when signs have been erected giving notice thereof, in which event the speed designated on the sign shall be the prima facie limit:

"'(a) Fifteen miles per hour: * * *

"'(3) When approaching or upon a curve or any other part of a highway in the event the driver's view is obstructed within a distance of 100 feet along the highway in the direction in which such driver is proceeding.'"

It is argued that such refusal was erroneous because it left the jury without any knowledge of the prima facie speed limit. This seems to be so, and the failure to give it is accentuated by the fact that the jury was instructed on section 513 (which section and which instruction *make reference to 511)* as follows: "Section 513. Exceeding prima facie limit not negligence as matter of law. In any civil action proof of speed *in excess of any prima facie limit* *declared in section 511 hereof* at a particular time and place shall not establish negligence as a matter of law but in all such actions it shall be necessary to establish as a fact that the operation of a vehicle at such excess speed constituted negligence." (Emphasis added.)

They were also instructed on 510 as follows: "Section 510. Basic Speed Law. No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property." But this gave the jury only a generalization, while section 511 would have given them a definite and specific (albeit prima facie) speed limit.

The failure to instruct on 511, the appellant points out, was particularly damaging because the zone on either side of the underpass was a 55 mile zone.

[8] The appellant contends that there is no evidence in the record to sustain the implied finding of the jury that it was negligent in the operation of its truck and trailer. There is evidence in the record wholly apart from the admission which Mossman is claimed to have made, from which inferences of appellant's negligence could have been drawn.

We are satisfied also that the motion for nonsuit was properly denied. 9 Cal.Jur. 551–553, Sec. 35.

This case has been ably and thoroughly briefed on both sides and in addition to the California cases herein discussed, numerous out-of-state authorities have been cited. The respondents rely on Westberg v. Willde, 14 Cal.2d 360, 94 P.2d 590; Anderson v. Mothershead, 19 Cal.App.2d 97, 64 P.2d 995 and Akers v. Cowan, 26 Cal.App. 2d 694, 80 P.2d 143, and claim that section 511 should be given only in criminal cases. In Westberg v. Willde, 14 Cal.2d 360, 94 P.2d 590, where the trial court had given an instruction on section 511 *verbatim and in its entirety,* the court quoted from Akers v. Cowan, as follows [14 Cal.2d 360, 94 P.2d 595]:

"In Akers v. Cowan, supra, the district court of appeal reversed the judgment for plaintiff for instructions similar to those given in the instant case. There, as in the instant case, the court read both sections 511 and 513 to the jury. The court held that the effect of reading both provisions to the jury was to give conflicting instructions. The court said * * *:

"'In connection with the prima facie speed limits thus given to the jury *the above instruction included the second paragraph of Section 511 of the Vehicle Code, which sets forth the rule applicable in criminal actions* where a defendant is charged with traveling on a highway at a rate of speed higher than the prima facie limits set forth in that section. In such a case the burden is placed upon the defendant of proving that any speed in excess of these limits did not constitute a violation of the basic rule set forth in section 510. A contrary rule prevails in civil actions, which rule is set forth in section 513 of this code. The question of speed was here material and important and the giving to the jury of this wrong instruction with reference to the burden of proof in connection with that issue was plainly erroneous. Anderson v. Mothershead, 19 Cal.App.2d 97, 64 P.2d 995.'" (Emphasis added.) The part of the quotation to which we have given emphasis clearly explains that it is *the second paragraph only* of section 511 which is banned in civil cases. In the case at bar the second paragraph was not tendered.

No authority cited herein goes any further than that. In Westberg v. Willde the section was given *in its entirety.*

There was testimony in this case (that of Freitas and Toscano) that Burch was driving at a speed of 25 to 30 miles per hour through the tunnel just before the crash (in fairness it should be added that they testified Mossman was doing the same). Respondent Burch himself admitted that his speed was "20 or 25 miles an hour" just before the van loomed up ahead of him, which distance he put at about 50 feet. The underpass was curved in shape. Thus there was evidence upon which such an instruction could have been supported as conforming to the appellant's theory of the case, for contributory negligence was in issue.

We find it unnecessary to discuss the cases from other jurisdictions.

[9] We are satisfied that there was prejudicial error in the rejection of the tendered evidence of the witness DeGarmo and in the refusal of the tendered instruction.

The judgment is reversed.

NOURSE, P. J., and DOOLING, J., concur.

Hearing denied; CARTER, J., dissenting.

WARNER BROS. PICTURES, Inc. v. BRODEL et al.*

Civ. 15685.

District Court of Appeal, Second District, Division 2, California.

March 25, 1947.

Rehearing Denied April 9, 1947.

Hearing Granted May 22, 1947.

1. Statutes 🔑82

The statutes prohibiting minors from disaffirming contracts for dramatic services approved by court is not within prohibition of local or special laws affecting "estates" of deceased persons, minors, or persons under legal disabilities. Civ.Code, § 36; Const. art. 4, § 25, subd. 12.

See Words and Phrases, Permanent Edition, for all other definitions of "Estate".

2. Statutes 🔑82

The prohibition of local and special laws affecting estates of deceased persons, minors and persons under legal disabilities was adopted to preclude passage of special laws empowering parent or guardian or specifically designated minor to dispose of minor's property, and to prevent singling out any one minor's property or estate for special attention of legislature. Const. art. 4, § 25, subd. 12.

3. Statutes 🔑78

The constitutional prohibition of local or special laws declaring any person of age or authorizing minor to sell, lease or incumber property was adopted to inhibit legislation applying to one individual. Const. art. 4, § 25, subd. 17.

4. Statutes 🔑78

The statute prohibiting minors from disaffirming contracts for dramatic services approved by court is not within prohibition of local or special laws declaring person of age or authorizing minor to sell, lease or incumber property. Civ.Code, § 36; Const. art. 4, § 25, subd. 17.

5. Statutes 🔑76(1)

Whether a law is "special" or "general" within constitutional provision that a special law shall not be passed where a general law can be made applicable depends upon whether it makes an arbitrary or discriminatory classification. Const. art. 4, § 25, subd. 33.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Law".

6. Constitutional law 🔑48
Statutes 🔑76(1)

Under prohibition of local or special law where general law can be made applicable, there is no absolute, inflexible rule for determining validity but courts must decide question in each case as it arises, with presumption at the outset in favor of constitutional exercise of legislative power. Const. art. 4, § 25, subd. 33.

7. Statutes 🔑76(1)

A statute does not violate prohibition of "local or special law" where general law may be made applicable if it operates uniformly upon all persons standing in same relation to the law in respect of privileges and immunities conferred by it or of acts which it prohibits. Const. art. 4, § 25, subd. 33.

See Words and Phrases, Permanent Edition, for all other definitions of "Local or Special Law".

8. Statutes 🔑76(1)

A law applicable to only one class of citizens is not within prohibition of local or special law where general law is applicable, if based upon intrinsic differences requiring different legislation. Const. art. 4, § 25, subd. 33.

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* Subsequent opinion 192 P.2d 949.

9. Statutes 🔑76(1)

The prohibition of local or special law where general law may be made applicable does not prohibit legislation for different classes of citizens, and if individuals to whom law is applicable constitute a class which requires legislation peculiar to itself in the matter covered by the law, the statute is nonetheless "general". Const. art. 4, § 25, subd. 33.

See Words and Phrases, Permanent Edition, for all other definitions of "General Law".

10. Statutes 🔑76(1)

Under prohibition of local or special law where general law may be made applicable, the class must not only be germane to purpose of law but must also be characterized by substantial qualities rendering such legislation necessary or appropriate for individual members of the class, and founded upon some natural, intrinsic or constitutional distinction. Const. art. 4, § 25, subd. 33.

11. Statutes 🔑76(1)

Under prohibition of local or special law where general law may be made applicable, classification must not be arbitrary for mere purpose of classification but must be founded upon some natural, intrinsic or constitutional distinction that will suggest a reason that might rationally be held to justify diversity. Const. art. 4, § 25, subd. 33.

12. Constitutional law 🔑48, 70(1)

An act of legislature is presumed constitutional and when this depends upon existence of some state of facts, determination thereof is primarily for legislature and courts will acquiesce in its decision unless error clearly appears.

13. Constitutional law 🔑48

Unless decision of legislature is manifestly unreasonable, there is no ground for official interference and constitutionality of act should be affirmed where there is reasonable doubt.

14. Statutes 🔑76(1)

Under prohibition of local or special law where general law may be made applicable, facts warranting the classification and reasons actuating the legislature in creating a class need not appear on face of statute, but if necessary facts are before court in any manner and such facts will sustain the law, court should uphold it. Const. art. 4, § 25, subd. 33.

15. Infants 🔑4

The doctrine of "parens patriæ" is inherent power and authority of state to protect person and property of a person non sui juris.

See Words and Phrases, Permanent Edition, for all other definitions of "Parens Patriæ".

16. Infants 🔑4

The legislature has inherent power to protect persons non sui juris and to make and enforce such rules and regulations as it deems proper for management of their property. Civ.Code, §§ 35–37, 56; Pen. Code, § 261.

17. Infants 🔑4

The age at which an infant shall be competent to do any act or perform any duty depends wholly upon the legislature. Civ.Code, §§ 35–37, 56.

18. Infants 🔑4

The period of majority is within legislative discretion and legislature may prescribe a longer period for some purposes than for others. Civ.Code, §§ 35–37, 56; Pen.Code, § 261.

19. Constitutional law 🔑70(3)
Infants 🔑4

The legislature may provide regulations for protection of children of immature years and cannot interfere with its judgment as to proper age at which such regulations shall become applicable. Civ. Code, §§ 35–37; Pen.Code, § 261.

20. Infants 🔑4, 46

Legislature may endow minor with right to make contracts otherwise lawful, and when so endowed he becomes, for purpose of the act, an "adult" or at least on the same plane. Civ.Code, §§ 35–37, 56.

See Words and Phrases, Permanent Edition, for all other definitions of "Adult".

21. Property 🔑2

An infant's disability to enter into a binding contract is not a "property right". Civ.Code, §§ 35–37, 56.

See Words and Phrases, Permanent Edition, for all other definitions of "Property Right".

22. Constitutional law 🔑92

An infant has no "vested right" in common law disability against making contracts that would preclude legislature from removing such disability as to future contracts. Civ.Code, §§ 35–37, 56.

See Words and Phrases, Permanent Edition, for all other definitions of "Vested Right".

23. Infants 🔑4

The legislature may change age at which minor may exercise legal rights upon which he shall become obligated, and may deny his right to disaffirm contracts. Civ.Code, §§ 35–37, 56.

24. Evidence 🔑15
Statutes 🔑212

It is common knowledge, of which legislature is presumed to have taken notice in enacting statute regarding disaffirmance of contracts for dramatic services, that of the large number of persons under 21 in stage, screen and radio performances, a great majority are girls and young women. Civ.Code, § 36.

25. Infants 🔑58(1)

In construing statute governing disaffirmance of contracts for dramatic services, it could be assumed that legislature, which at the same sesssion raised age of majority for females to 21, intended that females up to age of 21 should have same protection of court's scrutiny and approval of their contracts as was accorded to males. Civ.Code, § 36; Civ.Code, § 25, as amended by St.1927, p. 1119.

26. Constitutional law 🔑238(2)
Infants 🔑4, 58(1)
Statutes 🔑76(1)

The statute prohibiting disaffirmance of contracts for dramatic services approved by court does not apply only to contracts for services in motion pictures, and hence does not violate Fourteenth Amendment or prohibition of local or special law enacted where general law might be applicable. Civ.Code, § 36; Const. art. 4, § 25, subds. 12, 17, 33; U.S.C.A.Const.Amend. 14.

27. Evidence 🔑15

It is common knowledge that a large percentage of minors employed in dramatic and motion picture work are undeveloped "raw material" whose talents are unknown at time of employment.

28. Evidence 🔑20(1)

It is common knowledge that vast sums are expended in preparation of a single stage production or motion picture.

29. Constitutional law 🔑42

Infants engaged in dramatic services, being the persons favored by statute prohibiting disaffirmance of contracts for dramatic services approved by court, cannot complain of its unconstitutionality.

30. Constitutional law 🔑42

Employers, not being obliged to contract with minors, are not concerned with validity of statute prohibiting disaffirmance of contracts for dramatic services approved by court, and cannot question its constitutionality. Civ.Code, § 36; Const. art. 4, § 25, subds. 12, 17, 33; U.S.C.A. Const.Amend. 14.

31. Contracts 🔑172

An "option" is a contract whereby one party agrees to keep an offer open for a stated time upon specified terms and conditions, and may become a contract binding upon both parties, depending upon whether optionee exercises his right.

See Words and Phrases, Permanent Edition, for all other definitions of "Option".

32. Specific performance 🔑57

An option is not specifically enforceable by either party until accepted by optionee.

33. Sales 🔑3

An "option" is not a contract of sale or agreement to sell, but a mere right of election acquired by one under a contract to accept or reject a present offer within the time therein fixed.

34. Sales 🔑24

Optionee acquires no actual interest in property covered by option to purchase until he has seasonably exercised his option by accepting the offer according to its terms.

35. Sales 🔑3

Where offer made by granting option is accepted within time stipulated, the transaction ceases to be an "option" and becomes a "sale" or "contract of sale" according to circumstances of the acceptance.

See Words and Phrases, Permanent Edition, for all other definitions of "Contract of Sale" and "Sale".

36. Sales 🔑3

An "option to buy" is not synonymous with an "agreement to buy," in that optionee complying with the option acquires rights that he may enforce, but if he elects not to comply there is no specifically enforceable agreement and optionor cannot compel compliance.

See Words and Phrases, Permanent Edition, for all other definitions of "Agreement to Buy" and "Option to Buy".

37. Sales 🔑3

An "option" is an unaccepted offer to sell continuing until expiration of the time limited for its acceptance, which by reason of lack of agreement between minds of parties does not become a "contract of sale" until accepted.

38. Contracts 🔑172
Sales 🔑24

An "option" is a contract by which one binds himself to sell property or perform services and leaves it discretionary with the other to take the property or accept the services on terms specified.

39. Master and servant 🔑9

Employment contracts may give employer right to extend the term annually or for a term of lesser or greater length.

40. Infants 🔑58(1)

Where contract employed minor as motion picture actress for year and gave employer options to renew the contract from year to year five times, there was no "contract to perform or render services" after end of first year for court to approve when contract was first signed, and hence order approving the original contract did not affect subsequent employment, as to which the minor could disaffirm. Civ. Code, § 36.

See Words and Phrases, Permanent Edition, for all other definitions of "Contract to Perform or Render Services".

41. Infants 🔑58(1)

A minor has no natural, inherent or constitutional right to disaffirm a contract, but the right is purely statutory. Civ. Code, §§ 35–37.

42. Infants 🔑4

Legislature may determine at what age a minor may disaffirm contract, and terms upon which it may be disaffirmed and may change both the age and the terms from time to time, and prescribe conditions that will debar disaffirmation. Civ. Code, §§ 35–37, 56.

43. Infants 🔑4
Insane persons 🔑3

Under doctrine of "parens patriae" a state has sovereign power of guardianship over persons under disability, such as minors and incompetent persons. Civ. Code, §§ 35–37, 56; Pen. Code, § 261.

44. Infants 🔑4

Legislative power to control actions of minors and provide for their welfare ceases at majority. Civ. Code, §§ 35–37, 56; Pen. Code, § 261.

45. Infants 🔑4, 58(1)

The statute prohibiting disaffirmance of minors' contracts for dramatic services approved by court did not and could not prevent disaffirmation after minor reached majority. Civ. Code, § 36.

46. Courts 🔑1

If court has jurisdiction to determine a cause or question arising in judicial proceedings, it has jurisdiction to determine wrongfully as well as rightfully.

47. Judgment 🔑501

Mere error in court's decision can be corrected only by appeal and is not subject to collateral attack, if court had jurisdiction of the action.

48. Judgment ⚷349, 489

If cause is not within court's jurisdiction, order is not merely erroneous but void and is subject to attack either directly or collaterally.

49. Infants ⚷58(1)

An order approving contract employing minor as motion picture actress applied only to original term of the contract and was no impediment to disaffirmance of the contract arising by employer's exercise of its option to renew the contract from year to year. Civ. Code, § 36.

◆

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by Warner Brothers Pictures, Inc., against Joan Brodel, professionally known as Joan Leslie, and others, to enjoin performance of services by named defendant for other defendants pursuant to disaffirmance of defendant's contract with plaintiff. From a judgment for defendants, plaintiff appeals.

Affirmed.

Freston & Files, Ralph E. Lewis and Gordon L. Files, all of Los Angeles, for appellant.

Jennings & Belcher, Oscar R. Cummins and Frank Belcher, all of Los Angeles, Max Radin, of Berkeley, and Aaron J. Blackman and Robert Kingsley, both of Los Angeles, for respondents.

WILSON, Justice.

Asserting the right, after she had reached the age of 21 years, to disaffirm a contract entered into with appellant during her minority for the performance of services as a motion picture actress, respondent Joan Brodel gave notice of disaffirmance and engaged herself to perform like services for the other respondents, Nero Pictures, Inc., and Seymour Nebenzal. Appellant disputed Miss Brodel's privilege of disaffirming the contract and claiming the exclusive right to employ her thereunder brought this action to enjoin her from performing services for the other respondents or for any person or corporation other than appellant, and to enjoin said respondents from permitting her so to do. The term "respondent" when used hereinafter refers to respondent Joan Brodel unless otherwise specified.

This is a case of first impression, the effect of orders approving contracts pursuant to the second paragraph of section 36 of the Civil Code, added by amendment in 1927, not having heretofore been brought into question in a court of appellate jurisdiction. Moreover the statute has no counterpart in any other state.

General demurrers to the complaint were sustained without leave to amend. Judgment in favor of respondents followed from which this appeal was taken.

1. *The allegations in the complaint.* The complaint alleges these facts: On or about March 27, 1942, respondent Brodel entered into a contract with appellant for the performance of services as a motion picture actress. At the time of the execution of the contract she was 17 years of age. Appellant filed its petition in the superior court on April 22, 1942, asking for the approval of the contract pursuant to the provisions of section 36 of the Civil Code. Notice of the hearing was given in the manner provided by law. Respondent appeared at the hearing accompanied by her guardian, her attorney and her parents. Evidence was heard and the court made an order confirming, ratifying and approving the contract. Respondent rendered services under the contract throughout the basic period of 52 weeks to and including March 31, 1943. Appellant exercised its option to avail itself of respondent's services for the first, second and third extended periods of 52 weeks each, and she rendered her services throughout such periods pursuant to the terms of the contract. On February 13, 1946, appellant exercised its option to avail itself of respondent's services for the fourth extended period of 52 weeks, to commence in 1946. On February 20, 1946, by a notice in writing, respondent renounced and disaffirmed the contract and informed appellant that she would render no further services thereunder. The notice of disaffirmance was given less than one month after respondent reached the age of 21 years. In March, 1946, respondent Brodel entered into a contract with re-

spondents Nero Pictures, Inc., and Nebenzal whereby she agreed to render services for them as a motion picture actress. All respondents were then fully aware of the fact that respondent Brodel was bound by her contract to render services exclusively for appellant.

Upon the foregoing allegations appellant asserts the right to respondent's services and seeks an injunction restraining her from violating the contract.

2. *The provisions of the contract.* The contract is set out in the complaint. Among other things it provides: (a) Appellant employs and engages respondent to render her exclusive services "for and during the term of this agreement" and respondent accepts such employment and agrees to perform all the obligations and agreements contained in the contract and to perform solely and exclusively for and as requested by appellant. (b) The term of the contract commences March 30, 1942, and continues for a period of 52 weeks at a compensation of $600 per week, with the right to appellant to lay off respondent without pay for not exceeding 12 weeks during the term of employment. (c) The services to be rendered by respondent and the rights and privileges granted by her to appellant under the contract are deemed to be of a special, unique, extraordinary and intellectual character, giving them a peculiar value, the loss of which cannot be reasonably and equitably compensated in damages in any action at law. (d) In consideration of the terms and covenants of the agreement respondent grants to appellant the following rights or options: To extend the term of employment for an additional period of 52 weeks from and after the expiration of the period of the original employment, and five successive options each for an additional period of 52 weeks, the compensation increasing for each period. (e) Respondent warrants that she is 17 years of age, having been born January 26, 1925.

3. *History of section 36 of the Civil Code.* Prior to 1927 the section read as follows: "A minor can not disaffirm a contract, otherwise valid, to pay the reasonable value of things necessary for his support, or that of his family, entered into by him when not under the care of a parent or guardian able to provide for him or them." Amdts. to Codes 1873-74, p. 183. In 1927 the section was amended by adding a second paragraph reading as follows: "A minor can not disaffirm a contract otherwise valid to perform or render services as actor, actress, or other dramatic services where such contract has been approved by the superior court of the county where such minor resides or is employed. Such approval may be given on the petition of either party to the contract after such reasonable notice to the other party thereto as may be fixed by said court, with opportunity to such other party to appear and be heard." Stats.1927, ch. 876, p. 1917. In 1941 the section was again amended by including within the provisions of the second paragraph, relating to contracts to perform services, participants in professional sports —boxers, wrestlers and jockeys. Stats. 1941, ch. 734, p. 2251.

We are not concerned with the legality of the latter amendment since any question applicable to those engaged in professional sports will not affect the validity of that portion of the section relating to persons in the occupations covered by the amendment of 1927.

4. *The constitutionality of the 1927 amendment to section 36 of the Civil Code.* This question has been argued in the briefs and to the end that contracting parties, both producers and actors, may know their rights and liabilities each to the other it should be determined.

It is claimed that the second paragraph of section 36 is in violation of subdivisions 12, 17 and 33 of section 25 of Article IV of the Constitution of California forbidding the legislature to pass local or special laws in any of the cases enumerated therein. The three subdivisions of that section that are asserted to be transgressed will be separately discussed.

[1] (a) Subdivision 12: "Affecting estates of deceased persons, minors, or other persons under legal disabilities." In order that section 36 of the Civil Code may be declared to be in violation of this provision it must first be determined that it affects the estates of minors. Since it has no ap-

plication to the acquisition, ownership, possession or disposition of their property it can have no effect on their estates as that term is ordinarily used and understood. Such indirect effect as may possibly result by reason of the fact that an order approving a contract will detemine the income of the minor during the term of the contract and thereby limit the earnings that may become a part of the minor's estate is so remote that it cannot be considered as affecting the estate of a minor in the sense used in the constitution.

We find that in other jurisdictions special laws have been passed and sustained empowering the parent or guardian of a specifically designated minor to sell the minor's property and directing the manner of disposition of the proceeds, and special authority has been granted to guardians in cases of a certain character. See Rice v. Parkman, 16 Mass. 326; Kerr v. Kitchen, 17 Pa. 433; Carroll v. Olmsted, 16 Ohio 251; McComb v. Gilkey, 29 Miss. 146; Louisville etc. Ry. Co. v. Blythe, 69 Miss. 939, 11 So. 111, 16 L.R.A. 251, 30 Am.St.Rep. 599; Brevoort v. Grace, 53 N.Y. 245.

[2] Subdivision 12 was no doubt made a part of the Constitution for the purpose of precluding the passage of similar statutes in California and of preventing the singling out of the property or estate of any one minor for the special and individual attention of the legislature.

[3, 4] (b) Subdivision 17: "Declaring any person of age, or authorizing any minor to sell, lease, or encumber his or her property." This provision has the same purpose as subdivision 12—to inhibit legislation applying to one individual and may be dismissed from further consideration except to note that section 36 of the Civil Code does not purport to declare any person or group of persons to be of age, nor to authorize the sale or other dispostition of property.

[5-7] (c) Subdivision 33: "In all other cases where a general law can be made applicable." In respect to whether a statute infringes this provision there are certain established principles that must be taken into consideration. Whether a law is special or general depends upon whether it makes an arbitrary or discriminatory classification. There is no absolute, inflexible rule by which the boundaries of allowable deviation from uniformity may be fixed nor whereby the line may be established which, if passed, will result fatally to the statute. The courts must decide the question in each case as it arises, with the presumption at the outset in favor of the constitutional exercise of the legislative power. A statute is not in violation of the Constitution if it operates uniformly upon all persons standing in the same relation to the law in respect of privileges and immunities conferred by it or of acts which it prohibits.

[8-11] A law applicable to only one class of citizens is not subject to constitutional objection if it is based upon intrinsic differences requiring different legislation. Deyoe v. Superior Court, 140 Cal. 476, 481, 74 P. 28, 98 Am.St.Rep. 73. The Constitution does not prohibit legislation for different classes of citizens and if the individuals to whom the law is applicable constitute a class which requires legislation peculiar to itself in the matter covered by the law, the statute is nonetheless general. People v. Central Pac. R. Co., 105 Cal. 576, 584, 38 P. 905. The class must not only be germane to the purpose of the law but must also be characterized by some substantial qualities or attributes that render such legislation necessary or appropriate for individual members of the class and that are founded upon some natural or intrinsic or constitutional distinction. City of Pasadena v. Stimson, 91 Cal. 238, 251, 27 P. 604; Deyoe v. Superior Court, supra; People v. Central Pac. R. Co., supra. The classification must not be arbitrary for the mere purpose of classification but must be founded upon some natural or intrinsic or constitutional distinction that will suggest a reason that might rationally be held to justify the diversity in the legislation. City of Pasadena v. Stimson, supra; Deyoe v. Superior Court, supra.

[12-14] The presumption is that an act of the legislature is constitutional, and when this depends upon the existence or nonexistence of some fact or state of facts, the determination thereof is primarily for the legislature, and the courts will acquiesce

in its decision unless the error clearly appears. In re Spencer, 149 Cal. 396, 400, 86 P. 896, 117 Am.St.Rep. 137, 9 Ann.Cas. 1105. Unless the decision of the legislature is manifestly unreasonable there is no ground for judicial interference. In re Weber, 149 Cal. 392, 395, 86 P. 809. A statute should not be declared unconstitutional by the court unless it is clearly apparent that the act is in violation of some provision of the Constitution. Where there is reasonable doubt as to the validity of the act its constitutionality should be affirmed. Deyoe v. Superior Court, supra; Moore v. Williams, 19 Cal.App. 600, 606, 127 P. 509; Gregory v. Hecke, 73 Cal.App. 268, 281, 238 P. 787; Rainey v. Michel, 6 Cal.2d 259, 271, 57 P.2d 932, 105 A.L.R. 148. The facts warranting the classification and the reasons actuating the legislature in creating a class need not appear upon the face of the statute, but if the necessary facts are before the court in any manner and if such facts will sustain the law the court should uphold the legislation. Ex parte King, 157 Cal. 161, 164, 106 P. 578.

[15, 16] Minors as a whole have always been set apart and have been given privileges and immunities not possessed by the people as a whole. Because they are mentally undeveloped and are unable to exercise a mature judgment the state, as parens patriae, exercises control over their affairs through manifold statutes passed for their benefit. The doctrine of parens patriae is the inherent power and authority of the state to provide protection of the person and property of a person non sui juris. McIntosh v. Dill, 86 Okl. 1, 205 P. 917, 920; Louisville, N. O. & T. R. Co. v. Blythe, 69 Miss. 939, 11 So. 111, 113, 16 L.R.A. 251, 30 Am.St.Rep. 599. The legislature is possessed of inherent power to provide protection to persons non sui juris, and to make and enforce such rules and regulations as it deems proper for the management of their property. See McIntosh v. Dill, supra; Brenham v. Davidson, 51 Cal. 352; McLean County v. Humphreys, 104 Ill. 378; New York Life Ins. Co. v. Bangs, 103 U.S. 435, 26 L.Ed. 580; Cochran v. Van Surlay, 20 Wend. 365, 32 Am.Dec. 570.

[17-23] The age at which an infant shall be competent to do any act or to perform any duty depends wholly upon the legislature. In re Morrissey, 137 U.S. 157, 11 S.Ct. 57, 34 L.Ed. 644. The period of majority is a matter within legislative discretion to determine (Moore v. Williams, supra), and the legislature may prescribe a longer period of minority for some purposes than for others. Gouanillou v. Industrial Accident Comm., 184 Cal. 418, 421, 193 P. 937. It is competent for the legislature to provide regulations for the protection of children of immature years, and its judgment in regard to the proper age at which such regulations shall become applicable to the child cannot be interfered with by the courts. In re Weber, 149 Cal. 392, 395, 86 P. 809. The legislature has power to endow minors with the right to make contracts otherwise lawful and after he has been so endowed he becomes, for the purpose of the act, an adult or at least on the same plane. Scott v. Nashville Bridge Co., 143 Tenn. 86, 121, 223 S.W. 844; Borgnis v. Falk Co., 147 Wis. 327, 364, 133 N.W. 209, 37 L.R.A.,N.S., 489. The disability of an infant to enter into a binding contract is not a property right. An infant has no vested right in the disability erected by the common law as a barrier against his making binding contracts during his infancy to the extent that the legislature may not constitutionally remove such disability as to future contracts to which he may become a party. The legislature has power to change the age at which a minor is privileged to exercise legal rights upon which he shall become obligated and it may deny his right to disaffirm contracts. Young v. Sterling Leather Works, 91 N.J.L. 289, 102 A. 395; People v. Kowalski, 307 Ill. 378, 138 N.E. 634; Chicago R. I. & P. R. Co. v. Fuller, 105 Kan. 608, 186 P. 127. A statute declaring a minor to be sui juris for the purposes of the act was held not to violate provisions of the Constitution forbidding the passage of local or special acts affecting the estates of infants or relieving an infant of disability or allowing him to do acts allowed only to adults not under disability. Hewitt Lumber Co. v. Brumfield, 196 Ky. 723, 245 S.W. 858; Elkhorn Coal

Corporation v. Diets, 225 Ky. 753, 9 S.W. 2d 1100. The legislature may remove the disability of infancy so as to permit an infant old enough to work under the labor statutes to make an election as to whether he will work under the compensation law or the common law. Herkey v. Agar Mfg. Co., 90 Misc. 457, 153 N.Y.S. 369.

The legislature having segregated minors as a class from the remainder of the population has further classified them for various purposes. Hours and conditions under which they are permitted to labor are prescribed and the age at which they may begin to labor is fixed; the age of consent is determined and has been changed from time to time; the age at which they reach adulthood is the subject of legislation and it likewise has been varied. When the Civil Code was adopted in 1872, section 56 fixed the age of consent to marry at 18 for males and 15 for females. Ages of consent and conditions permitting marriage of those under such ages have been changed. See Stats. 1921, p. 333; Stats. 1929, p. 1017. By section 261 of the original Penal Code of 1872, intercourse with a girl under 10 years was defined as rape. This section was amended successively raising the age to 14, 16, and 18. See Stats. 1889, p. 223; Stats. 1897, p. 201; Stats. 1913, p. 212. The age of transition from minority to majority was originally 21 for males and 18 for females (Civil Code of 1872, sec. 25) and was later made 21 for all. (Stats. 1927, p. 1119.) These statutes, together with the child labor law, the juvenile court law, and others, are examples of the exercise by the legislature of its power to provide protection for the person and the property of minors and to change the regulatory provisions at will.

[24, 25] The legislature having set up the several classifications above mentioned determined in 1927 that minors engaged in rendering dramatic services, and their employers as well, should be given the protection and assurance of continuity of service under their contracts, and for that purpose added to section 36 of the Civil Code the paragraph above quoted and now under consideration. Stats. 1927, p. 1917. It is noted in passing that at the same session of the legislature the age of majority for females was raised to 21. Stats. 1927, p. 1119. Whether the legislature intended any connection between these two amendments does not appear from the statutes, but it is common knowledge of which the legislature is presumed to have taken notice that of the large number of persons under 21 years of age engaged in stage, screen and radio performances, a great majority are girls and young women. It may well be assumed that the legislature intended that females up to the age of 21 years should have the same protection of the court's scrutiny and approval of their contracts as that which was accorded to males who were already declared to be minors until they reached that age.

[26] The portion of section 36 of the Civil Code here under consideration is not subject to the objection that it applies only to contracts for services to be rendered in motion pictures. It pertains to contracts for the performance of services as an actor or actress, and to the performance of any and all other dramatic services, whether upon the legitimate or vaudeville stage, or in opera, radio broadcasts, motion pictures or floor shows in clubs or cafes, and wherever else dramatic services may be rendered or performed.

The disadvantage suffered by minors in the loss of the right to disaffirm contracts after the same have been approved by the court is overbalanced in favor of the minors and of their welfare by the right given to them by the same provision of the code to have their contracts submitted to the court immediately, or at any time, after their execution. Without such provision if a minor should sign a contract wholly unfair to himself and should perform services under it for a long period of time before he chose to disaffirm, then upon disaffirmance he would not be able to recoup for any detriment caused to him by unjust provisions of the contract.

The statute invites the minor, as well as the employer, to submit the contract to the court and to petition for its approval. In the exercise of the power given to the court by the statute to supervise and to approve or disapprove such contracts it may refuse its sanction until amended in such manner that it will be fair, just and equitable. We find no reason for anticipating that such supervision will cause any loss or damage to a minor employee or any impairment of his earnings.

[27] It is common knowledge that a large percentage of minors employed in both dramatic and motion picture work are undeveloped "raw material" and that such talents as they may have are unknown at the time of employment. Large expenditures are made in the training and "build-up" of the actor, in publicity and propaganda to bring him to the attention of the public and not only to make him a valuable asset to the employer but, as well, to place him in a position to receive merited compensation. It is obvious that no employer would be disposed to expend any considerable amount in the development of an untrained actor into a star, in advertising him to the public and in making him a valuable box office attraction with the knowledge that the minor could at any time within the period covered by the contract disaffirm it and accept employment upon a rival stage or in a rival studio, giving the latter the benefit of the precedent publicity and training which the minor had received at the hands of the first employer. (The right of an employee to disaffirm a contract after reaching legal age is discussed in a later portion of this opinion.)

[28] It is also common knowledge that vast sums are expended in the preparation of a single stage production or motion picture. No one would risk a fortune in the preparation and partial presentation of a play or in the production of a motion picture if the principal player could leave at will and enter employment elsewhere.

The protection thus given to the employer is of little importance as compared with the benefit conferred upon the minor. Without this provision in the statute the employers no doubt would be unwilling to expend their funds for the purposes mentioned and possibly would employ but few minors, as a consequence of which many of the minors now employed would never attain a position where they would be able to earn more than the small salaries of novices, thus depriving them of the wealth which they have been enabled to possess through the operation of the statute.

Experience has shown that many contracts have been procured with minors that were not for bona fide employment but were for the purpose of exploiting them and of making use of their talents with little or no gain to them but with profit to the employers. This is a concrete illustration of the beneficent purpose of the statute and of the wholesome result of its proper application. In the absence of section 36 such contracts, unjust and unfair to the minors, would yield large profits to the employers and small compensation to the minors. Both the minors and their parents are usually unschooled in such matters and have no advice from persons who are competent to give it. The aid of the court is proffered by section 36 for the prevention of imposition on the unwary.

[29, 30] Such classification and such discrimination as exists is to the advantage of the class who are set apart as actors, actresses, and persons performing other dramatic services and, as persons favored by the statute, they are not in a position to complain of its unconstitutionality, under the familiar rule that only those who are affected adversely by a law may object to it on the ground of its invalidity. A.F. Estabrook Co. v. Industrial Accident Comm., 177 Cal. 767, 769, 177 P. 848; Scheerer & Co. v. Deming, 154 Cal. 138, 142, 97 P. 155; Title Ins. & Trust Co. v. Lusk, 15 Cal.App. 358, 361, 115 P. 53. Since employers are not obliged to enter into contracts with minors they are not concerned with the validity of the statute and are therefore precluded from questioning it.

Motion pictures and the drama are in a realm apart from all others in the emoluments, both in money and in fame, bestowed upon those who choose those fields. In no other profession is it possible for any one, minors in particular, in so brief a period, to receive the financial returns there offered, and nowhere else is the reward of glory and public acclaim to be realized at an early age.

The classification of minors so employed is neither arbitrary nor discriminatory but is founded upon a natural and rational distinction, differentiating its members from the general body of the people, and requiring legislation with reference to their contracts different from that which is applicable to persons not performing dramatic services.

For the foregoing reasons section 36 of the Civil Code is not in conflict with the Constitution of California or with the Fourteenth Amendment to the Constitution of the United States.

What we have said refers only to the constitutionality of the statute and has no reference to the form or contents of contracts that the court is authorized thereby to approve. This subject is discussed in a later portion of this opinion.

5. *Was the agreement in question (a) only for the original term of employment, the options not becoming binding unless and until exercised by appellant, or (b) a single contract including both the term of original employment and the periods covered by the options?* The correlated query is, Did the order of the court approving the contract apply only to the original term of employment for one year or did it include the approval of the options?

Section 36 of the Civil Code provides that a minor cannot disaffirm a contract *to perform or render serivces* as an actor where such contract has been approved by the superior court. The only contract "to perform or render services" found in the agreement in question between appellant and respondent is in paragraph 1 of the document wherein appellant "hereby employs and engages" respondent "for and *during the term* of this agreement" and respondent "hereby accepts such employment and agrees to perform and keep all of the duties, obligations and agreements assumed or entered into by her hereunder," and in paragraph 3 which reads: "The term of this contract shall commence on the 30th day of March, 1942, and shall continue thereafter for a period of fifty-two (52) weeks." The *term* for which respondent was *employed* was for 52 weeks and no longer. The options granted by respondent for additional terms of employment, to which we shall refer, were not contracts whereby she was employed but were offers by her to hold her time open for the use of appellant if it desired her services upon the expiration of the term of actual employment.

Paragraph 28 of the contract provides that in consideration of the terms and covenants of the agreement respondent grants to appellant "the following *rights or options:* (a) To extend the term of employment of the Artist for an additional period of 52 weeks from and after the expiration of the period herein specified." (Emphasis added.) The other five successive options are in the same language.

The options are not of the character of the contracts referred to in section 36 of the Civil Code, to wit, "to perform or render services." By reason of paragraphs 1 and 3 of the contract respondent was employed and appellant was bound to pay her for 52 weeks but under the provisions of the options appellant did not employ or agree to pay her and she did not promise to perform services. She gave appellant the *right or option* to extend the period of employment, but until appellant exercised an option by giving her notice thereof there was no contract and neither party was obligated to the other.

[31, 32] An option is a contract whereby one party agrees to keep an offer open for a stated period of time upon specified terms and conditions. It may become a contract binding on both parties, depending on whether or not the optionee exercises the right granted to him by the optionor. It is not specifically enforceable by either party until it has been accepted by the optionee. When accepted it becomes a contract that may be enforced by either party.

[33-35] Options have been variously defined and the rights acquired thereunder described and limited. An option on real property is not a sale of the property but is the sale of a right to purchase it. Hicks v. Christeson, 174 Cal. 712, 716, 164 P. 395; Dreyfus v. Richardson, 20 Cal.App. 800, 805, 130 P. 161. It is not a contract of sale nor an agreement to sell (Howard v. D. W. Hobson Co., 38 Cal.App. 445, 455,

176 P. 715) but is a "mere right of election acquired by one under a contract to accept or reject a present offer within the time therein fixed." Ware v. Quigley, 176 Cal. 694, 698, 169 P. 377, 378. The optionee acquires no actual interest in the property covered by the option until he has seasonably exercised his option to purchase by accepting the offer according to its terms. Ludy v. Zumwalt, 85 Cal.App. 119, 130, 259 P. 52. When the offer thus made is accepted within the time stipulated, the transaction ipso facto ceases to be an option and becomes a sale or a contract of sale according to the circumstances of the acceptance. Menzel v. Primm, 6 Cal.App. 204, 209, 91 P. 754; Tufts v. Mann, 116 Cal.App. 170, 178, 2 P.2d 500.

[36-38] An option to buy is not synonymous with an agreement to buy. If the terms of the option be complied with by the optionee he acquires rights that he may enforce, but if he elects not to comply there is no specifically enforceable agreement and the optionor cannot compel compliance with its terms. Bruce v. Mieir, 120 Cal.App. 287, 290, 7 P.2d 1037. An option is an unaccepted offer to sell, a continuing offer until the expiration of the time limited for its acceptance, which, by reason of the lack of an agreement between the minds of the parties, does not become a contract of sale until accepted. Standiford v. Thompson, 4 Cir., 135 F. 991, 996; Milwaukee Mechanics' Ins. Co. v. B. S. Rhea & Son, 6 Cir., 123 F. 9, 11. It is a contract by which one binds himself to sell property or to perform services and leaves it discretionary with the other to take the property or to accept the services on the terms specified. Shubert Theatrical Co. v. Rath, 2 Cir., 271 F. 827, 833, 20 A.L.R. 846.

Appellant relies strongly on the case of DeHaviland v. Warner Bros. Pictures, Inc., 67 Cal.App.2d 225, 153 P.2d 983, in support of their contention that a contract of employment for 52 weeks with six options for 52 weeks each is a single contract covering the entire period of seven years. We find nothing in that case applicable to the question under discussion. The options there had all been exercised and seven years from the commencement of service had expired, but the continuity of the plaintiff's work had been interrupted by periods of suspension occasioned by her refusal to perform services as required by the defendant. The contract provided that the producer had a right to extend the term of the contract, at its option, for a time equal to the periods of suspension. The court held that section 2855 of the Labor Code limited the term of a contract to render personal services to seven years "from the commencement of service under it," quoting the language of the section, and since a contract for a period of seven years "of actual service" from the commencement of the employment would extend the time of service beyond the time limited by the statute such a provision was unenforceable. Since the options provided for in the contract had all been exercised and the full period of seven years from the commencement of the plaintiff's service had expired, there was no occasion to discuss the legal effect of the options and the court gave no consideration to the question.

[39] There is no question but that employment contracts may validly give the right to the employer to extend the term annually or for a term of lesser or greater length. Philadelphia Ball Club v. Lajoie, 202 Pa. 210, 51 A. 973, 974, 58 L.R.A. 227, 90 Am.St.Rep. 627; Shubert Theatrical Co. v. Rath, supra. However, we have found no authority holding the right to extend the period of service to be any more than an option to claim the services of the employee that the employer may or may not exercise. Each option was a conditional agreement on the part of respondent to perform services, the condition being that appellant would exercise the option in the manner and within the time specified in the contract.

[40] Assuming that in the contract between appellant and respondent there had been no words of employment on the part of appellant and no promise by respondent to render services for any period of time, and that the contract contained nothing but an option whereby she gave the right to appellant to demand her services at some

future time, it could not be contended that there was a contract such as is referred to in section 36 of the Civil Code "to perform or render services."

An option upon the right to require the performance of services is not different legally from an option to purchase real estate. The optionee has the right to call upon the optionor for the performance of services for the additional period specified in the option, but if the optionor is not notified in the manner and within the time required by the option that it has been exercised he is released from all obligations to the optionee.

By virtue of the options contained in the contract here under consideration, granting the "right or option" to appellant "to extend the term of employment," respondent did not sell her services for any one of the extended periods but merely sold to appellant the right to purchase them in the future. The options were not unqualified agreements by her to render services nor by appellant to require or to pay for them. The contract was that she would keep open her offer and allow appellant to determine within the time limit of each option whether or not it would employ her. Manifestly if appellant had failed to exercise any one of the options neither party would have been obligated to the other—respondent to work or appellant to pay. Since there was no contract "to perform or render services" after the end of the first year of employment there was nothing for the court to approve except the contract whereby respondent was definitely employed for one year, and the order of approval is limited in its legal effect to the contract of employment for one year. It cannot be construed as an approval of the options to keep offers of employment open, to be accepted or rejected by appellant in the future.

[41] 6. *Respondent's right to disaffirm the contract.* A minor has no natural, inherent or constitutional right to disaffirm a contract. This right is purely statutory, as is the age of reaching adulthood, and the age of consent to marry. Since the right to disaffirm and the conditions of disaffirmance are statutory they may be changed whenever deemed needful or proper by the legislature in its capacity as parens patriae. The right to disaffirm is not an absolute right but is a privilege granted to persons who enter into contracts while non sui juris and not to others. It is a "right accorded by the state," it may be regulated in such manner as is deemed proper by the legislature, and the right may be entirely or partially withdrawn. The right is given to disaffirm certain contracts but not contracts for necessities. Civil Code, sec. 36, first paragraph. A contract other than for necessities, entered into while the minor is under 18 years of age may be disaffirmed without condition, but if he was over 18 when he made the contract he may disaffirm only upon restoring the consideration to the party from whom it was received. Civil Code, sec. 35. Any of these provisions may be amended or entirely withdrawn at the will of the legislature.

[42] The legislature possesses power to determine at what age a minor may disaffirm a contract and the terms upon which it may be disaffirmed, and to change both the age and the terms from time to time. It has equal power to prescribe the conditions that will debar a disaffirmation. It has no less authority to fix the terms upon which a contract may not be disaffirmed than to determine those upon which it may be disaffirmed. Having jurisdiction so to do, the legislature has enacted that a contract whereby a minor agrees to perform dramatic services cannot be disaffirmed by him if the superior court has approved it. The legislature has chosen to make the court the practical guardian of the minor for the purpose of supervising his contract.

Section 35 of the Civil Code reads in part as follows: "In all cases other than those specified in sections thirty-six and thirty-seven, the contract of a minor, if made whilst he is under the age of eighteen, may be disaffirmed by the minor himself, either before his majority or within a reasonable time afterwards; * * *". Since section 37 refers to contracts entered into by minors under express authority or direction of a statute it does not enter into this discussion. We are concerned only with section 36.

Respondent's disaffirmance of her contract must be sustained for two reasons:

[43, 44] (1) Section 36 validates contracts of minors when approved by the superior court. Under the doctrine of parens patriae a state has the sovereign power of guardianship over persons of disability, such as minors and incompetent persons. In re Turner, 94 Kan. 115, 145 P. 871, 872, Ann.Cas.1916E, 1022; Louisville, N. O. & T. Ry. Co. v. Blythe, 69 Miss. 939, 11 So. 111, 113, 16 L.R.A. 251, 30 Am.St.Rep. 599. It may control the actions of minors and provide for their welfare. By reason of this power the state has undertaken in section 36 to provide for and to protect those who are incompetent by reason of their minority to care for their own interests. This power ceases when a minor reaches his majority since he is then competent to make such legal contracts as he desires without interference from the state.

The legislature, in adopting section 36, recognized its lack of power over contracts of adults by providing that a *minor* cannot disaffirm a contract approved by the court, but it did not attempt to restrain the disaffirmance of such a contract after the contracting party had passed out of the control of the state by becoming an adult.

[45] Even if the soundness of appellant's theory to the effect that the order of the court approving the contract included the approval of the options as well should be conceded, respondent would nevertheless have been privileged to disaffirm the contract (a) because section 36 was applicable to her only while she was a minor and does not by its terms purport to control her right of disaffirmance after she became an adult; and (b) because the state did not have power, if it had so attempted, to deny her that right upon her reaching majority.

(2) The option contracts are separable from the contract to render services. The latter is a presently existing contract enforceable by either party, while the option is an offer by the employee that does not become an implemented contract of employment until the offer is accepted by the employer.

Since section 36 mentions only a contract to perform or render services and not an option contract the effect of the order approving the contract between the parties was to approve only that portion by which respondent was definitely employed for the original term of one year. Each option, when exercised by appellant, became a new contract between it and respondent. No one of the contracts of employment that resulted from the exercise of the options was approved by the court, hence there was no inhibition on her disaffirmance of the unapproved contract.

The case of Blackburn v. Home Life Ins. Co. of New York, 19 Cal.2d 226, 120 P.2d 31, does not assist us in determining whether the options are separable from the main contract. That case related to "riders" attached to an insurance policy which the law of the state in which the policy was issued expressly declared were deemed to be parts of the policy.

Appellant advances the argument that because large sums of money are expended by a motion picture producer in developing the talents of a young actress and in publicizing her ability and her charms he would be unwilling to make such expenditures unless assured of the right to her services for a long period of time. This argument is one of economics affecting the motion picture industry and on that ground has much merit. However, it does not overcome the legal barrier that the options are not agreements of employment that, when approved by the court, are not subject to disaffirmance but are only contracts whereby the time of the actress is reserved for the benefit of the employer who may, but need not, extend the period of employment. The plight in which appellant and other motion picture producers have placed themselves by making short-term contracts cannot be fashioned into a Procrustean bed on which the law may be stretched or amputated to fit the circumstances. Contracts of definite employment for longer periods would dispose of the arguments made by appellant on this phase of the case and would protect employers from loss to which we referred in our discussion of the constitutionality of the statute.

When the optionor is a minor at the time the option is granted, as in the instant case, her right to disaffirm either the option or the contract created by its exercise abides with her as fully and to the same extent as her right to disaffirm any other contract except one for necessaries of life or one that the law makes binding by expressly declaring it to be beyond the power of a minor to disaffirm.

[46-48] 7. *Is the order approving the contract res judicata barring respondent's right to disaffirm?* Appellant contends that the disaffirmance of the contract is a collateral attack on the order of approval that had become final and is *res judicata.* The basis of this argument is that the court had power to approve and did approve the options. If a court has jurisdiction to determine a cause or any question arising in judicial proceedings it has jurisdiction to determine wrongly as well as rightly. If the decision is a mere error it can be corrected only by appeal and is not subject to collateral attack. This rule is applicable to errors made when the court has jurisdiction of the action. If the cause is not within the court's jurisdiction then the order is not merely erroneous but it is void and subject to attack either directly or collaterally. Estate of Pusey, 180 Cal. 368, 374, 181 P. 648; Bartholow v. Davies, 276 Ill. 505, 114 N.E. 1017, 1020.

[49] Since, as we have determined, the court was without jurisdiction (1) to approve the options for the reason that they were not contracts to perform or render services, or (2) to validate the contract for a period extending beyond respondent's minority, the order approving the contract applied only to the original term and was no impediment, when she became of legal age, to her disaffirmance of the contract that arose by appellant's exercising of the option.

8. *The cause of action against respondents Nero Pictures, Inc., and Nebenzal.* An injunction was sought to restrain said respondents from permitting respondent Brodel to perform services for them or for any person or corporation other than appellant. Inasmuch as respondent Brodel had power to and did disaffirm her contract with appellant she is free to make a contract with the other respondents and therefore a cause of action is not stated against them.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

Petition of LOEW'S, Inc.

In re LITTLE.

Civ. 15674.

District Court of Appeal, Second District, Division 2, California.*

March 25, 1947.

Rehearing Denied April 9, 1947.

Hearing Granted May 22, 1947.

1. Infants 🔑47
Statutes 🔑218

That courts had been approving minors' contracts for 20 years without indication that power of approval was limited to period of employee's minority or to term of employment current at time of approval did not require construction that approval of options to extend term of employment be included in order of approval. Civ.Code, § 36.

2. Statutes 🔑190, 218

Contemporaneous construction will be resorted to for construing statute only when it is ambiguous, and in absence of ambiguity courts will not sanction an erroneous construction.

3. Statutes 🔑190, 219

Where there is no ambiguity, statute will be given its proper construction even though officers administering it have construed it otherwise, regardless of what the administrative practice has been or how long continued.

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*Dismissed July 8, 1948.

4. Statutes 🔑218

Contemporaneous construction is not an absolute rule and does not preclude inquiry by courts into correctness of interpretation given to statute.

5. Courts 🔑89

Appellate court will not follow lower court's long continued construction of statute in absence of ambiguity in meaning.

6. Statutes 🔑225¾

The rule that words which have received judicial interpretation are presumed to have been used by legislature as so construed, unless contrary intention clearly appears, merely means that legislature has used words in their accepted sense.

7. Statutes 🔑225¾

In amending statute governing disaffirmance of minors' contracts, to prohibit disaffirmance of contracts for dramatic services approved by court, legislature presumably referred only to existing contracts to perform services and not to options, in view of numerous cases defining "option" and "contract". Civ.Code, § 36.

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Proceeding in the matter of petition by Loew's Incorporated for approval of a contract of employment with Lila Lee Little, professionally known as Lila Leeds, also known as Lila Lee Wilkerson, a minor. From that portion of an order approving the contract which limited the approval to the period of the minority, the petitioner appeals.

Affirmed.

Loeb and Loeb, David T. Sutton and Herman F. Selvin, all of Los Angeles, for appellant.

No appearance for respondent.

Max Radin, of Berkeley, and Frank B. Belcher, of Los Angeles, amici curiæ supporting respondent.

WILSON, Justice.

By contract dated January 14, 1946, appellant employed respondent as a motion picture actress. The contract provided that "the term of employment hereunder shall be deemed to have commenced on January 10, 1946, and shall continue for a period of three (3) months from and after said date." In the same paragraph respondent granted to appellant the rights or options "to extend the term of employment" for a period of three months "from and after the expiration of the term hereinbefore specified," for an additional period of six months after the expiration of the first extended period, and six successive options "to extend the term of employment * * * from and after the expiration of" the preceding period for additional terms of one year each.

Pursuant to section 36 of the Civil Code, appellant filed a petition on May 20, 1946, for the approval of the contract alleging that respondent was then 19 years of age. At the time of the filing of the petition the original term of employment, three months, had expired and the option for the first extended period had been exercised by appellant.

After a hearing on May 21, 1946, the court made an order approving and confirming the contract "for and during the minority of the said minor as to the term provided for in paragraph 23 of said contract (the original term thereof) and as to the optional term of said contract provided for in subdivision (a) of paragraph 23 of said contract." The order further required that when and if the option for the next succeeding period should be exercised the minor should return and appear "for the further orders and instructions of this court," thus indicating that the court intended to give consideration to the subsequent contract of employment that would result from the exercise of the option for the next period.

The appeal is from that portion of the order that confines and limits the court's approval of the contract to the period for and during the minority of the minor and for the term provided for in paragraph 23 of the contract and the optional term provided for in subdivision (a) of paragraph 23, and from the order insofar as it fails to approve the contract in its entirety and without limitation or restriction as to time or term.

All questions raised by this appeal, save one, are decided in our opinion this day filed in the case of Warner Bros. Pictures, Inc. v. Brodel, Cal.App., 179 P.2d 57. Appellant contends that the doctrine of contemporaneous construction is applicable by reason of the fact that for 20 years the courts have been approving contracts of minors and that it has never been indicated that the court's power of approval is limited either to the term of employment current at the time the order of approval is made or to the period of the employee's minority. No doubt the reason why the occasion to consider the question has never arisen until now is because there has been no controversy in which the court was required to determine the extent of its jurisdiction.

[1] The contention advanced by appellant that the theory of contemporaneous construction requires us to hold that the approval of the options "to extend the term of employment" was included in the order approving the contract of employment must be rejected for three reasons:

[2-4] (a) It is only when a statute is ambiguous that contemporaneous construction will be resorted to for the purpose of determining its meaning. Where there is no ambiguity administrative or departmental construction cannot alter the plain meaning of a statute and an erroneous construction will not be given sanction by the courts. California Drive-in Restaurant Ass'n v. Clark, 22 Cal.2d 287, 294, 140 P.2d 657, 147 A.L.R. 1028; Consolidated Rock Products Co. v. State of California, 57 Cal. App.2d 959, 965, 135 P.2d 699; Montgomery v. Board of Administration, 34 Cal.App. 2d 514, 521, 93 P.2d 1046, 94 P.2d 610; Hodge v. McCall, 185 Cal. 330, 334, 197 P. 86; United States v. Missouri Pac. R. Co., 278 U.S. 269, 277, 49 S.Ct. 133, 73 L.Ed. 322, 376. If there is no ambiguity the statute will be given its proper construction even though the officers administering it have construed it otherwise (First National Bank v. Watters, 201 Ala. 670, 79 So. 242, 244), and it matters not what the administrative practice has been nor how long continued. United States v. Graham, 110 U.S. 219, 221, 3 S.Ct. 582, 28 L.Ed. 126, 127. Contemporaneous construction is not an absolute rule and does not preclude an inquiry by the courts as to the correctness of the interpretation given to it. Houghton v. Payne, 194 U.S. 88, 99, 24 S.Ct. 590, 48 L.Ed. 888, 891.

[5] Even a judicial construction of the contracts by the superior court, if it had been made as contended by appellant, would not influence us to apply the same theory, since a long continued construction of a statute by a lower court will not be followed by an appellate court where there is no ambiguity or uncertainty in its meaning. Bartholow v. Davies, 276 Ill. 505, 114 N. E. 1017, 1020.

The construction of section 36 has never been before an appellate court until the Warner Bros. case reached us and since in that case we found no infirmity in the statute the construction there placed on it must necessarily be adopted in the instant case.

(b) It does not appear from the record that any court has ever construed the approval of a contract of employment to have coupled with it the approval of the options by which the minor has held his time open for future employment, or that the court has ever approved an option in advance of its having been exercised by the employer.

We accept as correct the statement in appellant's brief, documented as it is by an excerpt from an opinion rendered several years ago by a judge of the superior court in another proceeding, that a great number of minors' contracts have been approved by that court since section 36 was amended in 1927. Such fact, however, does not furnish a basis for holding that the statute has ever been construed in respect to whether or not the approval of a contract carried with it the approval of the options. Mention is made in the opinion referred to in the brief of contracts that had been before the court "on petitions for approval," but nowhere does it appear that the statute had been construed or that the approval of contracts had been considered as applying to options. This question was not discussed at all.

[6] (c) It is a settled rule of statutory construction that when the legislature uses words which, before the enactment of the statute, have received judicial interpretation they are presumed to have been used as so construed and to have the same meaning and effect in the statute unless the contrary intention clearly appears. This means no more than that the legislature has used the words in their accepted sense. State v. Jones, 91 Ark. 5, 120 S.W. 154, 155, 18 Ann.Cas. 293; Indiana Trust Co. v. Griffith, 176 Ind. 643, 95 N.E. 573, 575, 44 L.R.A.,N.S., 896, Ann.Cas.1914A, 1023; Commonwealth v. Greenwood, 205 Mass. 124, 91 N.E. 141, 142, 18 Ann.Cas. 185; Murrell v. Industrial Comm., 291 Ill. 334, 126 N.E. 189, 190; Commercial Trust Co. v. Hudson County Board of Taxation, 87 N.J.L. 179, 92 A. 799, 801; Baltimore & Philadelphia Steamboat Co. v. State Tax Comm., 157 Md. 279, 145 A. 770, 772; Thorn v. Browne, 8 Cir., 257 F. 519, 523; Baltimore & Philadelphia Steamboat Co. v. Norton, D.C. 40 F.2d 530, 531.

[7] In Warner Bros. v. Brodel, supra, we pointed out that while an option is a contract there is a difference between a contract to perform or render services and an option to extend the term of employment, the former being a presently effective contract whereby the employee agrees to perform services during the specific period prescribed in the agreement, and the latter a grant by the employee of a right or option to the employer to require the services of the employee for an additional period, and that the option did not become a definite contract to perform services until the offer was accepted by the employer by the exercise of the option. The cases defining both terms are so numerous that it must be presumed that when the legislature amended section 36 it intended the new paragraph to mean an existing contract to perform services and not an option pursuant to which the employer might or might not elect to bring into existence another contract thereafter.

Since the statute is unambiguous and self-construing and since no court or administrative agency has purported to give it a meaning contrary to that given by us in the Warner Bros. case, the doctrine of contemporaneous construction is inapplicable.

Order affirmed.

MOORE, P. J., and McCOMB, J., concur.

In the Matter of the Contract between LOEW'S, Incorporated, a corporation, appellant, and Joan Winifred ELMES, a minor, respondent.*

Civ. 15759.

District Court of Appeal, Second District, Division 2, California.

March 25, 1947.

Rehearing Denied April 9, 1947.

Hearing Granted May 22, 1947.

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Loeb and Loeb, David T. Sutton, and Herman F. Selvin, all of Los Angeles, for appellant.

No appearance for respondent.

Max Radin, of Berkeley, and Frank B. Belcher, of Los Angeles, amici curiæ supporting respondent.

WILSON, Justice.

Appellant employed respondent as a motion picture actress by an agreement in writing dated May 13, 1946, for a period of one year with six successive options to extend the term of employment for one year each. The terms of the contract of employment and of the options are identical, except as to time and salary, with those in the contract considered by us in In re Loew's Incorporated and Little. Cal.App., 179 P.2d 71. Appellant filed a petition for the approval of the contract pursuant to section 36 of the Civil Code, reciting that respondent was approximately 14 years of age. After notice to respondent and her parents a hearing was had and the court made an order approving and confirming the contract "as to the term provided for in paragraph 23 of said contract (the original or current term thereof)" and directing the minor and her parents to return and appear before the court for further order and instructions "when and if the option provided for in subdivision (a) of paragraph 23 of said contract is exercised." The option referred to is for a period of one year from and after the expiration of the original term of employment.

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* Subsequent opinion 192 P.2d 958.

Appellant has appealed from the order insofar as it confines and limits the court's approval of the contract to the term provided for in paragraph 23 thereof (meaning the period of actual employment for one year and not the periods covered by the options) and insofar as it fails to approve the contract in its entirety and without limitation or restriction as to time or term.

The questions involved in this proceeding are all discussed and decided in our opinions this day filed in Warner Bros. Pictures, Inc. v. Brodel, Cal.App., 179 P.2d 57, and In re Loew's Incorporated and Little, Cal.App., 179 P.2d 71.

Order affirmed.

MOORE, P. J., and McCOMB, J., concur.

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79 Cal.App.2d 146

PEOPLE v. CARROLL.

Cr. 649.

District Court of Appeal, Fourth District, California.

April 14, 1947.

1. **Burglary 🔑42(1)**

The possession of stolen property, shortly after it was stolen in a burglary, is a circumstance pointing to the guilt of the one in possession of the property, but there must be, in addition to such possession, corroborating circumstances, such as acts, conduct, or declarations of accused tending to show his guilt.

2. **Burglary 🔑42(3)**

In burglary prosecution of one found with stolen property in his possession, familiarity of accused with burglarized premises, accused's failure to account properly for his possession of the stolen property, the giving of false testimony, and the dealing of the stolen property as accused's own, are corroborating circumstances tending to show accused's guilt.

3. **Burglary 🔑41(1)**

Evidence sustained burglary conviction.

4. **Criminal law 🔑1172(2)**

In burglary prosecution, general instruction on circumstantial evidence was not prejudically erroneous, on ground that it failed to instruct jury to effect that all circumstances relied on must not only be consistent with accused's guilt but must also be inconsistent with his innocence.

5. **Burglary 🔑46(7)**

In burglary prosecution, evidence authorized giving of instructions respecting possession of stolen property, corroborating circumstances, defendant's failure to account reasonably for his possession, and that a false account or a refusal to give any account of the manner in which he came into possession of stolen property may be considered.

◆

Appeal from Superior Court, Orange County; Raymond Thompson, Judge.

Robert Estrada Carroll was convicted of burglary, and he appeals.

Judgment affirmed.

N. D. Meyer, Public Defender, and Samuel Dreizen, Deputy Public Defender, both of Santa Ana, for appellant.

Fred N. Howser, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with the crime of burglary in having entered a pool room in La Habra, with the intent to commit theft. It appears, without question, that this pool room was entered on the night of July 17, 1946, by someone who effected an entry by breaking a skylight, and that about $400 in cash, $900 in checks, and a 38-caliber Ivar Johnson revolver were stolen therefrom. About ten days later, the defendant sold this revolver to a man named Rios at a street corner in Los Angeles. The defendant was later arrested and prosecuted. A jury found him guilty of this burglary and he has appealed from the judgment.

It is first contended that the evidence is insufficient to support the verdict and judgment. It is argued that the evidence shows that the appellant had only temporary possession of the revolver at the time it was sold to Rios and that, in any event, there is no other evidence outside of, and apart from, the fact of said possession to connect him with the crime charged. The argument that the appellant had only temporary possession of the revolver is based upon a portion of the evidence, which was conflicting in that regard. There is evidence, which the jury was entitled to believe, that the appellant had the gun in his possession when Rios first saw it; that he offered to sell it to Rios; that Rios bought it from him for $20; and that he delivered the gun to Rios.

[1, 2] There are other facts and circumstances apart from the possession of the revolver which sufficiently tend to connect the appellant with the commission of this crime and which, with the fact of possession, are sufficient to support the conviction. The possession of stolen property, shortly after it is stolen, is a circumstance pointing to the guilt of the accused. People v. Russell, 34 Cal.App.2d 665, 94 P.2d 400. However, there must be, in addition to such possession, corroborating circumstances, such as acts, conduct or declarations of the accused tending to show his guilt. People v. Russell, supra. The familiarity of the accused with the burglarized premises is a circumstance which may be considered. People v. Davis, 1 Cal.App. 8, 81 P. 716, 88 P. 1101. The failure of the accused to properly account for his possession of the stolen property is such a circumstance. People v. Russell, 120 Cal. App. 622, 8 P.2d 209. Also, the giving of false testimony, and dealing with the stolen property as his own. People v. Morris, 124 Cal.App. 402, 12 P.2d 679. The giving of equivocal answers to questions asked by officers, and other conduct inconsistent with that of an innocent man, may also be considered in this connection.

There is evidence here that the appellant had repeatedly been in this pool hall; that at noon on July 17, he asked his employer for the afternoon off; that his employer consented but expected him back the next morning; that he did not return the next morning and, in fact, did not return to work at all; that he spent the afternoon and night of July 17 in La Habra; that he cashed a check for $32.50 which he received from his employer; that he left $25 with his sister, and paid $2 to a man to whom he owed that amount; that he bought wine and was drinking; that the next morning he went to Los Angeles and rented a room; that he spent the next two weeks loafing and spending money; and that about ten days after the burglary he sold the revolver taken from the pool hall in La Habra to Rios. A deputy sheriff testified that he had a conversation with the appellant at the jail after he was arrested; that he asked the appellant if he had any knowledge of this burglary and that the appellant said he did not; that he then asked him if he was in La Habra on July 17; and that the appellant said "Yes" and stated that he had come to La Habra about noon, that he had cashed a check at a liquor store and bought a bottle of wine, and "that if he had been connected with this burglary he had no knowledge of it as he was drinking." The officer then testified that the appellant was shown the revolver taken from this pool hall and that he stated he had never seen that gun before and had not sold it to Rios for $20. This officer also testified that at a later conversation he asked the appellant if he had committed this burglary and that the appellant replied, "I wont say yes and I wont say no"; that he then asked him why and the appellant replied: "Well — every time I have been in trouble is as it has always been, when I was drinking." The appellant took the stand and admitted that he was in La Habra on July 17, and stated that he had left his mother's house there at about eight o'clock that night, that he did not know when he returned there, but that he must have returned because he woke up there the next morning. While on the stand he did not deny that he had committed this burglary. While he had told the officers that he had never seen this gun and had not sold it to Rios, he admitted on cross examination that he had talked to Rios on the street corner in Los Angeles where Rios said he had bought the gun from him, and when asked whether the testimony given by Rios as to what occurred at that corner on that occasion was true, he replied: "That may have been true, yes."

[3] The circumstances shown, with the acts and statements made by the appellant, furnish rather strong corroborating evidence which is to be considered in connection with the fact of his possession of this gun and the absence of any satisfactory explanation thereof. The evidence, in its entirety, is sufficient to support the judgment of conviction.

[4] The appellant next contends that the court committed prejudicial error in giving a general instruction on circumstantial evidence, and in failing to further instruct the jury to the effect that all of the circumstances relied upon must not only be consistent with the guilt of the accused but must also be inconsistent with his innocence. Reliance is placed upon such places as People v. Rayol, 65 Cal. App.2d 462, 150 P.2d 812; People v. Koenig, 29 Cal.2d 87, 173 P.2d 1; and People v. Bender, 27 Cal.2d 164, 163 P.2d 8. The court here gave practically the same instruction which was given in the case of People v. Rayol, 65 Cal.App.2d 462, 150 P. 2d 812. No other instruction on circumstantial evidence was requested by the appellant, but the court thereafter gave the jury the following instructions:

"You are instructed that if from the evidence you can with equal propriety draw two conclusions, the one of guilt, the other of innocence, it is your duty to adopt the one of innocence and find the defendant not guilty.

"The law presumes the defendant to be innocent and the defendant is entitled to the benefit of this presumption at all stages of this proceeding. You must acquit the defendant if, after consideration of the evidence, it is consistent with any reasonable hypothesis of his innocence.

"It is not your duty to look for some theory upon which to convict the defendant but on the contrary, it is your duty and the law requires you, if you can reasonably do so, to reconcile all the facts and circumstances that have been shown with the innocence of the defendant and to acquit him.

"If the evidence relating to any or all the circumstances in this case, is, in view of all the evidence, susceptible of two reasonable interpretations, one of which would point to the defendant's guilt and the other would admit of his innocence, then it is your duty in considering such evidence to adopt that interpretation which will admit of defendant's innocence and reject that which would point to his guilt."

While the court did not use the exact language suggested in some of the cases cited, the language here used was even more forceful in telling the jury that the circumstances relied on must not only be consistent with the guilt of the accused but must also be inconsistent with his innocence. The jury was directly told to acquit the appellant if it found the evidence consistent with any reasonable hypothesis of his innocence; to reconcile all facts and circumstances with his innocence and acquit him if this could reasonably be done; and with respect to the evidence relating to any or all of the circumstances, where two reasonable interpretations were possible, to adopt the one favorable to appellant's innocence and to reject the one pointing to his guilt. No prejudicial error appears in this connection.

[5] Appellant's final contention is that four instructions should not have been given because there was no evidence which made them applicable. These instructions were to the effect that the mere possession of stolen property is not sufficient to connect the defendant with the perpetration of a burglary in which the property was stolen, but is a circumstance which may be considered in connection with other evidence; that there must be corroborating circum-

stances; that the failure of the accused to reasonably account for his possession is such a circumstance; that false statements showing consciousness of guilt may also be considered; and that a false account or a refusal to give any account of the manner in which he came into possession may be considered. It is argued that there is no evidence here that the appellant was in possession of this gun and no evidence that he made any false statements. These arguments are sufficiently answered by what we have already said in discussing the sufficiency of the evidence. No prejudicial error appears in connection with the instructions given.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.

79 Cal.App.2d 213

VAUGHN v. VAUGHN.

Civ. 3554.

District Court of Appeal, Fourth District, California.

April 17, 1947.

1. Divorce 🔑239

Evidence sustained finding that written agreement to pay wife $125 per month was executed by husband so as to warrant judgment requiring husband to pay wife such amount per month, though husband was granted a divorce on ground of cruelty of wife.

2. Divorce 🔑239

Where husband's answer to wife's cross-complaint alleging the making of a contract by husband to pay wife $125 per month and seeking enforcement of such agreement in no way denied the making of agreement, execution of such agreement by husband was admitted by the pleadings and no proof thereof was necessary.

3. Divorce 🔑236

Husband's agreement to pay wife $125 per month was enforceable in husband's suit for divorce wherein wife filed cross-complaint for separate maintenance and enforcement of such agreement.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Suit for divorce by William Bryan Vaughn against Lenore Wilson Vaughn, wherein defendant filed a cross-complaint for separate maintenance and approval of a contract whereby plaintiff had agreed to pay $125 per month for defendant's support. From that portion of judgment granting plaintiff a divorce by which he was required to pay $125 per month for defendant's support, plaintiff appeals.

Portion of judgment appealed from affirmed.

Clyde E. Cate, of Fresno, for appellant.

Ray W. Hays, of Fresno, for respondent.

BARNARD, Presiding Justice.

By his complaint filed on March 1, 1946, the plaintiff asked for a divorce from the defendant on the ground of cruelty. The defendant answered, and also filed a cross complaint asking for separate maintenance, and also that the court approve a contract made by the plaintiff and, in accordance therewith, award her the sum of $125 a month for her support and maintenance.

It appears that the plaintiff received a salary of $450 per month as manager of a certain corporation, plus 5% of the profits made by the corporation, with $85 per month in addition for automobile expenses. The parties had accumulated community property consisting of certain stock in this corporation, household furniture, an automobile, and a few United States bonds.

At the trial, although present in court, the defendant offered no evidence in support of her cross complaint other than by cross examination of the plaintiff and by introducing into evidence a contract dated February 25, 1945, signed by the defendant, in which he agreed to pay her $125 per month "until she remarrys or by witness of law has any immoral clandestine relations or affairs", and in which he agreed to keep certain life insurance policies in effect for her benefit.

The court found in favor of the plaintiff on the allegations of cruelty set forth in his complaint, and further found that on February 25, 1945, the plaintiff had entered into a written agreement by which he was required to pay $125 per month to the defendant. As conclusions of law it was found, among other things, that the plaintiff should be required to pay to the defendant $125 per month until she remarries, that the life insurance policies mentioned in the agreement should be kept in force by plaintiff for the benefit of the defendant, and that the community property of the parties should be divided by awarding the corporate stock to the plaintiff and the household furniture and war bonds to the defendant. An interlocutory decree was entered to this effect, with the provision that the plaintiff should be entitled to a divorce. The plaintiff filed notice of appeal from that part of the judgment which ordered him to pay $125 per month to the defendant until she remarries and which provides that he shall keep certain life insurance policies in effect for her benefit. However, in his brief, this appeal is presented on the sole issue that he was entitled to a divorce without the requirement that he pay to the defendant the sum of $125 per month, or any other sum, for her support and maintenance, and that the making of such an award to her was illegal and void.

The appellant's sole contention is that there is no evidence to sustain the finding that he signed the agreement which was introduced in evidence and that, in the absence of an agreement, the court is without power to grant "alimony" to the guilty party against whom a divorce is granted. The principle of law last referred to may be conceded. The appellant, in his testimony, admitted signing an agreement in February, 1945, but when shown the agreement which was introduced in evidence he said he did not know whether or not the purported signature thereon was his. He said: "I don't know. It looks very much like it." He then said: "I signed an agreement but that doesn't look like it." He did not say that it was not his signature, and he further testified that he could not remember seeing that particular agreement before. The court compared the signature in question with the appellant's admitted signature on the answer to the cross complaint, and remarked that the one was a counterpart of the other and that "the court can come to no other conclusion but that it is his signature." It was stipulated upon the hearing of this appeal that the original answer to the cross complaint might be examined by this court as an exhibit and compared with appellant's signature on the questioned agreement. This has been done and we are in accord with the trial court's statement that no conclusion could reasonably be reached other than that the agreement in question was signed by the appellant. In his testimony the appellant further stated that the agreement he did sign was signed on the understanding that the respondent would leave Fresno. The agreement did not so provide, and he did not say that the respondent agreed to leave Fresno at any particular time. In an affidavit sworn to and filed by him on March 22, 1946, in connection with a hearing on the allowance of temporary alimony, he made no mention of such an understanding although he stated that the respondent left Fresno about June 1, 1945. He further stated therein that on or about January 10, 1945, he agreed to pay her $125 a month for her support and maintenance, and that he has fully paid that sum each month to and including March 1, 1946, with the exception that on February 1, 1946 and March 1, 1946, he had paid smaller amounts for the reason that he had been compelled to pay certain bills she had left.

[1-3] In view of the appellant's equivocal testimony in connection with his signature to the contract which was introduced in evidence, and the comparison of his signature thereon with his admitted signature on the answer to the cross complaint, we think the court's finding with respect to the execution of this agreement by the appellant is sufficiently sustained. Moreover, the execution of this agreement by the appellant was admitted by the pleadings, and no proof was necessary. The making

of a contract by the appellant, by which he agreed to pay to the respondent $125 per month, was alleged in the cross complaint and enforcement of that agreement was sought. The answer to the cross complaint in no way denied the making of that agreement. The execution of the contract was established, and the same was enforceable in this action. Hogarty v. Hogarty, 188 Cal. 625, 206 P. 79; Adams v. Adams, 29 Cal.2d 621, 177 P.2d 265.

The portion of the judgment appealed from is affirmed.

MARKS and GRIFFIN, JJ., concur.

78 Cal.App.2d 860

BOVETTE v. LOS ANGELES TRANSIT LINES et al.

Civ. 15477.

District Court of Appeal, Second District, Division 1, California.

April 1, 1947.

1. Appeal and error 🔑1122(2)

Appellate courts sit to review errors of law, and are without power to make findings of fact.

2. Appeal and error 🔑989

The primary concern of an appellate court in considering an attack upon a verdict is not how it would find the facts, but whether there is substantial evidence to support verdict, and if there is such evidence, verdict must be affirmed however strongly such evidence may be opposed by other evidence.

3. Trial 🔑256(1)

If defendant felt that plaintiff's charge should have been elaborated, it was defendant's duty to request such elaboration.

4. Automobiles 🔑244(1)
Carriers 🔑318(1)

In action by passenger on street car against street car company and trucker for injuries allegedly sustained when street car collided with truck, substantial evidence supported verdict for both defendants.

5. Carriers 🔑321(23)

Evidence warranted instruction that if street car motorman was confronted by an emergency not caused by his own negligence, wherein he was required to make a choice of courses of conduct, both dangerous for some one, fact that he chose course involving risk of passenger's safety was not proof of negligence.

6. Appeal and error 🔑110

An order denying a new trial is not appealable.

◆

Appeal from Superior Court of Los Angeles County; Robert H. Scott, Judge.

Action by Helen Bovette against Los Angeles Transit Lines and others to recover for injuries sustained by plaintiff while a passenger on named defendant's street car in a collision between such street car and a motor truck. From a judgment for defendants and from an order denying plaintiff's motion for new trial, plaintiff appeals.

Judgment affirmed and attempted appeal from order denying a new trial dismissed.

Laurence B. Martin, of Los Angeles (Horace L. Hahn, of Los Angeles, of counsel), for appellant.

Gibson, Dunn & Crutcher, of Los Angeles (Sherman Welpton, Jr., of Los Angeles, of counsel), for respondent Los Angeles Transit Lines.

Leo Friedman, of Long Beach, for respondent Max H. Schiller.

DORAN, Justice.

The plaintiff herein, passenger on a street car operated by the Los Angeles Transit Lines, has appealed from an adverse judgment entered upon a verdict denying recovery of damages for personal injuries alleged to have resulted from a collision between the street car and a motor truck driven by the other respondent, Max H. Schiller; and from the denial of a new trial. The collision occurred at approximately 1 p. m. on October 24, 1944, some 180 to 200 feet from the intersection of

11th Street and Grand Avenue in the City of Los Angeles.

The record discloses that at the time of the collision the pavement was dry, the weather was clear; the street car was of the new streamlined design. Immediately prior to the accident the street car had been halted at the intersection by reason of traffic signals and to admit passengers. With the change in traffic signals the car proceeded along Grand Avenue towards a point where respondent Schiller's truck had been parked adjacent to the curbing, facing in the same direction as the street car. The truck was about 18 feet in length with a stake body, and at the moment of collision was being moved by Schiller from its parked position into the flow of traffic. Schiller testified that before pulling out from the curb, "I looked down the street and I saw this streetcar there with the red lights set against it, so I got into the truck and I pulled up this (mechanical) arm with the rope * * * which indicates that I am going to make a left-hand turn". According to Schiller's testimony, "maybe fifteen or twenty seconds" elapsed while maneuvering the truck from the parking place and before the collision occurred. Schiller also waited for two automobiles to pass before moving the truck into the stream of traffic, the truck then remaining in an "angled position", some "two or three, four or five feet" away from the curb. The street car motorman testified that "When I was approximately fifteen or twenty feet away from the truck I realized the danger, that he might possibly pull on the rails". The record also contains the motorman's statement, commented on by appellant: "I might have saw the truck sooner. I don't recall how soon I saw the truck". There is also evidence that the motorman sounded the gong "one or more times". It appears that the street car was in proper working order and the motorman testified that at 20 miles per hour it would require a space of 60 feet to stop the car, or 40 feet when traveling at 15 miles per hour, the latter speed being estimated as that of the car just previous to the collision.

According to the appellant's brief "the impact consisted essentially of a glancing blow". The truck driver, Schiller, described the collision by saying, "Well, all that happened there was the street car brushed against the side of the truck. There was no impact". Appellant's brief further says: "With the application of the brakes by the operator of respondent's car and the impact of the collision * * * the appellant (who was sitting on the operator's side of the car approximately 3 feet to the rear of the center of the car) was thrown forward, thrown up out of her seat and partly over the railing of the seat in front of her", suffering injuries therefrom. Appellant's 72 year old mother seated next to the appellant, was not injured, nor does it appear that complaint of injury was made by any other passenger. As before indicated, the verdict of a jury denied appellant the right to recover damages from either of the respondents.

[1, 2] Extended argument is found in the appellant's brief to the effect that "There is insufficient evidence to support the verdict of the jury in the instant cause", and it is claimed that "A review of the evidence, * * * disclosed certain uncontroverted facts which the appellant contends rendered the respondents herein guilty of negligence, and that by no construction of the evidence as presented can the verdict * * * be justified in law or in fact". The argument, however, is unavailing. It is fundamental that "appellate courts sit to review errors of law, and are without power to make findings of fact, and it is only when the question is presented as one of law that the appellate court will examine it (the evidence) to this sole end". 2 Cal.Jur., Appeal and Error, Section 542 et seq. "It must be borne in mind", continues this work, "that the question before the court in considering the attack on the verdict * * * is not how it would find the facts to be, but * * * was there substantial evidence in support thereof? If so, the verdict must stand, however strongly such evidence may be opposed by other evidence". As was said in Rinker v. McKinley, 65 Cal.App.2d 109, 110, 149 P.2d 859, 860, "the rule is established that it is not sufficient ground for reversal of a judgment for an appellant to point out or to even demonstrate to an appellate court that a finding is against the preponderance of

the evidence; he must show that there is not any substantial evidence to sustain the questioned finding". That the record in the instant case presents substantial evidence to sustain the verdict rendered, cannot be doubted.

The appellant maintains that "The only possible explanation of the jury's conclusion may be found perhaps in the errors committed by the trial court in the matter of the instructions read". In this connection complaint is made of two instructions. First, that "The instruction relating to respondent Schiller's liability in the event that the jury found he had violated a provision of the Vehicle Code (by turning into the traffic without exercising reasonable care) was meaningless without the additional and all essential element that if such violation were established then the jury should find him guilty of negligence per se". Appellant's other complaint is that the trial court erroneously instructed the jury as to the care to be exercised in case the motorman was confronted by an "emergency not caused by his own negligence", when, as appellant maintains, "the evidence wholly failed to support even a remote possibility" that an emergency existed.

[3, 4] The giving of neither instruction warrants a reversal. The instruction which gave to the jury the relevant provisions of the Motor Vehicle Code, was requested not by the appellant but by the respondent transit company, and the appellant did not request the giving of that further explanation which it is now insisted should have been given by the court. In other parts of the charge the jury was correctly instructed as to the nature of negligence and ordinary care. Moreover, as hereinbefore indicated, the record reveals substantial evidence to justify the verdict.

[5] The instruction which told the jury, "if you should find that the motorman of the street car was confronted by an emergency not caused by his own negligence, wherein he was required to make a choice of courses of conduct, both dangerous for someone, the fact that he chose a course that involved the risk of plaintiff's safety is not, in itself, proof of negligence", does not seem improper under the circumstances disclosed by the evidence. In view of the very brief interval of time and distance which preceded the collision—"maybe fifteen or twenty seconds" between maneuvering the truck into the street and the impact; and from the evidence that the motorman realized the danger when the car was only 15 or 20 feet from the point of impact,—the jury might well believe that a sudden emergency was presented. Appellant's insistence that the motorman's statement, "I might have saw the truck sooner", indicated negligence and the absence of any emergency, is not persuasive. As said in respondent's brief, the motorman presumably "used the word 'might' to indicate that he may have seen the truck sooner but that its presence or activity made no impression on him because it was not then a danger".

[6] There being substantial evidence to justify the verdict, and no prejudicial error appearing in the record, the judgment is affirmed and the attempted appeal from the order denying a new trial is dismissed.

YORK, P. J., and WHITE, J., concur.

MATHER et al. v. MATHER. *

Civ. 13275.

District Court of Appeal, First District, Division 2, California.

April 10, 1947.

Rehearing Denied May 10, 1947.

See 180 P.2d 35.

1. Appeal and error ⚷194(1), 236(2)

Whether method of procedure by which defendant in action of interpleader by answer to supplemental cross-complaint of codefendant sought an accounting was regular was not reviewable on appeal where no objection to filing of such pleading, motion to strike out any part of it, or request that submission of cause be set aside was made, and trial judge mentioned pleading as a basis of his findings.

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* Subsequent opinion 194 P.2d 1.

2. Pleading ⚿229

Liberality in permitting amendments is favored.

3. Appeal and error ⚿1041(1, 5)

Allowing plaintiff to amend or supplement pleadings so as to deprive defendant of opportunity to defeat a just claim on technical grounds is not prejudicial.

4. Interpleader ⚿26

Wife's answer to husband's cross-complaint in interpleader action to determine right to balance due on husband's claim against decedent's estate alleging assignment of one-half interest in claim to wife and stating amount of claim and payments received by each and asking judgment against husband for unpaid balance of wife's half was sufficient as a cross-complaint for an accounting notwithstanding pleading was designated an answer.

5. Judgment ⚿713(2), 728, 735

A judgment generally operates as an estoppel in subsequent action between same parties as respects issues that actually were raised or might have been litigated in former action, but not as respects issues not germane to or essentially connected with issues actually raised, nor as respects rights, duties or demands, constituting separate or distinct causes of action, which were not put in issue in the former action. Code Civ.Proc. § 1911.

6. Judgment ⚿683, 736

Judgment that property settlement agreement involving assignment to wife of one-half interest in husband's claim against decedent's estate was valid and that husband and wife were each entitled to one-half of unpaid balance due on claim was not res judicata as to wife's right to an accounting as to previous payments on claim received by husband or as to rights of wife's assignees, where no issue as to previous payments or accounting therefor was raised by pleadings or evidence in former action and assignees were not made parties to such action. Code Civ.Code. § 1911.

7. Interpleader ⚿32
Judgment ⚿743(1)

In interpleader action to determine right to unpaid balance due on claim against decedent's estate, wherein assignee of one-half interest in claim and her assignees asked for an accounting as to previous payments made on claim, judgment in former action between claimant and his assignee should be accepted as establishing validity of assignment and right of each party to one-half of unpaid balance and court should determine how much of claim had previously been paid to each, enter judgment giving each his respective one-half, impress a lien on claimant's share of unpaid balance for any amount due his assignee and determine rights of subassignees.

◆

Appeal from Superior Court, San Francisco County; Edmund P. Mogan, Judge.

Action in interpleader by administrators of the estate of Louis R. Greenfield, deceased, against A. W. Mather and others to determine right to balance due upon an approved claim against the estate, wherein Dorothy Devore Mather and others by answer to named defendant's cross-complaint sought an accounting. From an adverse judgment, Dorothy Devore Mather and others appeal.

Judgment reversed.

Don Lake and James R. Jaffray, both of Los Angeles, for appellants.

Marcel E. Cerf and Robinson & Leland, all of San Francisco, for respondent.

NOURSE, Presiding Justice.

This appeal presents a tragedy of errors covering a period of more than twelve years, twelve years filled with technical arguments and decisions after which, for reasons which do not appear, some essential issues have still remained unsettled, though four prior judgments have been reversed on appeal in the Supreme Court.

On August 3, 1934, Mr. Mather began an action in the Los Angeles Superior Court against his former wife for rescission of a property settlement made in Hawaii in June, 1933, shortly before their divorce; in which settlement he gave her money, securities, and a one-half interest in an approved claim against the estate of Louis R. Greenfield of which a separate assignment was also made. That assignment transferred to Mrs. Mather "one-half (½) of all sums becoming payable to said grantor from said estate, both by way of principal and interest." In that action the administrators of the Greenfield estate were joined as defendants to have them enjoined from making further payments to Mrs. Mather on the assigned half of the claim. In their answer—subsequently held by the Supreme Court to be in the nature of an interpleader—the administrators disclosed that they were holding a sum of $12,549.60 on account of the Mather claim subject to the orders and direction of the court.

The complaint in this action of Mr. Mather, herein further referred to as the Los Angeles action, was in three counts: one based on fraud, the second on misrepresentation and the third on the ground that under the Hawaiian law a married woman at the time in question was not permitted to contract with her husband. Against the third cause of action a demurrer was sustained without leave to amend and on January 4, 1935, a judgment was entered that plaintiff take nothing by the third cause of action. After trial on the first two counts the court found for Mrs. Mather. Among other facts it was found that the allegations with respect to fraud and misrepresentation were untrue and that Mr. Mather on June 16, 1933, assigned to Mrs. Mather one-half of the title to the approved claim against the Greenfield estate, then amounting to $38,699 together with accrued interest. On March 14, 1935, judgment was entered to the effect that plaintiff take nothing by reason of his complaint, the recitals referring only to the trial on the issues joined by the first and second counts of the complaint. Although a temporary injunction restraining payment to Mrs. Mather was dissolved, no express directions were given to the administrators. Mrs. Mather demanded payment on the basis of the two judgments but Mr. Mather disputed their validity and opposed payment.

In April, 1935, the administrators filed in the San Francisco Superior Court an original action in interpleader, the action in which this appeal is taken. It will be referred to as the San Francisco action. Their complaint pleaded that the Mather claim against the estate had been paid in full except for the sum of $12,549.60, which it asked leave to deposit in court. Mr. and Mrs. Mather, Don Lake and Carl B. Rhodes, the latter as assignees of Mrs. Mather, were all made parties defendant. On August 15, 1935, the administrators were authorized to deposit the sum of $12,549.60 with the clerk, and on June 5, 1936, they were discharged from the case after the four defendants had filed cross-complaints and answers. Mrs. Mather filed her cross-complaint in October, 1935, alleging the assignment by Mr. Mather to her of half the Greenfield claim on which she had been paid but $7,441, and pleading the provision of the assignment directing the administrators "as moneys shall become due and payable and shall be paid on account of said obligation owing by the estate to A. W. Mather, to pay one-half (½) of all such moneys, both principal and interest, to Dorothy Devore Mather until the full amount of the indebtedness owing to said A. W. Mather shall have been completely and fully discharged. * * *" She prayed that "a decree may be entered fixing and declaring the rights of Dorothy Devore Mather and said estate, and the amount remaining unpaid of principal and interest under said assignment and conveyance. * * *" In November, 1935, Mr. Mather filed his cross-complaint in which he pleaded the invalidity of the whole settlement agreement—in this San Francisco action only on the ground of the Hawaii statute—alleged the facts as to all transactions that had taken place under this settlement, among which the fact that in June, 1933, the Greenfield estate was still indebted on the claim in the sum of $38,699 and that Mrs. Mather had received on account thereof $7,441, and claimed not only the amount in the hands of the administrators but also return of everything received by Mrs. Mather under that agreement and for all other relief that may be meet and just. He did not allege what he had received from the estate. Mrs. Mather also prayed for all other relief both as against the administrators and as against Mr. Mather. She stated that her rights were subject to the claims of her assignees Don Lake and Carl B. Rhodes, but Mr. Mather denied their rights alleging that the assignments to them were void, without consideration, and made for the purpose of hindering him.

In the meantime Mr. Mather had appealed from both Los Angeles judgments. In September, 1935, the appeal with respect to the first two counts, the judgment of March 14, 1935, was dismissed for failure to file a transcript; on March 17, 1936, the Supreme Court dismissed the appeal from the judgment of January 4, 1935, as to the third cause of action as an invalid piecemeal disposition of the action and not a final judgment. Mather v. Mather, 5 Cal. 2d 617, 55 P.2d 1174.

In the San Francisco action Mrs. Mather contended that the judgment of March 14, 1935, the appeal from which was dismissed for failure to file a transcript, was a bar to all claims of her husband. The court decided in her favor and distributed all the fund held by the clerk of the court to her and to her assignees. However this judgment was reversed by the Supreme Court (Greenfield v. Mather, 14 Cal.2d 228, 93 P.2d 100) on the ground that the Los Angeles judgment of March 14, 1935, just as the judgment of January 4, 1935, only disposed of part of the case and was not final. The court mentioned (14 Cal.2d at page 232, 93 P.2d 100) that the Los Angeles proceedings were still pending and that appellant could proceed independently either in Los Angeles or in San Francisco. Mrs. Mather then proceeded in Los Angeles and moved the court to enter a final judgment adjudging that plaintiff Mr. Mather take nothing on any count, that the injunctions be dissolved and that the administrators pay to Mrs. Mather the total sum deposited in court. From judgment entered accordingly Mr. Mather appealed because allegedly this judgment deviated from the original findings in 1935, and because the motion was made on insufficient notice. The Supreme Court reversed on both grounds. Mather v. Mather, 22 Cal.2d 713, 140 P.2d 808. The court said (22 Cal.2d at page 718, 140 P.2d at page 810): "The judgment, being based upon a finding that Anna Inez Mather was the owner of one-half of the claim against the Greenfield estate, is erroneous in adjudging her to be the owner of the whole of said claim." The remark must be made that this statement of the Supreme Court seems somewhat elliptic. A decision which adjudges that Mrs. Mather was entitled to the whole of a balance of $12,549.60 based on a finding that she was the owner of half of a claim of $38,699 plus interest is not necessarily erroneous. We presume that the actual intention of the Supreme Court was the same as that expressed more amply in the prior opinion before rehearing (Mather v. Mather, Cal.Sup., 134 P.2d 795, 799), namely, that as the court had found that Mrs. Mather had but a one-half interest in the claim against the Greenfield estate, she "should be entitled to only one-half of any moneys in the hands of the administrators for payment of the claim, in the absence of anything in the record to the contrary."

Thereafter Mr. Mather made a motion in the Los Angeles action for the entry of a judgment in accordance with the decision of the Supreme Court which required (22 Cal.2d at page 719, 140 P.2d at page 811): "the entry of a judgment properly responsive to the prior rulings of the trial court herein—the findings made at the conclusion of the trial on the first two counts and the order sustaining the demurrer to the third count of the complaint—(which) would simply serve to complete the judgment roll in effectively disposing of all the issues in controversy by a single pronouncement of decision as to the entire case." Mrs. Mather, however, now desired a judgment *not* directing what should be done with the amount paid into court. She had in the Los Angeles proceeding only defended the *validity* of the property settlement and assignment and had evidently not been aware that the character of the answer of the administrators might be considered to require her to litigate the extent of her claim to the fund in their hands then and there, but had expected to litigate this point in the original interpleader action in San Francisco. The Los Angeles court again followed Mrs. Mather and on November 1, 1943, entered a judgment which did not make any reference to the disposition of the claim against the Greenfield estate. The Supreme Court again reversed (Mather v. Mather, 25 Cal.2d 582, 154 P.2d 684, 686) "with directions to the trial court to bring this case to a proper termination by including in its judgment a provision that the sum now held on account of the claim against the Greenfield estate be paid as follows: one-half to the plaintiff, A. W. Mather, and one-half to the defendant Anna Inez Mather."

The court mentions (25 Cal.2d at page 585, 154 P.2d at page 685) that Mrs. Mather by "a complicated mathematical argument" tries to show that she is entitled to the whole amount of said claim, but that this point had already been finally decided in the 22 Cal.2d decision. At the same time the Supreme Court rejected definitely Mr. Mather's argument of the invalidity of the settlement under the Hawaii statute.

On March 29, 1945, the Los Angeles court entered its judgment providing:

"It is Hereby Ordered, Adjudged and Decreed 1. That the sum of $12,549.60 admittedly in the hands of the Estate of Louis R. Greenfield and Edna Greenfield, as administratrix, and Herman Wobber and Hugo D. Keil, as administrators, thereof, subject to the order and directions of the court in this action, be paid as follows: One-half of the said sum of $12,549.60 to plaintiff, A. W. Mather, and one-half thereof to defendant, Anna Inez Mather:

"2. That otherwise than as above provided, plaintiff take nothing by his complaint."

After this judgment had become final without appeal, Mr. Mather filed with leave of the court a supplemental cross-complaint in the San Francisco action in which he pleads this final judgment as a bar in this, the San Francisco action. Mrs. Mather and the two assignees filed their joint answer on July 5, 1945, wherein they pleaded the assignment of one-half of the claim against the Greenfield estate; that that claim inclusive of interest amounted to $46,259.65, of which Mrs. Mather was entitled to one-half or $23,129.82½; that there had been paid to Mr. Mather on account of the claim $7,441 on September 3, 1935, $5,581 on January 1, 1934, $6,327.50 on March 2, 1934, and $6,919.55 on July 24, 1934, as against only $7,441 paid to Mrs. Mather on September 5, 1933; that therefore Mrs. Mather was still entitled to $23,129.82½ minus $7,441 which equals $15,688.82½; that Mr. Mather and his attorneys had concealed from Mrs. Mather and from the courts that Mr. Mather's share had been fully paid and more than that before the commencement of any action between the parties and that by certain fraudulent misrepresentations in the pleadings in the Los Angeles action, they had led the courts to assume, *without any evidence as to this point having been received,* that the payments to each of the parties had been equal. The prayer was for judgment against Mr. Mather for $15,688.90.

At the trial on June 25, 1945, Mrs. Mather offered in evidence accounts, reports and vouchers of the administrators of the Greenfield estate showing all the payments to Mr. and Mrs. Mather stated above and mentioning under creditors Dorothy Devore Mather, held in trust pending suits $11,908.50, interest due $641.10, unpaid $12,549.60. However, objections to this evidence were sustained on the ground that the matter was concluded by the last Los Angeles judgment.

Without hearing any evidence the court found that the sum of $12,549.60 mentioned in the Los Angeles judgment of March 29, 1945, is the same as the sum paid to the clerk of the San Francisco court and that by that judgment it is finally adjudicated that Mr. Mather is entitled to one-half of that sum plus certain costs. The judgment provides only for disposition of that sum in accordance with that Los Angeles judgment.

Mrs. Mather and her assignees contend on appeal that the court had failed to find on material issues joined by the pleadings, both as to the rights of the assignees and as to those of Mrs. Mather as against Mr. Mather and that the court erred in refusing to ascertain an account between the parties regarding the distributions between them of the original claim against the Greenfield estate and in rejecting evidence regarding the payments made in that respect.

It is important therefore to determine just what issues have been tendered for decision in this San Francisco action and what has been heretofore adjudicated.

[1-4] The issues joined were certainly not restricted to the disposition of the balance of $12,549.60 only. Even the original cross-complaints of the respective parties and their answers thereto, as stated herein before, tendered the issues of the validity of the whole property settlement and of the respective rights of Mr. and Mrs. Mather in case of validity or invalidity of that settlement. Although in that state of the proceedings the claims of Mrs. Mather as to Mr. Mather were still vague; they were made precise and stated with sufficient exactitude in Mrs. Mather's pleading of July 5, 1945, entitled answer to supplemental cross-complaint of A. W. Mather. In that pleading Mrs. Mather set up the respective payments received by the parties on account of the Greenfield claim and sought a judgment in the nature of an accounting, on the basis that each of the parties was entitled to an equal half of that claim. The record does not show any objection to the filing of this pleading, nor any motion to strike out any part of it, nor any request that the submission of the cause be set aside. The trial judge mentions it as a basis for his findings. Under these circumstances we need not and cannot review whether this method of procedure was regular or not. Groom v. Bangs, 153 Cal. 456, 459, 96 P. 503; Eldridge v. Mowry, 24 Cal.App. 183, 190, 140 P. 978; Stoops v. Pistachio, 70 Cal.App. 772, 777, 234 P. 423. We hesitate the less to consider this pleading as regular and determinative of the issues, as liberality in permitting amendments is favored in furtherance of justice and in the present case no justice between the parties can be done without an accounting of the respective payments they received. Appellants' allegations and offers of proof, which seem not to be seriously denied show that Mr. Mather surreptitiously received $18,528.05 more than Mrs. Mather, whereas both should have received equal amounts. The amending or supplementing of the pleadings does not cause any prejudice to respondent "unless the deprivation of an opportunity to defeat a just claim on unsubstantial and technical grounds can be said to be prejudicial. The rule is to the contrary." San Joaquin Valley Bank v. Gate City Oil Co. 170 Cal. 250, 253, 149 P. 557, 558. Even if the affirmative relief prayed for is in the character of a cross-complaint, the pleading contains sufficient allegations for such a cause of action. If such is the case it is immaterial that the appellants designate it an answer. Holmes v. Richet, 56 Cal. 307, 311, 38 Am.Rep. 54; Hanes v. Coffee, 212 Cal. 777, 780, 300 P. 963.

We are therefore satisfied that the evidence offered was within the issues raised by the pleadings and admissible if the trial of these issues was not barred as res judicata, as held by the trial court. However, we do not find any prior adjudication with respect to final accounting between the parties of the payments they received on the claim. Three issues can be considered as finally adjudicated:

1. That the property settlement and assignment were valid. It was so held in all decisions in the Los Angeles action and finally decided by the Supreme Court in 25 Cal.2d 582, 587, 154 P.2d 684, and in the decision of the Los Angeles court of March 29, 1945, holding that—except for half of the amount in the hands of the administrators—plaintiff take nothing by his action attacking the validity of the assignment.

2. That appellant was entitled to one-half of the title to the approved claim against the Greenfield estate at the time of the assignment amounting to $38,699 together with accrued interest. It was so found by the Los Angeles court in the findings of March 14, 1935, and on these findings the Supreme Court in 22 Cal.2d 713, 718, 140 P.2d 808, based its reversal of a judgment, adjudging Mrs. Mather to be entitled to the whole of the moneys in the hands of the administrators.

3. That the amount in the hands of the administrators be paid one-half to appellant, one-half to respondent Mather. It was so ordered in the judgment of March 29, 1945, responsive to the express direction to that effect of the Supreme Court in 25 Cal.2d 582, 587, 154 P.2d 684. In her pleading of July 5, 1945, appellant attacked the validity of this last adjudication on the ground of fraudulent misrepresen-

tations of Mr. Mather and his attorneys which had led the courts to assume that the payments to each of the parties had been equal. The trial court found in this respect. "Each of the allegations of the answer of cross-defendants Dorothy Devore Mather, Carl B. Rhodes and Don Lake to the supplemental cross-complaint of A. W. Mather, which purports to contradict or impeach the adjudication, purport or effect of said judgment of March 29, 1945, is untrue, including, without affecting the generality of the preceding portion of this finding, Paragraphs XX, XXII, XXIII, XXV, XXVII, XXVIII, XXX, XXXI, XXXIII, XXXV and XXXVI."

There may be some doubt whether this finding is sufficiently definite to support a judgment (Krug v. F. A. Lux Brewing Co., 129 Cal. 322, 61 P. 1125), but we do not think that the issue presented by the alleged misrepresentations is material and therefore neither the truth of these allegations nor the question whether they can form a basis for a collateral attack on the judgments in the Los Angeles action needs decision. We do not find any prior adjudication, either express or implied, that the payments made to each of the parties on the Greenfield claim have been equal. No prior equal payments need be assumed to justify equal division of the moneys in the hands of the administrators. As pointed out in the prior opinion of the Supreme Court, before rehearing, 134 P. 2d 795, the indenture of assignment provided that each separate amount that became payable should be divided equally. In the Los Angeles action no accounting of the total amounts received on the claim was at issue at all. The only original issue was the validity of the property settlement and assignment. Incidentally the administrators brought up the disposition of the money in their hands. To decide their interests in this amount the parties could have investigated all prior payments; they were under no duty to do so and they did not do so. No allegations whatever as to prior payments were made in the Los Angeles court before trial; no evidence as to it was offered at the trial there, nothing as to it was in the record that went up to the Supreme Court. Before rehearing, 134 P.2d 795. The decision equally to divide the moneys in the hands of the administrators which was before the court as a separate specific issue is supported by the agreement of the parties independent from the equality of the prior payments.

[5] "That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto." Section 1911, Code of Civil Procedure. In Title Guarantee & Trust Co. v. Monson, 11 Cal.2d 621, 631, 81 P.2d 944, 949, it is said: "Although it is a general rule that a judgment operates as an estoppel to the maintenance of a subsequent action as between those persons who were parties to the former action, not only as it may affect each issue that actually was raised in such action, but also as to every other issue which properly might have been litigated and determined therein, nevertheless, in each of many jurisdictions, exceptions to that rule have been announced, which include a situation wherein it has appeared that the questioned issue in the subsequent action was neither germane to nor essentially connected with the actual issues that were raised in the former action, even though, with propriety such issues might have been presented therein. 34 C. J. 818, 823. Nor is the rule applicable to rights, claims or demands, although growing out of the same subject matter, but which constitute separate or distinct causes of action, and which were not put in issue in the former action. 34 C.J. 823." See also our decisions in Schumacker v. Industrial Acc. Com., 46 Cal.App.2d 95, 98, 115 P.2d 571, and Progressive Collection Bureau v. Whealton, 62 Cal.App.2d 873, 877, 145 P.2d 912.

[6] The trial of the issue in the nature of an accounting of prior payments, tendered by the pleadings was therefore not barred by any prior adjudication and the evidence offered in that respect was admissible.

Neither has there been any prior adjudication of the rights of the assignees who had not been made parties to the Los Angeles action.

[7] The trial court should accept the final judgment of the Los Angeles court as res judicata of the three issues there decided—that the property settlement and assignment are valid and that each party is entitled to one-half of the claim and one-half of the sum on deposit. It should then determine how much of *the claim* has been paid to each and enter a judgment which will give to each their respective one-half in accordance with the former judgment. If it is found that respondent has received more than his share the appellants should have a lien on that portion of the deposit awarded to respondent under the Los Angeles judgment. The rights of the assignee appellants herein should be finally determined.

Judgment reversed.

GOODELL and DOOLING, JJ., concur.

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79 Cal.App.2d 11

PEOPLE v. CLINE.

Cr. 2424.

District Court of Appeal, First District, Division 1, California.

April 10, 1947.

Rehearing Denied April 25, 1947.

Hearing Denied May 8, 1947.

1. Forgery 🔑44

The possession of an instrument recently forged by one claiming under it is evidence against the possessor. Pen.Code, § 470.

2. Criminal law 🔑317

In prosecution for forgery by altering a deed so as to show defendant as the grantee instead of one originally the grantee, jury could consider fact that defendant did not testify in determining question of defendant's authority to alter deed where defendant was the only one who knew the circumstances relative to his authority. Pen.Code, § 470.

3. Criminal law 🔑1159(2)

The right to draw proper inferences from the evidence is a function of the jury and so long as conclusions drawn by a jury do not do violence to reason, an appellate court may not substitute its finding of the ultimate fact for that reached by the jury.

4. Forgery 🔑44

Evidence sustained conviction for forgery of a deed. Pen.Code, § 470.

5. Criminal law 🔑29

The forgery of eight documents at one time in the course of one transaction constituted eight crimes and not only one, authorizing conviction for each of the eight forgeries. Pen.Code, § 470.

6. Forgery 🔑12(2)

In prosecution for forgery, sufficiency of forged instruments to create a legal liability was immaterial. Pen.Code. § 470.

Appeal from Superior Court, San Francisco County; Herbert C. Kaufman, Judge.

Alfred L. Cline was convicted of forgery, and he appeals.

Judgment affirmed.

J. W. Ehrlich and Roy A. Sharff, both of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., Miriam E. Wolff, Deputy Atty. Gen., Edmund G. Brown, Dist. Atty., and Norman Elkington, Asst. Dist. Atty., both of San Francisco, for respondent.

WARD, Justice.

Whether a judgment of conviction under nine counts of forgery can be sustained, is the question raised by this appeal.

The first count of the indictment charges Alfred L. Cline with forgery committed as follows: "The said Alfred L. Cline on or about the 9th day of November A.D. nineteen hundred and forty-five at the City and County of San Francisco, State of California, with the intent then and there to cheat, prejudice, damage and defraud Elizabeth Cline, Walter Graf and Title Insurance Company, a corporation, did then and there knowingly, wilfully, fraudulently, falsely, and feloniously make, alter, forge and counterfeit a certain deed and instrument in writing in words and figures following, to-wit: Deed Elizabeth Hunt hereinafter called the grantor hereby grants to Elizabeth Cline herein called the grantee, all of that real property situated in the City of Richmond, County of Contra Costa, State of California, described as follows: All of lot numbered Four (4) in Block numbered Twenty-six (26); and all of lots numbered one (1), two (2), and three (3), in block numbered Twenty-six (26) * * * which said deed and instrument in writing after such making, altering, forging and counterfeiting was in words and figures following, to-wit: Deed Elizabeth Hunt hereinafter called the grantor hereby Grant to Alfred L. Cline herein called the grantee, all that real property situated in the City of Richmond, County of Contra Costa, State of California * * * and did then and there utter, publish, pass and attempt to pass the said deed and instrument in writing as true and genuine, knowing the same to be false, altered, forged and counterfeited, with intent to prejudice, damage and defraud said Elizabeth Cline, Walter Graf, and Title Insurance and Guaranty Company, a corporation contrary to the form, force and effect of the Statutes in such case made and provided, and against the dignity of the People of the State of California."

The prosecution introduced evidence establishing that August 24, 1943, the defendant appeared before the notary public who notarized a deed which was executed by Elizabeth Hunt to Elizabeth Cline concerning lots one, two, three, and four of block twenty-six in Contra Costa County. Following the entry as to said deed, the notary public's records contained this notation: "Mr. Cline, 559-30-7918." When the defendant was apprehended he had in his possession a social security card bearing the numbers 559-30-7918 and the name Alfred Leonard Cline. That same day a withdrawal for $565.55 was made from account 55739 held by Elizabeth Hunt Lewis with the Farmers and Merchants Savings Bank. Two days later said account was closed with a cashier's check for $2,000 to the order of A. L. Cline. When the defendant was apprehended, a dictionary bearing the name Elizabeth Hunt, a paper showing the names and addresses of relatives of Mrs. Elizabeth Hunt Lewis, and a promissory note to the order of A. L. Cline for $4,000, signed "Mrs. Elizabeth Lewis," dated August 15, 1943, were found in his possession.

A registration of A. L. Cline at the Hotel Windsor, Jacksonville, Florida, October 22, 1943, was identified as being in the defendant's handwriting. A document, dated November 10, 1943, requesting the cremation of the remains of "Elizabeth Hannah Klein by one F. L. Klein" as husband of the deceased was identified as bearing defendant's handwriting. A certificate of death bearing the same date stated that one Elizabeth Hannah Klein died November 8, 1943, at 10 a. m., from "Dilation of the heart, due to Hyperthropy of Heart," and was cremated at the Southern Crematorium, Jacksonville, Florida, November 10, 1943. The certificate bears the signature of S. A. Kyle as director of the crematorium. Upon defendant's apprehension a notebook was taken from him which contained the following notation: "S. A. Kyle, 17 W. Union. Southern Crematorium, 323 Riverside Ave, Oak Lawn Cemetery."

Two years later, November 9, 1945, defendant sent Walter Graf of the Title Insurance & Guaranty Company a deed covering all of lots numbered one, two, three and four in block numbered twenty-six in the City of Richmond, County of Contra Costa, bearing the typewritten name of Elizabeth Hunt as grantor and the typewritten name of Alfred L. Cline as grantee. An expert testified that the words "Elizabeth Hunt" and "Elizabeth Cline" had been written in pencil on the document in the areas where the words "Elizabeth Hunt" and "Alfred L. Cline" were typewritten, but that the penciled writings were subsequently erased. An infra-red photography process picked up graphite from the pencil as well as "red rubber like particles deposited by a pencil erasure."

[1, 2] In addition to being instructed as to the provisions of section 470 of the Penal Code, the jury was specifically told that an "essential element of the crime of forgery is the false making or signing of another's name without authority. The burden of es-

tablishing want of authority is upon the prosecution." The jury returned a verdict of guilty on the count now under consideration.

On appeal, defendant contends that the conviction on the first count cannot stand as there is no evidence tending to establish that defendant was not authorized to alter the deed. He points out that no evidence was offered to connect the deceased Elizabeth Hannah Kline with the Elizabeth Cline mentioned in the deed, nor was any evidence offered as to the date of the alteration of the deed. Defendant, however, overlooks the rule stated in People v. Smith, 103 Cal. 563, 566, 37 P. 516, 517: "The possession of an instrument recently forged, by one claiming under it, like the possession of goods recently stolen, is evidence against the possessor." Furthermore, the jury was entitled to take into consideration the fact that the defendant did not take the witness stand. As said in People v. Caldwell, 55 Cal.App.2d 238, 251, 252, 130 P.2d 495, 502: "This case is of the type in which the rule of convenience might properly be applied. While the information accused appellant of a forgery necessitating proof that he did not have the authority * * * to affix the * * * name to the certificate or to the indorsement upon it, appellant did not take the stand to throw any light upon that subject. Under circumstances * * * appellant should have assumed some of the responsibility of defeating the accusation rather than of maintaining the attitude of expecting the prosecution to fail in its proof. * * * His proof of possession of any such authority would instantly have dispelled the web that entangled him, and if such proof existed it lay peculiarly within his knowledge," citing People v. Agnew, 16 Cal.2d 655, 663, 107 P.2d 601; People v. Terrill, 133 Cal. 120, 65 P. 303.

Recognition of the rule of convenience does not deprive defendant of the presumption of innocence. The Supreme Court in People v. Osaki, 209 Cal. 169, 186, 286 P. 1025, 1031, stated: "It is consistent with all the constitutional protections of accused men to throw on them the burden of proving facts peculiarly within their knowledge and hidden from discovery by the Government. 4 Wigmore, Evidence, § 2486." In People v. Agnew, supra, the defendant argued that there cannot be two conflicting presumptions in a criminal case and that the presumption of innocence outweighs all other presumptions, citing People v. Strassman, 112 Cal. 683, 45 P. 3, relied upon by defendant herein. At page 662 of 16 Cal. 2d., at page 604 of 107 P.2d, the court stated that the effect of the language in the Strassman opinion "is clearly nullified by the decision in People v. Le Doux, 155 Cal. 535, at page 553, 102 P. 517, at page 524, the court saying, 'The instructions declare that the presumption of innocence is the only presumption allowable in a criminal case, that it is not overcome by any other presumption, but does overcome all other presumptions of whatsoever kind or nature. Such, however, is not the law. All presumptions are evidence. Conclusive presumptions (Code Civ.Proc. § 1961, 1962) are not overcome by the presumption of innocence, nor are many disputable presumptions so overcome.' "

[3, 4] The conviction on the first count must stand. "The right to draw proper inferences from the evidence is a function of the jury; and as long as its conclusions do not do violence to reason, an appellate court is not permitted to substitute its finding of the ultimate fact for that reached by the constitutional as well as the statutory arbiter thereof. Circumstantial evidence may be as convincing in its force and as conclusive as the testimony of witnesses to an overt act." People v. Latona, 2 Cal. 2d 714, 725, 43 P.2d 260, 265.

The second count of the indictment accused defendant with the theft of the deed mentioned in the first count. It was dismissed by the trial court prior to the submission of the case to the jury. The indictment also charged defendant with two prior convictions of felonies. He admitted this charge.

Each of counts three to six, respectively, charge defendant with forging an affidavit of loss to defraud Old Colony Trust Company, American Investment Securities Company, E. Delora Krebs, and the estate of E. Delora Krebs, and with uttering said instrument for the purpose of defrauding the same parties. The said affidavits of loss allege the loss of certificate No. 571 representing 25 shares of the common stock of American Investment Securities Company issued in the name of E. Delora Krebs, which was exchangeable for two shares of the Columbia Life Insurance Company and $139.38, and ask the release of the aforesaid securities and cash in lieu of that alleged to have been lost. Each of counts seven to ten, respectively, alleges the forging of an indemnity bond indemnifying the American Investment Securities Company, the Old Colony Trust Company, etc., from loss should the allegedly lost certificate No. 571 be found, and charges that said forging was committed with intent to defraud the same parties mentioned in counts three to six and uttered for the same purpose.

In proving that Mrs. E. Delora Krebs neither signed the eight documents which form the basis of counts three to ten nor authorized the signing of her name, the prosecution established that Mrs. E. Delora Krebs was dead on October 18, 1944, whereas the Plan of Liquidation and Dissolution was not adopted until December 12, 1944. This proof brought to light the defendant's relationship with three women, Mrs. Alice Carpenter, Mrs. E. Delora Krebs, and Mrs. Isabel Van Natta.

February 12, 1944, Mrs. Alice Carpenter left Jacksonville, Florida, in good health. Mrs. Chase, a friend of Mrs. Carpenter, identified defendant as the man with whom Mrs. Carpenter departed. The hotel register of the Hotel Lanier of Macon, Georgia, contains a registration for February 17, 1944, of F. A. Klein of San Francisco and Mrs. Alma Carter of San Francisco. An expert identified the writing as that of the defendant. Pictures which Mrs. Chase identified as being of Mrs. Carpenter, were recognized by the hotel housekeeper as those of the lady who had died in the hotel on February 21, 1944, and who had been accompanied by the man she identified in the courtroom as being the defendant. Mrs. Carpenter told her she was on her way to manage an apartment house. The housekeeper asked defendant why he didn't do something for Mrs. Carpenter and he replied, "She's a Christian Scientist and won't take any medicine." The death certificate revealed that "Alma Finch Carter" died of "acute endocarditis," February 21, 1944, and was cremated the same day. It was signed "F. A. Kline, St. Petersburg, Florida." After Mrs. Carpenter's death, defendant gave her clothes to the hotel housekeeper to distribute to the maids—in one of the garments she found a dry cleaner's mark with the name "Alice Carpenter."

May 28, 1944, defendant married Mrs. E. Delora Krebs in Chicago, Illinois. She was in the habit of keeping in close contact with her relatives and was a prolific letter writer. She was last seen by her relatives in September, 1944, at which time she was in good health. After October the family received numerous letters purportedly written for her by defendant post marked somewhere in the West. They stated that she was not well as a result of the long trip West by car, but since she and defendant believed in Christian Science they did not choose to discuss the matter; defendant asked the family to communicate by writing to Box 1532, Columbus, Ohio; the letters reveal a gradual deterioration in her health.

Mr. Gerald W. Christian, a funeral director employed by Sparkman Brand, Inc., a crematorium in Dallas, Texas, testified that on October 17, 1944, he met a man whom he identified as being the defendant. The latter asked him to cremate the body of a Mrs. Carpenter for whom he was business manager. The death certificate, which was signed "Fred Cline," showed that the death of a Mrs. Carpenter occurred in Dallas, Texas, October 18, 1944, from "coronary occlusion." The picture identified by Mrs. Chase as being that of Alice Carpenter was shown to Mr. Christian who testified that the woman he had embalmed was not the one appearing in that picture. He testified that a picture identified as being that of Mrs. E. Delora Krebs was a picture of the woman he had prepared for cremation. A package containing the personal effects of Mrs. E. Delora Krebs was mailed at Dallas, Texas, October 19, 1944.

The prosecution introduced evidence of defendant's purpose in concealing the death of E. Delora Krebs, and pretending that she was alive. She was the recipient of an annuity which did not expire until November 15, 1945, and which paid $500 a month. November 29, 1945, defendant wired her relatives "Delora very sick past week. Passed on very suddenly yesterday of hemorrhage of the brain. Undecided about plans. Will wire again to-morrow. A. L. Cline, Old Heathman Hotel."

November 17, 1945, defendant and Mrs. Isabel Van Natta registered at the Mountain View Hotel, Calistoga, California. A chamber maid in the Hotel Heathman, Portland, Oregon, identified a picture of Mrs. Van Natta as being that of the woman who was registered in that hotel on or about November 25, 1945. Her description of Mrs. Van Natta's appearance corresponds with that given by Mrs. Van Natta's friends—she walked with a cane and her knuckles were large "like she had arthritis or rheumatism or something like that." The register of the Hotel Heathman showed that the defendant was there the last of November, 1945. The death certificate showed that the death of "E. Delora Cline" occurred November 29, 1945 in Portland, Oregon, and that the body was cremated November 30, 1945—the cause of death given was cerebral hemorrhage due to hypertension.

The attorney of Mrs. E. Delora Krebs, Mr. Gerald Ryan, received the following letter from defendant: "February 28, 1945. Dear Mr. Ryan: I am mailing you under separate cover the papers requested. I hope you will find them entirely in order. I note they want to give Mrs. Cline $139.38 in cash and two shares of the Columbia Life Insurance Company. Ask them to pay it all in cash to her, for we do not want to bother with just two shares of stock in any company. If we are forced to take the two shares, ask them to make the certificate to Alfred L. Cline, which will make it a little simpler to transfer for I will sure trade it off or sell it. * * * Write us at Columbus, Box 1532, and we will get it in due time * * * A. L. Cline." "The papers requested" were the affidavits of loss and indemnity bonds which constitute the basis of counts three to ten. These were also received by Ryan. Each of these documents were signed "E. Delora Cline formerly E. Delora Krebs" and each of them contained an original acknowledgment. Expert witnesses testified that the signatures were traced and that the word "formerly" was in the defendant's handwriting.

Defendant contends that the trial court erred in (1) permitting him to be tried for forgery on counts three to ten, inclusive, as separate crimes; (2) in instructing the jury "that the false making or forging of two or more separate instruments all done at the same time and as a part of the same transaction constitutes separate and distinct offenses of forgery. * * * The making or forging of a number of forged instruments constitutes as many crimes as there are forged instruments, each forged instrument being the product of a separate crime"; (3) in accepting separate verdicts on each of said counts; and (4) in pronouncing judgment upon the defendant on each of said counts as a separate offense.

Whether the forgery of several documents at one time in the course of one transaction constitutes only one crime or as many crimes as there are instruments, was considered in People v. Gayle, 202 Cal. 159, 259 P. 750. There the defendant was a real estate salesman in Los Angeles, California, and was attempting to sell property owned or controlled by the Clear Lake Beach Company. He handed to said company three purported contracts of sale of lots in its subdivision, each contract being accompanied by a check of the supposed purchaser for the first payment upon the land. Defendant was tried and convicted upon six counts charging, separately, forging of the three different checks and their corresponding contracts. On appeal he contended that each check was connected with a contract and the two were one inseparable transaction; hence that he could only be charged with three offenses and not with six. The Supreme Court ruled at pages 162, 163 of 202 Cal., at page 751 of 259 P., "the false making and forging of two separate instruments, although done at the same time, are separate and distinct offenses," citing People v. Ryan, 74 Cal.App. 125, 239 P. 419. The opinion then continues (at page 163 of 202 Cal., at page 751 of 259 P.): "No question was raised at the time of the return of the verdict as to its form or sufficiency in not indicating which of the acts charged as forgery had been committed by defendant with reference to each of the instruments. Had such an objection been made, the court, probably, would have returned the verdict to the jury and directed a reconsideration of it, as provided by section 1161 of the Penal Code." In the present case, the request noted in the Gayle case was not presented at the time of the return of the verdict, and no objection was made to the recordation of the verdict. Penal Code, sec. 1161.

During the presentation of the prosecution's case, defendant vigorously raised the question as to whether the eight documents constituted one crime or eight crimes. The trial court instructed the jury adversely to defendant's contention. In so doing, full effect was given to the rule laid down in the Gayle case.

The precise question here involved has received little attention either in reported cases or in treatises. The most comprehensive treatment of the subject is found in 61 L.R.A. 819, wherein, at page 822, it is said: "The forgery of several instruments at the same time is regarded generally as the commission of a separate offense for each instrument." Quoted with approval in People v. Ryan, supra, 74 Cal. App. at page 130, 239 P. 419. Language in opinions to this effect is frequently merely dicta as is the case in State v. Moore, 86 Minn. 422, 424, 90 N.W. 787, 61 L.R.A. 819. Often a trial for the forgery of several instruments will culminate in a conviction on several counts of forgery without the question of the separateness of the offenses ever being raised, although the propriety of the indictment or information may be questioned. United States v. Lawrence, 13 Blatchf. 211, 26 Fed.Cas. 578, [Fed.Cas. No. 15572] Towles v. U. S., 19 App.D.C. 471; Rex v. Thomas, 2 East Pleas of the Crown 934; Van Sickle v. People, 29 Mich. 61.

In Barton v. State, 23 Wis. 587, the defendant forged five separate drafts. The court held that the forging of each draft was a distinct and separate offense by itself, stating, 23 Wis. at pages 589, 590, that "The fact that the five drafts were each for the same amount, and upon the same sheet of paper, is entirely immaterial. They were five distinct and separate forgeries." The theory of the court appears to be that evidence showing that the defendant forged one of these drafts would not prove that he forged the others.

The indictment in United States v. Carpenter, 9 Cir., 151 F. 214, 9 L.R.A.,N.S., 1043, 10 Ann.Cas. 509, contained four counts. The first count charged the alteration of a money order on November 28, 1903; the second count charged the utterance of that order; the third count charged the alteration of another money order on the same day; and the fourth count charged its utterance. The appellate court held that the forging and uttering of a forged instrument constituted one crime, but that the first and third counts charged separate offenses, citing the Barton case and 19 Cyc.Law & Proc., p. 1411.

[5] In view of the foregoing authorities and the position taken by the Supreme Court in People v. Gayle, supra, the ruling of the trial court must be sustained. None of the authorities cited by the defendant require a holding that counts three to ten charge only one crime. They support the proposition that the forging and uttering of one instrument constitute but one offense (People v. Frank, 28 Cal. 507, 513), and the proposition that only one offense is charged in an indictment which alleges that various acts of forgery took place on one instrument. People v. Dole, 122 Cal. 486, 55 P. 581, 68 Am.St.Rep. 50; see, also, Rosekrans v. People, 3 Hun 287, 2 Cow. Cr. R. 195, 5 T. & C. 467 (N.Y.); People v. Wright, 9 Wend. (N.Y.) 193. Defendant quotes from People v. Adams, 79 Cal. App. 373, 375, 376, 249 P. 536, which relates to a pleading problem as to what instruments the defendant therein was accused of forging. Such language is not in point.

[6] Defendant also challenges the sufficiency of each of the instruments which constitute the basis of counts three to ten, citing People v. Tomlinson, 35 Cal. 503, 506. The dicta of the Tomlinson case was expressly overruled in People v. Munroe, 100 Cal. 664, 666, 35 P. 326, 24 L.R.A. 33, 38: "There is some general language in the

Tomlinson case, taken very probably from People v. Shall, 9 Cow. (N.Y.) [778,] 784, to the effect that the writing, if genuine, must be sufficient to form the basis of a legal liability; but such is not the true test, in our opinion. The requirements of the statute demand no such construction, and its adoption would result in the escape from justice of many criminals." See, also, People v. McKenna, 11 Cal.2d 327, 332, 79 P.2d 1065.

Defendant was not prejudiced by the conduct of the trial court ordering that the sentence pronounced on counts three to ten run consecutively.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

* * *

79 Cal.App.2d 48

In re NICOLL'S ESTATE.

NICOLL v. NICOLL

Civ. 15398.

District Court of Appeals, Second District, Division 3, California.

April 10, 1947.

1. Executors and administrators 🔑21(1)

Finding that one seeking appointment as administrator with will annexed was not a competent person to administer estate's affairs because of lack of business experience is not a finding of "incompetency" within meaning of statute disqualifying a person to serve as executor. Probate Code, § 401.

See Words and Phrases, Permanent Edition, for all other definitions of "Incompetency".

2. Executors and administrators 🔑15

The expression "want of understanding", as used in statute disqualifying a person to serve as executor, does not mean lack of business experience, but a want of common intelligence amounting to a defect in intellect. Probate Code, § 401.

See Words and Phrases, Permanent Edition, for all other definitions of "Want of Understanding".

3. Executors and administrators 🔑19

The fact that deceased's wife, under provisions of property settlement agreement made part of interlocutory divorce decree, waived her right to act as administratrix of deceased's estate, was not a waiver by her in her representative capacity of guardian of deceased's minor child, of the minor's right, if any, to have letters of administration granted to her as minor's guardian.

4. Executors and administrators 🔑21(2)

On appeal from judgment appointing deceased's brother as administrator with will annexed rather than guardian of minor son of deceased, District Court of Appeal had no authority to interpret the will for purposes of distribution.

5. Executors and administrators 🔑21(2)

Where provisions of will were not clear as to whether testator's minor son was to succeed to a part of testator's estate, and will had not been interpreted by the probate court for distribution, District Court of Appeal on appeal from judgment appointing testator's brother as administrator with will annexed, instead of guardian of minor son, could not say that trial court erred in finding that guardian did not have the prior right to appointment as administrator, thereby finding, in effect, for purposes of appointing administrator, that minor did not succeed to a portion of testator's estate. Probate Code, §§ 409, 420, 422, 426.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Proceeding in the matter of the estate of Clarendon R. Nicoll, deceased, wherein David R. Nicoll, brother of the deceased, filed a petition for probate of the deceased's will and for letters of administration with the will annexed, and wherein Mary Nicoll, as guardian of the person and estate of

Barry R. Nicoll, eight-year-old-son of the deceased, filed a petition for probate of the will and for letters of administration as guardian. From a judgment appointing David R. Nicoll as administrator with the will annexed of the estate of Clarendon R. Nicoll, deceased, and admitting the will to probate, and from an order denying a motion for new trial, Barry R. Nicoll, by and through his duly appointed guardian, Mary Nicoll, appeals.

Judgment affirmed. Appeal from order denying motion for new trial dismissed.

John A. Holland and John M. Hines, Jr., both of Los Angeles, for appellant.

Macfarlane, Schaefer & Haun and William Gamble, all of Los Angeles, for respondent.

WOOD, Justice.

Clarendon R. Nicoll died on July 8, 1945, leaving an holographic will, dated October 11, 1943, in which he did not nominate an executor. David R. Nicoll, brother of decedent, filed a petition for probate of the will and for letters of administration with the will annexed.

The decedent had obtained an interlocutory decree of divorce from his wife, Mary Nicoll, on June 28, 1940, but a final decree of divorce has not been entered. Under a property settlement agreement executed on June 19, 1940, by decedent and Mary Nicoll, which was made a part of the interlocutory decree, the decedent and Mary Nicoll each waived the right to inherit from the other and waived the right to be administrator of the estate of the other. Mary Nicoll is the guardian of the person and estate of Barry R. Nicoll, aged about 8 years, the son of decedent and Mary Nicoll.

As such guardian, she filed a petition that the will be admitted to probate and that letters of administration with the will annexed be issued to her as such guardian of said minor. Also as such guardian she filed objections to the said petition of David R. Nicoll for letters of administration with the will annexed, and alleged that as such guardian she had the prior right to such letters of administration; that David R. Nicoll was not a fit person to be appointed for the reason that he was physically unable to conduct the affairs of the estate; that his interests under the will and otherwise were adverse to the interests of said minor; and that David R. Nicoll did not have sufficient knowledge or experience to carry on the general contracting business of decedent as a going concern.

David R. Nicoll filed objections to the said petition of said guardian for letters of administration, and alleged that under said property settlement agreement Mary Nicoll had waived all rights to act as administratrix; that she was not a competent person to serve as administratrix by reason of a want of integrity; that it would not be for the best interests of the minor for her to administer the estate of decedent for the reason that after the interlocutory decree of divorce, while she had custody of said minor, she purported to be married to a Mr. Hawkins and resided with him as husband and wife; and that thereafter, at a time when a final decree of divorce had not been entered, she entered into a marriage ceremony with a Mr. O'Hara and lived with him as husband and wife.

The will was as follows:

"10-11-43 I, Clarendon R. Nicoll being sound of mind make my last and only will this 11th day of Oct-1943, as Follows, I leave my contracting business, equipment, real estate, Insurance, personal belongings, and stocks and bonds, (box at Bank of Am 7 & Spring Sts) to my brother Dave R. Nicoll; who will always take care and share same with my only son Barry R. Nicoll to the best of his ability. In case of Dave's death all above and cash on hand to go into a Trust fund for son Barry to be given him in 3 parts—one at 18, 21, and 25 yrs old. My oldest brother James S. Nicoll or Bank of Am. to be administrator in such a case.

"Also leave my cash in Bank of Am. 7th & Spring & money due me on contracts to my brother Dave R. Nicoll except $500.00 cash which is to go to my faithful servant Billie Clark. Also leave $1.00 to my ex-wife now Fay Hawkins. This will is the way I want it and not to be changed.

"Bury me at Sawtelle with the boys. Again I say I am of sound mind and this is only will—signed.

"Clarendon R. Nicoll
"C. R. Nicoll.

"Dog Madame Queen to go to Billie Clark."

The court found that decedent left property consisting of real property of the approximate value of $10,000; and personal property consisting of $10,470 cash; a going masonry contracting business having equipment of the approximate value of $2,000; an automobile of the approximate value of $1,000; and stocks and bonds of the approximate value of $4,600. It further found, among other things, that David R. Nicoll, the brother, was entitled to succeed to the bulk of the estate; that he had worked with decedent for the past 19 years in the said masonry contracting business; that "it is not true that no other person exists who has a prior right to petitioner, Mary Nicoll, as such Guardian, to Letters of Administration-With-the-Will-Annexed of the said Estate of Clarendon R. Nicoll, Deceased"; that Mary Nicoll individually had waived all rights to act as administratrix; that Mary Nicoll was not a competent person to administer the affairs of said estate by reason of lack of business experience; that it would not be for the best interests of the minor for her to administer the estate; that it is not true that David R. Nicoll is not a fit person to handle the affairs of the estate; that it is not true that he is physically unable to conduct the affairs of the estate; that it is not true that he has interests adverse to the interests of the minor; that David R. Nicoll has sufficient knowledge, skill or experience to carry on said business in a competent and economical manner. As a conclusion of law, among others, the court concluded that Mary Nicoll, as guardian of said minor, is incompetent to serve as administratrix of the estate of the decedent.

The will was admitted to probate, and David R. Nicoll was appointed administrator with the will annexed of said estate. The judgment admitting the will to probate and appointing the administrator was signed and filed on October 22, 1945, and was entered on October 29, 1945.

The notice of appeal recites that Barry R. Nicoll, a minor, by Mary Nicoll, the guardian of his person and estate, appeals from the judgment entered on September 22, 1945, and from an order denying a motion for a new trial.

The minor, by his guardian, contends that letters of administration with the will annexed should have been granted to his guardian in preference to David R. Nicoll, the brother of decedent, since, according to Section 422, subdivision 2, of the Probate Code, the minor, being the son of decedent, is in class two of the order of priority in which administrators should be appointed, whereas, the brother is in class five of such order. Said Section 422 provides that administration must be granted to one or more of the following persons, who are entitled to letters in the following order: "(1) The surviving spouse, or some competent person whom he or she may request to have appointed. (2) The children. * * * (5) The brothers and sisters. * * *" Said section also provides that "the relatives of the decedent being entitled to priority only when they are entitled to succeed to the estate or some portion thereof." It is provided in Section 409 of the Probate Code that "Persons are entitled to appointment as administrators with the will annexed in the same order of priority as in the appointment of administrators * * *." In Section 426 of the Probate Code it is provided that "If a person otherwise entitled to administer is a minor * * * letters may be granted to his or her guardian, or any other person entitled to letters, in the discretion of the court." The words, "other person entitled," appearing in said Section 426 refer to a person who is of the same class as the minor, who, either as an adult or a minor is seeking letters of administration. Estate of Turner, 143 Cal. 438, 443, 77 P. 144.

[1, 2] The finding that Mary Nicoll was not a competent person to administer the affairs of said estate by reason of lack of business experience is not a finding of incompetency within the meaning of Section

401 of the Probate Code. That section provides that no person is competent to serve as executor who is "adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity." The qualifications required of an administrator are the same as those required of an executor. Prob.Code, sec. 420. The expression "want of understanding," as used in Section 401, does not mean a lack of business experience. It means "a want of common intelligence amounting to a defect in intellect." Estate of Olcese, 210 Cal. 262, 268, 291 P. 193, 196. There must be an express adjudication of such incompetency as that specified in Section 401 of the Probate Code. Estate of Davis, 55 Cal.App.2d 784, 788, 131 P.2d 557. The trial court did not adjudge that Mary Nicoll was incompetent within the meaning of that Section.

[3] Under the provisions of the property settlement agreement Mary Nicoll individually waived her right to act as administratrix. Such waiver, however, is not to be construed as a waiver by her in her representative capacity, as guardian of the minor, of his right, if any, to have letters of administration granted to her as his guardian.

[4, 5] Unless the minor was entitled to succeed to a portion of the estate his guardian would not be entitled, as his representative, to priority of appointment, over the decedent's brother, as administratrix with the will annexed. Under the provisions of the will it is clear that the brother, David R. Nicoll, was entitled to succeed to a portion of the estate, that is, it is clear from the second paragraph of the will that he was entitled to succeed, at least, to the cash in the bank and the money due on contracts. As shown above, the court found that "it is not true that no other person exists who has a prior right to petitioner, Mary Nicoll, as such Guardian." In other words, the court found that Mary Nicoll as such guardian did not have the prior right to appointment. The effect of the finding, in view of the appointment of the brother, is that the minor was not entitled to succeed to a portion of the estate. The provisions of the will with reference to the minor are in the first paragraph wherein some of the property was left to decedent's brother with a request or direction that he "take care and share same" with the minor "to the best of his ability." It is then stated therein that "In case of Dave's death" the property so left to Dave should go into a trust fund for the minor. The provisions are not clear as to whether the minor is to succeed to a part of the estate. An interpretation of the will involves various questions, including whether a precatory trust was created, and whether a life estate in Dave with remainder in trust for the minor was created. There might be extrinsic evidence which would be of assistance in determining the intent of the testator with respect to the interest of the minor, if any, in the property. It does not appear that all the evidence which would be material in interpreting the will was presented or offered in the trial court. This court cannot on this appeal interpret the will for the purposes of distribution; that will be a question for the trial court at the time of distribution. Under the record here, this court cannot say that the trial court, in this proceeding which was limited to the matter of determining who should be appointed administrator with the will annexed, erred in finding that the guardian did not have the prior right to appointment, thereby finding in effect, for the purposes of appointing such an administrator, that the minor did not succeed to a portion of the estate.

The judgment is affirmed, and the appeal from the order denying the motion for a new trial is dismissed.

SHINN, Acting P. J., and KINCAID, Justice pro tem.

78 Cal.App.2d 922

CASEY v. FORTUNE.

Civ. 15460.

District Court of Appeal, Second District, Division 3, California.

April 7, 1947.

1. Automobiles 🔑244(22)

Under statute making owner of a vehicle liable for death or injury to a person or property resulting from negligence in operation thereof by one operating vehicle with permission of owner, fact of permission is as important as fact of ownership, must be affirmatively proved, and cannot be left to speculation or conjecture. Vehicle Code, § 402(a).

2. Appeal and error 🔑1008(1)

Whether driver of automobile had permission of owner to operate vehicle is a question for trial court upon the evidence and inferences reasonably to be drawn therefrom. Vehicle Code § 402(a).

3. Evidence 🔑591

Testimony of defendants, the owner and driver of automobile, given on plaintiff's examination of them as adverse parties, to the effect that driver was operating automobile without owner's permission, even though uncontradicted, was not required to be accepted by trial court. Vehicle Code, § 402(a); Code Civ.Proc. § 2055.

4. Automobiles 🔑195(1)

While prior knowledge of an owner of an automobile that driver, owner's 16-year-old son, had operated vehicle without owner's permission, is not a necessary element of implied permission, it may be considered in light of owner's conduct in leaving ignition keys in the open easily available to driver. Vehicle Code, § 402(a).

5. Evidence 🔑589
Witnesses 🔑316

On issue of whether driver of automobile was operating vehicle with owner's permission, thereby making owner liable for driver's negligence, trial court was warranted in refusing to give full credence to testimony of owner and driver denying that permission had been given because both had an interest in result of litigation and because of contradictions, discrepancies, and inconsistencies in the testimony. Vehicle Code, § 402(a).

6. Automobiles 🔑192(1)

The statutory liability imposed on owner of an automobile for the negligence of one operating automobile with owner's permission is placed upon any owner who is not liable under the doctrine of respondeat superior. Vehicle Code, § 402(a).

7. Automobiles 🔑192(1)

The legislative purpose of statute imposing liability on owner of an automobile for negligence of driver operating automobile with owner's permission is to protect innocent third parties from careless use of automobiles, which protection is paramount to rights of an owner who has permitted use of automobile by others even though he personally is not guilty of negligence. Vehicle Code, § 402(a).

8. Automobiles 🔑244(30)

Evidence justified inference that automobile owner had knowledge of repeated use thereof by her 16-year-old son and tolerated such use, even though she may not have approved of it in advance of his obtaining an operator's license, and that she took no positive steps to prevent use by son, and justified conclusion that she impliedly consented to its use and was liable for son's negligent operation thereof. Vehicle Code, § 402(a).

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Melvin W. Casey against Amanda F. Fortune and Robert Fortune to recover for injuries sustained when plaintiff's motorcycle collided with an automobile owned by Amanda Fortune and operated by defendant Robert Fortune. Judgment for plaintiff, and defendant Amanda Fortune appeals.

Affirmed.

Reginald L. Dyer and Thomas A. Joyner, both of Los Angeles, for appellant.

Charles L. Blek, of Inglewood, for respondent.

WOOD, Justice.

This is an action for damages sustained by plaintiff as the result of a collision between an automobile operated by Robert Fortune and a motorcycle operated by plaintiff. Defendant Amanda Fortune is the owner of the automobile and the mother of Robert. Trial was without a jury. Judgment was for plaintiff against both defendants in the sum of $4,824.67. Amanda Fortune appeals from the judgment.

The accident occurred on July 10, 1944, at which time defendant Robert Fortune was 16 years of age, and had no license to operate an automobile. His parents were divorced, and the custody of said minor had been awarded to his mother, and he was living in her home. The complaint alleged, and the court found, that Robert was operating the automobile at the time of the collision with the consent of his mother.

The sole contention on appeal is that there is no evidence to support the finding that Robert was operating the automobile with the knowledge and consent of appellant.

Section 402(a) of the Vehicle Code provides that: "Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle * * * by any person using or operating the same with the permission, express or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages."

[1, 2] The only evidence introduced on the issue of permission was the testimony of appellant and Robert given under Section 2055 of the Code of Civil Procedure. Appellant asserts that that testimony was uncontradicted, and that it shows that she had "persistently forbade the defendant Robert" to drive her automobile. Permission under Section 402(a) of the Vehicle Code, cannot be left to speculation or conjecture nor be assumed, but must be affirmatively proved (Engstrom v. Auburn Automobile Sales Corp., 11 Cal.2d 64, 68, 77 P.2d 1059), and the fact of permission is just as important as is the fact of ownership (Krum v. Malloy, 22 Cal.2d 132, 134, 137 P.2d 18). The question, however, of whether there was such permission is one to be determined by the trial court upon the facts and circumstances in evidence and the inferences reasonably to be drawn therefrom. Boland v. Gosser, 5 Cal.App.2d 700, 701, 43 P.2d 559.

Appellant testified that she knew Robert had the automobile on the night of the accident, but that he did not have it with her permission; that he had asked her permission to use the automobile, but she did not know he had the automobile until he was gone; that she "naturally" heard him drive out but "it was too late," and she stated "I couldn't run after him, he was definitely told not to and the reasons why." In answer to the question, "Did you see him leave the home with the car?" she replied, "I was in the kitchen and he was gone before I knew it. I definitely said the reason I didn't want him to have the car, that is to drive, is because if he did get any ticket I would be the one responsible for it and that the insurance wasn't taken out yet." She also testified that, "We always keep our car keys" on the buffet; that they were there on the night of the accident; that she did not see her son take them, but they were in plain view, and he had access to them. In answer to the question, "Had he been using the car before that?" she replied, "I think for about two days before while I was at work he must have been using it to go to work but absolutely without my permission." She also testified that she did not know Robert had driven the automobile prior to the date of the accident "Because you see I was at work," but that "we talked it over afterwards [after the accident]." In answer to the question, "Anybody else in your family drive the car?" she replied, "Well, at that time I think the other boy was not home."

Robert testified that he had previously driven the automobile to work 2 or 3 times; and that his mother "didn't want" him to drive it until he got an operator's license and until the automobile was insured.

[3, 4] Even though the testimony of the owner and the driver of the automobile was uncontradicted, the trial judge was not

required to accept it. Appellant's answers were evasive as to whether she had knowledge, prior to the night of the accident, that Robert had been driving the automobile. While prior knowledge is not a necessary element of implied permission (Burgess v. Cahill, 26 Cal.2d 320, 324, 158 P. 2d 393, 159 A.L.R. 1304), the evidence was sufficient to support a finding that appellant did have knowledge prior to the accident that Robert had been driving her automobile. Although she said that she "didn't want" him to drive the automobile and she had told him the reason why she didn't want him to drive it, and although the circumstances with respect to his prior use of the automobile were such that she should have suspected that he had disobeyed her, she did nothing further on the night of the accident to prevent him from using the automobile. On the contrary, she continued to keep the keys where they were easily obtainable by him, "in plain view" on the buffet where "We always keep our keys." The court may have concluded that, under the circumstances, the keeping of the keys in such an accessible place refuted her testimony that he was told not to use the automobile.

[5] In the case of Flemmer v. Monckton, 73 Cal.App.2d 271, 166 P.2d 380, the sole contention of the appellant was that there was a complete lack of any evidence upon which the trial court based its finding that the defendant driver was driving the automobile with the implied permission of the defendant owner. That finding necessarily involved the rejection by the trial court of much of the testimony of defendants. The court therein stated, 73 Cal.App. 2d at page 275, 166 P.2d at page 382: "The facts which warranted the trial court in refusing to give full credence to the testimony of defendants are: (1) that both witnesses had an interest in the result of the case [citing authorities]; and (2) that there were contradictions, discrepancies and inconsistencies in the testimony of both defendants which could have been deemed to detract from its credibility." The court also stated therein, 73 Cal.App. 2d at page 276, 166 P.2d at page 383, that one of the factors which tended to show implied permission on the part of the appellant owner was: "The circumstance that the key was left in the car during appellant's absence, and the fact that no check was made upon the oil or gas or mileage to determine whether or not the car had been used."

[6, 7] Appellant states in her brief that plaintiff has cited cases involving employer-employee relationships, and has attempted to draw an analogy thereby to cases involving parent-child relationships. The statutory liability imposed by Section 402(a) of the Vehicle Code is upon any owner of an automobile who is not liable under the doctrine of respondeat superior. It was stated in Burgess v. Cahill, supra, in discussing that section (26 Cal.2d at page 323, 158 P.2d at page 394, 159 A.L.R. 1304), that the legislative purpose "was to protect innocent third parties from the careless use of automobiles and that this protection should be paramount to the rights of an owner who has permitted the use of his car by others even though he, personally, was not guilty of negligence. The wording of the statute is clear and indicates that purpose. The statute defines the owner's liability in cases where the principle of respondeat superior is inapplicable, in order to make the owner liable for the negligence of any person to whom he had expressly or impliedly given permission to operate his car. [Citing authorities.] The legislation was plainly intended to enlarge the liability of the nonculpable owner of a motor vehicle for its operation on a public highway."

[8] Upon a consideration of all the facts in evidence, which it is unnecessary to repeat, we conclude that the evidence was sufficient to justify an inference that Amanda Fortune had knowledge of the repeated use of the car by Robert and that she tolerated such use even though she may not have approved of it in advance of his obtaining an operator's license. From the fact that she took no positive steps to prevent the use of the car by Robert under the circumstances, it could reasonably be inferred that she impliedly consented to its use.

The judgment is affirmed.

SHINN, Acting P. J., and KINCAID, Justice pro tem., concur.

78 Cal.App.2d 926

PEOPLE v. HIDALGO.

Cr. 2438.

District Court of Appeal, First District, Division 1, California.

April 8, 1947.

Rehearing Denied April 23, 1947.

Hearing Denied May 8, 1947.

1. Criminal law ⚷1144(14)

Where defendant failed to produce oral charge of court, and court stated that subject matter of defendant's rejected instructions was covered elsewhere, District Court of Appeal was required to assume that the subject was fully covered. Rules on Appeal, rules 33(b), 52.

2. Criminal law ⚷829(18)

Instruction given at defendant's request on reasonable doubt sufficiently covered subject matter of defendant's refused instruction on reasonable doubt, and therefore refusal of instruction was not error.

3. Criminal law ⚷829(7)

Instruction that fully covered the subject of "alibi" was not inadequate because it failed to distinguish the legal definition from an alleged "lay" definition, and therefore refusal of defendant's requested instruction that did distinguish the legal definition from an alleged "lay" definition, was not error.

4. Criminal law ⚷1186(4)

Statements of district attorney in closing argument to jury not shown to be in reply to argument of defendant's counsel, that if he did not think the defendant guilty he would not have prosecuted him, constituted prejudicial error requiring a new trial, despite court's instruction to jury to disregard statements, where evidence against defendant was such that jury would have been justified in finding a verdict for defendant. Const. art. 6, § 4½.

5. Criminal law ⚷1144(10)

Under rule, District Court of Appeal was required to presume that had there been any statements made by defendant's counsel inviting prejudicial reply by district attorney, the state would have included them in record in appeal by defendant seeking reversal because of district attorney's prejudicial remarks. Rules on Appeal, rule 52.

6. Criminal law ⚷728(3), 1037(1)

Generally, it is defendant's duty if he thinks any statement by district attorney is improper, to make known his objection when statement is made, and, having failed to do so, it is too late to raise the objection for the first time on appeal, but there is an exception where an examination of entire record fairly shows that acts complained of are of such character as to have produced an effect which, as a reasonable probability, could not have been obviated by any instructions to the jury.

7. Infants ⚷20
Rape ⚷54(1)

In prosecution for rape and for contributing to delinquency of a minor, the law does not require corroboration, and testimony of prosecutrix alone, if believed, is sufficient to convict. Pen.Code, § 261; Welfare and Institution Code, § 702.

◆

Appeal from Superior Court, San Francisco County; Theresa Meikle, Judge.

Merold Hidalgo was convicted of rape and of contributing to the delinquency of a minor, and from the judgment of conviction and from order denying motion for new trial, he appeals.

Judgment and order reversed, and cause remanded for a new trial.

Leslie C. Gillen, of San Francisco, for appellant.

Fred N. Howser, Atty. Gen., and Ralph W. Scott, Deputy Atty. Gen., for respondent.

BRAY, Justice.

Appeal from judgment of conviction for violation of section 261 of the Penal Code and section 702 of the Welfare and Institutions Code, and from the order denying the motion for new trial.

Appellant does not question the sufficiency of the evidence to support the verdict of the jury, but bases his appeal on two grounds: (1) alleged error by the court in omitting two of defendant's proposed instructions; and (2) alleged misconduct of the prosecuting attorney.

The information charged defendant with violating section 261 of the Penal Code by an act of sexual intercourse with Johanna Nellen, a girl of the age of fourteen years, not his wife, on April 3, 1946 (a date changed by amendment of the information from April 9), and with violating section 702 of the Welfare and Institutions Code on the same day by taking Johanna Nellen to a room in a San Francisco hotel, thereby causing her to become and remain "A person under twenty-one years of age who is leading or from any cause is in danger of leading, an idle, dissolute, lewd, or immoral life. * * *" Appellant pleaded "not guilty" to both counts.

The defendant is a Filipino; the complaining witness a white girl. The latter lives with her father on Orienta Street in Bayshore City, San Mateo County. Next door, defendant lives with his white wife, Evelyn, whom he married shortly after his arrest, and two children—his child by a former marriage, and her child by a former marriage to another Filipino.

The prosecutrix testified as to her age and that she was not married to defendant, and as follows: She had met defendant the preceding November. On the day in question, when she came home at noon recess from the Bayshore Elementary School, defendant phoned her, stating that he wanted her to help him look for his wife, Evelyn, and that he would pick her up at 2 o'clock at the "P. G. & E." (the power plant about a block from Johanna's school). She returned to school and remained until 2 o'clock. When she came out defendant was waiting for her at the designated spot. She got into his car with him and he drove her to the Broadmoor Hotel in San Francisco. They entered the back entrance of that hotel. Pictures of the hotel and this back entrance were identified by prosecutrix. Defendant took her in the elevator from the basement to the fourth floor bathroom, pictures of which she identified. Defendant asked her if he could have sexual intercourse with her, and she consented. The act was consummated and defendant gave her a dollar and told her to go home. She left the hotel by the back entrance, taking a street car and bus to her home, arriving there at 5:30. The first person she told about the affair was the principal of her school, Miss Fitzgerald, whom she told the next day. Previously she had told the principal of her sex relations with other men. On the 13th of April prosecutrix went to Placerville for her Easter vacation, and while there told her aunt about what had happened. Before she went to Placerville defendant phoned to her again and wanted her to come down again with him. She said that she would, but she did not go. He again phoned her asking her to see him before she left for Placerville, and then asked her to take off the first day of her return to school and go with him to the Broadmoor Hotel. He told her that "if I told anybody, even told Evelyn or anybody, he would cut my neck."

On the first day of her return from her vacation, about noon, she went to the vicinity of the P. G. & E., where the defendant was supposed "to pick me up." She was accompanied by two police inspectors. Shortly thereafter defendant drove by the place in his automobile and on into the driveway of his home, where the inspectors arrested him.

On cross-examination, in an endeavor to show motive, defendant brought out the fact that prosecutrix had several times been scolded by defendant's wife for sitting in cars in front of defendant's home with Filipino boys. She had also been told by other women in the neighboorhood not to sit in cars with Filipinos. Prosecutrix had on many occasions eaten dinner with the defendant and his wife, and on about five occasions her father had also eaten dinner with her there. Then because she was spending so much time at Hidalgo's house her father complained that he did not like to eat alone. In March defendant's wife stopped inviting prosecutrix to dinner. Prosecutrix denied that she became angry over this, but her feelings were hurt and she resented it. She admitted that she had told the authorities that Mrs. Hidalgo had set traps for her in her house, so that Filipino boys would be there when prosecutrix went in, and these boys would have relations with her. She knew that there was no one home at the Hidalgo house during the day, as Hidalgo worked at the Broadmoor Hotel, Mrs. Hidalgo worked at Christine's Restaurant, and the two Hidalgo children were at school. Defendant's wife had asked her to empty the ice box. To get in for that purpose, as well as to meet the Filipino boys, prosecutrix would put her arm around through the window and unlatch the door. Defendant and his wife introduced prosecutrix to Filipino boys who gave her presents.

The two police inspectors testified to being parked in a car with Johanna on April 22d, on Orienta Street, not at the point of the rendevous testified to by Johanna, although they could see the P. G. & E. from where they were parked; that defendant drove by, was pointed out by Johanna, and the arrest was made as soon as defendant drove into his driveway. One inspector stated that the reason defendant gave for coming home at noon was that his car needed fixing.

Miss Dorothy Fitzgerald, principal of the Bayshore School, a witness for the people, testified that Johanna left school without permission on April 3d between 2 and 2:20 and did not come back. Her teacher reported that fact to witness, who thereupon wrote a note to Johanna's father telling him about it. The next day Johanna brought this note back with an excuse on the bottom. Apparently not believing the excuse, the witness said to Johanna, "Now tell me the truth." After fifteen or twenty minutes of conversation Johanna apparently told witness what had happened the preceding day. On April 12th, the day before Easter vacation, witness saw defendant driving his car very slowly, circling the school grounds, continuing to do so until 25 minutes after 1. It does not appear in her testimony what time he first came out or how long he was there. Witness made a note of his car license number. On cross-examination witness testified that Johanna had been truant from school four or five times and that her father did not seem to think her conduct was his responsibility.

Mrs. Evelyn Hidalgo, the defendant's wife, called as a witness for defendant, testified that she married defendant after his arrest. She worked at Christine's Coffee Shop on Franklin Street in San Francisco, about two blocks from the Broadmoor Hotel, where her husband worked as a room boy. Defendant had a half hour from his work, and daily came to Christine's for lunch at 12 noon. She always had his place set up at the end of the counter, and had a meal ticket there for him. He would remain there after he finished eating, helping with the dishes and other things. Defendant came to Christine's for lunch on April 3d. In October, witness had taken Johanna with her and three of the latter's relatives to the Broadmoor Hotel to get the car keys from defendant. They, including Johanna, went in the back way to the hotel, as Mrs. Hidalgo had on her working clothes and did not want to pass through the lobby, and into the room referred to by Johanna as a waiting room. They then went in the elevator to she thought the second floor, and thence to the bathroom. The bathroom they went to looked like the fourth floor bathroom, as shown in the pictures in evidence. Witness then told of the frequency with which Johanna and her father had formerly come to her home and later at the father's request of stopping Johanna from coming there. Johanna was boy crazy and would put her arms around the Filipino boys with whom she had become "pretty well acquainted" at witness' home. She told of scolding Johanna for sitting in automobiles with Filipino boys who temporarily lived at her house. Johanna did not like the scoldings, became very angry, and would go home. The neighbors were not friendly with witness. The reason she reprimanded Johanna for sitting in the car with Filipinos was because Johanna was too young and "I knew our neighbors out there was against us, and we didn't want to do anything that would make them treat us any worse than the way they were treating us." She had also scolded Johanna three times for being absent from school. Explaining why defendant was not at work on April 22d (the day of his arrest and the day, according to testimony of proecutrix, defendant had asked her to meet him again), witness stated that defendant went out in the Mission to have his car fixed and was supposed to get her clothes, which she had forgotten that morning, bring them to the restaurant, and take her to the doctor. Her appointment with the doctor was around 2:30. On the question of motive, witness testified that she was arrested on Johanna's complaint in San Mateo, Johanna claiming that witness had set a trap so that Filipino boys would meet Johanna alone in witness' house.

To prove an alibi, defendant called Mrs. Rosalie Hugo and Ben Unruh. Mrs. Hugo testified that for three years she had been the assistant executive housekeeper at the Broadmoor; that defendant worked under her direct supervision, and that she kept books on the records of employment and tasks and duties of the employees, including defendant. She produced the time book showing the working hours of defendant and his co-worker Sam. From her books she stated that both boys worked April 3d. From the assignment book she testified that they were cleaning the venetian blinds, polishing the floor and walls, cleaning the lobby in general. She also listed the rooms cleaned by defendant on April 3d. That was the last day of work for Sammy. He used too much "purex" in the water and developed a rash on his arms and they sent him to the doctor. Witness saw the houseboys every 15 minutes or half hour throughout the day. On cross-examination witness denied that the boys leave the building at any time during the daytime. She did not see how defendant could possibly have left the hotel on April 3d for over half an hour; she would have known if he left for more than that. She testified that defendant was off April 22d. On cross-examination it appeared that in accounting for the days the witness used a numeral system rather than the day of the week, and the record book showed that April 3d was a Wednesday and that the 22d was a Sunday. (Actually April 3d was a Tuesday and the 22d was a Monday.)

Ben Unruh testified that he had worked four years at the Hotel Broadmoor, and that for the last five months continuously he had been manager. On April 3d Sammy and defendant were working in the lobby where witness conducted his business as manager. The boys that day were under the witness' observation. The two boys were cleaning the venetian blinds and owner's office. Sammy used too much "clorox"; his hands broke out in a rash, and he had to be sent to the doctor. It is not clear from the witness' testimony whether Sammy went to the doctor on the third or the fourth. Sammy reported that the doctor told him he could not work, so Sammy did not work from the 4th until the 15th. Witness watched them clean the chandelier in the owner's office. It must have been after 1 o'clock that they were working on the venetian blinds. Witness was not asked how long into the afternoon the boys worked.

Defendant, testifying in his own behalf, after telling of the acquaintanceship of Johanna and her father with defendant and his family, substantially as testified to by Johanna, stated that several times defendant asked Johanna not to come to his house because he heard that the neighbors had told her not to associate with "us." Johanna acted "mad." On April 3d, defendant took his lunch hour from 12 to 12:30. Upon returning from lunch, he cleaned the venetian blinds in the lobby, working with Sammy from about 1 o'clock until 3 o'clock; then defendant helped Sammy bring down the garbage. Defendant quit at 4 o'clock—his regular quitting time. He did not leave the hotel from 1 to 4:30, nor did he drive out to Bayshore City. To drive from the Broadmoor Hotel to Bayshore City takes 45 minutes. The round trip would take an hour and a half. Defendant denied picking Johanna up in the car or bringing her to the hotel or having sexual intercourse with her. He testified that Johanna had been to the Broadmoor only once, on the occasion when she accompanied his wife who came to get the automobile keys; that she never was at the Broadmoor alone with him. Defendant denied circling the Bayshore School on April 12 (the day the school principal testified to seeing him). He had to pass the school on Orienta Street going to his home, which was a couple of blocks up Orienta Street from the school. On no day did he ever circle the school. April 22d, the day he was arrested, he did not go to work because he went to have the gas tank on his car welded. He asked Mrs. Hugo's permission to take the day off to have his car fixed. That morning he drove the children to school near Christine's restaurant and took his wife to the restaurant. She requested him to pick up a dress for her and bring it to the restaurant so she could go to the doctor. After the car was fixed he went home to get the dress, where he was arrested. There was admitted in evidence a bill, dated April 22d and marked paid, for work done on and for welding a gas tank. Defendant denied ever telephoning to Johanna, or threatening her, or making an appointment to meet her on her return from her vacation. Sammy, whose hands were swollen and itchy, went to the doctor on the 4th of April. (Mrs. Hugo testified the boy went to the doctor on the 3d.) Defendant never went home at noon; he always went to Christine's restaurant for lunch.

To overcome the effect of the defendant's purported alibi, the prosecution called Mrs. Evelyn Merrifield and Mrs. Lela Silva. Mrs. Merrifield testified that she lived next door to the defendant's home and saw defendant at his home at noontime various days between March 31 and April 17. The witness would not definitely state how many times. Witness had heard Mrs. Hidalgo call Johanna over to her house at the time Filipinos were in the house. (Mrs. Hidalgo in her testimony had denied doing this.) On cross-examination witness admitted that she had complained to the real estate people to prevent the Hidalgos from purchasing their house and resented very sorely that a Filipino with a white wife was living next door to her; that "she had ignored" them completely. She complained to the S.P.C.A. that the Hidalgos had left their dog in the back yard in the rain and without food or water.

Mrs. Silva testified that she lived on Orienta Street two houses down the hill from defendant's house. In the early part of April she saw the defendant around his home at noontime many times, but could not give the exact number of times, nor any specific date. Witness did not particularly resent the Hidalgos living near her property, and neither liked nor disliked them. Witness asked Johanna's father to keep his daughter away from the Hidalgos because she did not think it was a fit environment for a fourteen year old child to be among all those men—witness did not like what she observed "going on there." She said that she noticed that Johanna stopped playing with other children in the neighborhood and witness did not feel that it was right for Johanna to spend so much time over at a place where there were so many Filipino men.

The Instructions

Defendant complains of the failure to give two of his offered instructions, Nos. 4 and 2. Written instructions were waived by counsel and the court delivered an oral charge. The clerk's transcript, with the exception of defendant's proposed instructions Nos. 3 and 9, hereinafter mentioned, does not give the instructions which were given by the court, but only the rejected instructions. The reporter's transcript does not contain any of the court's charge to the jury, but does contain the following statement of the court: "* * * let the record show that of Mr. Gillen's proposed instructions on behalf of the defendant, I gave Instructions Nos. 3 and 9. * * * The others were all covered, Mr. Gillen. I covered all that you gave me." Nor does defendant's brief cure this situation.

Rule 33(b), Rules on Appeal, provides: "The appellant may request the inclusion in the record of any of the following: * * * (2) In the reporter's transcript: * * * (e) instructions given, which cannot be copied by the clerk; provided, however, that *if error is urged as to the giving, refusal or modification of instructions, the reporter's transcript shall include all instructions given* which cannot be copied by the clerk." (Emphasis added.) (In view of the specific provisions of Rule 33, Rule 52, Rules on Appeal, hereinafter mentioned on another subject, does not apply to instructions.)

[1] In People v. Jacobs, 11 Cal.App.2d 1, at page 14, 52 P.2d 945, at page 952, the court states: "Appellant complains that

the trial court erred in the instructions which it gave to the jury and that it improperly refused to give forty-four instructions which he offered. In presenting this contention appellant's brief on appeal refers to these instructions by number and by very incomplete suggestion of their contents without in any instance presenting the full text of the instruction. Nor has appellant presented, in connection with instructions claimed to have been erroneously refused, other instructions given by the court bearing upon the subjects covered by the refused instructions. It is therefore evident that appellant has failed to comply with section 3, rule 8 of the rules governing practice in this court, and in the absence of more definite criticism we are justified in the belief that the instructions given by the trial court were free from serious error and that instructions which were offered by appellant and refused were properly refused." In People v. Von, 78 Cal. 1, at page 3, 20 P. 35, it is said: "* * * while the judgment roll in the case at bar contains the written charges *presented* and indorsed 'given' or 'refused,' it also shows that there were other oral instructions given by the court to the jury, but does *not* show what those instructions were. We are asked, therefore, to reverse the case because a particular written instruction presented by appellant is marked 'refused,' while we are informed that there were other instructions not in the record, and are not informed that the instruction refused (or that part of it which was correct) was *not* given in those instructions. An appellant must show error affirmatively and clearly. It might be argued that the prosecution should have shown that the 'refused' instruction was given elsewhere. But how could the prosecution have done so? The defendant had entire control of the appeal, and chose to make it upon the judgment roll alone." The court relied upon Penal Code section 1207 as it read in 1888 when it required that charges given and refused be included in the record. Although this requirement has been deleted, a similar requirement is found in Rule 33 of the Rules on Appeal above quoted. In view of appellant's failure to produce the entire charge and of the court's statement to the effect that the subject matter of the rejected instructions was covered elsewhere, this court must assume that the subject was fully covered.

However, regardless of that situation, we believe from an examination of the two instructions included in the clerk's transcript which were given, that there was no error in omitting the rejected instructions.

[2] Defendant's proposed instruction No. 4 which the court marked "covered," and refused to give, reads as follows: "If there is a reasonable doubt as to the credibility or reliability of any witness whose testimony is necessary in order to convict the defendant, even though the testimony of such witness may be uncontradicted, such reasonable doubt is sufficient to acquit the defendant." The court did give defendant's proposed instruction No. 3, which read: "If you have any reasonable doubt as to the credibility or truthfulness of any statement made by any witness against the defendant, you must resolve that doubt in favor of the defendant and find such statement to be untrue." A comparison of the two instructions shows that they treat of the same subject matter and are practically duplications. (We are assuming from the foregoing authorities and from the failure of defendant to claim otherwise that the court gave the usual instructions on reasonable doubt.) Coupling instruction No. 3 with the usual instructions on reasonable doubt, this court cannot say that the subject matter of instruction No. 4 was not sufficiently covered by the court.

[3] The other instruction of whose failure to give the defendant complains was defendant's proposed instruction No. 11, which reads as follows: "You are further instructed that the defense of an alibi as it has been defined for you, is a legitimate and proper defense recognized by the law, and is not to be confused by you with the use of the word 'alibi' by lay persons outside of the law to mean an unmeritorious excuse or evasion." The court marked that "covered," and did give defendant's proposed instruction No. 9 which reads: "When evidence is offered by the defendant in a criminal case indicating or tending to

establish that he was elsewhere than at the place where the crime is alleged to have been committed at the time it was alleged to have been committed, this is known in the law as an alibi. Offering an alibi, the defendant is not obliged to establish that defense beyond a reasonable doubt or even by a preponderance of evidence, but it is sufficient to entitle him to a verdict of not guilty if the proof raises in the minds of the jury a reasonable doubt as to the presence of the defendant at the place where the crime was alleged to have been committed at the time the crime was alleged to have been committed." It would appear that instruction No. 9 fully covers the subject of "alibi." Appellant produced no authority for the proposition that, in addition to fully defining what an alibi is, the court must further distinguish the legal definition from an alleged "lay" definition. In comparing the two instructions we can find no error in omitting one of them. Especially is this so, when we are deprived of the opportunity to examine the instructions as a whole.

The language in People v. Cruse, 24 Cal. App. 497, at page 501, 141 P. 936, at page 938, on the subject of instructions is particularly appropriate here: "A great many instructions offered by the defendant were refused, many of which might well have been given by the trial judge, in order that the defendant might have had [the benefit of a] more detailed statement of the propositions material to be submitted given to the jury. It is said by the Supreme Court in the case of People v. Baldwin, 117 Cal. [244,] 249, 49 P. [186,] 187, in discussing a case similarly conditioned as to the evidence: "In this class of prosecutions the defendant, owing to natural instincts and laudable sentiments on the part of the jury, and the usual circumstances of isolation of the parties involved at the commission of the offense, is, as a rule, so disproportionately at the mercy of the prosecutrix's evidence that he should be given the full measure of every legal right.' An appellate court, however, in considering the matter of the instructions given and refused, will not reverse a case where it appears that the court has stated in a generally clear, though brief, form the propositions of law applicable to the issues tried." "The defendant in any given case is not entitled, under the section of the Code which permits the submission to the court of the defendant's requested instructions, to have his own particular phrasing of the law adopted by the court and given to the jury. All that he is entitled to is to have the substance of the law applicable to his case set forth by the court correctly in its instructions * * *". People v. MacPhee, 26 Cal.App. 218, 221, 146 P. 522, 523.

Misconduct of the District Attorney.

A more serious situation is presented with reference to the claimed misconduct of the district attorney. In his closing argument he stated: "* * * I have an abiding faith and confidence in little children; I believe strongly in their wisdom, intelligence, integrity and truthfulness; and I am willing to stand upon it. *But I am willing to go further, and I always do go further.* When Counsel tells you we are rushed out here, and we are busy out here, that is true; but when he says we don't take enough time, or infers that we don't give sufficient time to preparing our cases, then he is wrong; then he is completely wrong. I have spent plenty of time on this case; *I know every in, out, quirk and little incidental about this defendant, and about every witness who appeared on this stand. I spent hours down in that neighborhood; I spent time at the school questioning the teachers; I spent time on records, marriage certificates, correspondence. No, I am deadly, absolutely certain, and there is not a scintilla of doubt in my mind.* It is not a question of being rushed, and *it is not a question of prosecuting somebody when you are not convinced of his guilt. I have stood in this courtroom—and I will do it again whenever the occasion arises—and tell you ladies and gentlemen of the jury that I don't think you should convict the man; I don't think he is guilty—when I don't think he is—and I have done just that right here."* No objection was made to this at the time. Later, the district attorney said: "Ladies and gentlemen of the jury, I know you are tired but, as Counsel told you, he feels a responsibility in these cases, I, too, feel a responsibility; not that it makes a difference of one iota in my salary; it doesn't. I will be trying a case here tomorrow, and another the day after that, and I prepare them and work hard on them, *and any time I am not absolutely convinced of the guilt of the defendant brought into this courtroom here, I pledge you my word of honor, I will tell the jury about it.*" Thereupon the following occurred: "Mr. Gillen: Just a moment. I am going to assign that as misconduct. The Supreme Court has held that as misconduct and as cause for a mistrial, and I request a mistrial of this right now, in accordance with the decisions of our Supreme Court. Mr. Mullins: No, Your Honor; I was very careful not to have phrased it in that manner. I was speaking in generalities. Mr. Gillen: I ask Your Honor for a ruling and to admonish the jury, and that that not be considered. Mr. Mullins: I have no hesitation, ladies and gentlemen of the jury, in asking you to return a verdict of guilty as charged. Mr. Gillen: Will Your Honor act on my motion. The Court: Yes; I admonish the jury to disregard that statement of counsel's relative to cases in which if he is not convinced; you will disregard it; I grant that that far." (Emphasis added.) Both of these statements are cited by defendant as prejudicial misconduct. Respondent does not contend that they do not constitute misconduct other than to say that they "seem to be in the nature of a reply to the argument advanced in behalf of the defense," but he does not refer to any specific statement in this respect claimed to have been made by defense counsel in argument. He does contend that appellant cannot challenge the first statement because appellant made no objection to it in the lower court, and that the conduct was not prejudicial to the rights of the defendant, under section 4½ of Article VI of the Constitution, and the instructions of the court.

[4] There can be no question but that those portions of both statements in which the district attorney stated in effect that if he did not think the defendant guilty he would not prosecute him, are misconduct. As said in People v. Chilcott, 18 Cal.App.2d 583, at page 588, 64 P.2d 450, at page 452: "With reference to the remaining statements included in the group now under consideration in which the prosecutor referred to the fact that he had never prosecuted or attempted to convict anyone of a crime unless he thought such person was guilty and that he conceived that it was his duty to prosecute if he believed that the evidence warranted such action, it must be conceded that these remarks were improper and should not have been made. As was correctly stated in People v. Podwys, 6 Cal.App.2d 71, 74, 44 P.2d 377, 378: 'There can be no excuse for such comment.'"

While the argument of the defense is not before us (the reporter's transcript shows it was not reported), the highly objectionable portions of those statements do not appear to be in reply to any argument advanced by defense counsel. The portions referring to the amount of time spent on the case apparently were in answer to some statement of the defendant, but the remarks "I have stood in this courtroom—and I will do it again whenever the occasion arises—and tell you ladies and gentlemen of the jury that I don't think you should convict the man; I don't think he is guilty—when I don't think he is—and I have done just that right here," were not answering the defendant, but stating in effect that in the opinion of the district attorney the defendant is guilty. "* * * and I have done just that right here" and "I am deadly, absolutely certain, and there is not a scintilla of doubt in my mind" can only mean with reference to this particular case and defendant. They are not statements of a general attitude of the district attorney as to prosecutions, but are directed to this particular prosecution and defendant alone, and certainly no argument of defendant could justify a prosecuting officer in stating "any time I am not absolutely convinced of the guilt of a defendant brought into this courtroom here, *I pledge you my word of honor,* I will tell the jury about it." (Emphasis added.)

We have in mind the rule set forth in a number of cases, including People v. Chilcott, supra, 18 Cal.App.2d 583, at page 586, 64 P.2d 450, at page 451: "When that portion of the address in which the criticised language occurs is examined, it becomes apparent that the speaker was replying to a charge or an insinuation made by appellant's counsel in their arguments to the jury that the district attorney, during the course of the trial, had sought to procure a change in the testimony of a certain witness called by the prosecution because the testimony as originally given did not fit with certain documentary evidence consisting of a written report by a ballistic expert, which evidence was likewise submitted by the prosecution. The transcript on appeal, although it apparently contains the full text of the addresses made to the jury by counsel representing the respondent, contains no part of the arguments which were addressed to the jury by appellant's counsel. Under these circumstances, a reviewing court is unable intelligently to appraise the effect of the criticised remarks and to declare that the language amounts to such prejudicial misconduct as to demand reversal of the judgment. People v. Bragdon, 103 Cal.App. 20, 283 P. 881; People v. James, 133 Cal. App. 751, 24 P.2d 859; People v. Lawyer, 1 Cal.App.2d 1, 35 P.2d 1036; People v. Gregory, 12 Cal.App.2d 7, 54 P.2d 770; People v. Mareck, [17] Cal.App. [2d 278,] 61 P.2d 972. If appellant's counsel desired that the criticised language should receive the full consideration and fair appraisal of a reviewing court, they should have complied with the provisions of section 7 of rule II of the rules of this court."

[5] However, those cases were decided prior to the adoption in 1943 of the new Rules on Appeal. Rule 52 provides: "If a record on appeal does not contain all of the papers, records and oral proceedings, but is certified by the judge or the clerk, or stipulated to by the parties, in accordance with these rules, *it shall be presumed in the absence of proceedings for augmentation that it includes all matters material to a determination of the points on appeal.*" (Emphasis added.) Under that rule we must presume that had there been any statements made by defense counsel inviting the prejudicial reply, respondent would have had them included in the record. There can be no doubt that this rule applies to appeals in criminal cases. 17 S.C.L.R. 79, at page 123, footnote 128.

Also we must assume that defense counsel did not make any statement in his argument that would justify the district attorney stating that on his word of honor he would tell the jury "any time I am not absolutely convinced of the guilt of a defendant." It is true that after this was assigned as misconduct the district attorney said, "I was very careful not to have phrased it in that manner. I was speaking of generalities." The first part of this remark indicates that the district attorney was purposely getting as close to the line as he could, and certainly his statement that he was "speaking in generalities" could not cure a remark which shows on its face he was referring definitely to the defendant. Especially is this true when he shortly theretofore said with reference to prosecuting only the guilty, "and I have done just that right here." As said in People v. Edgar, 34 Cal. App. 459, at page 468, 167 P. 891, at page 894: "When the district attorney declared that he would not prosecute any man he did not believe to be guilty, he thereby wrongfully placed his personal opinion of the guilt of the defendant in evidence in the case. He was privileged to argue to the jury that it was his opinion, formed from deductions made from the evidence adduced at the trial, that the defendant was guilty of the crime charged. People v. Rogers, 163 Cal. 476, 126 P. 143. But his declaration to the jury that he would not prosecute any man whom he did not believe to be guilty was tantamount to an assertion that he believed in the guilt of the defendant at the very inception of the prosecution; and necessarily such belief must have been founded upon the result of the district attorney's original and independent investigation of the charge, and therefore in all likelihood was based, in part at least, upon facts which did not appear, and which perhaps could not have been shown, in evidence."

The last portion of that opinion is particularly appropriate here, as the district attorney here said: "I know every in, out, quirk, and little incidental about this defendant, and about every witness who appeared on this stand. I spent hours down in that neighborhood; I spent time at the school questioning the teachers; I spent time on records, *marriage certificates,* correspondence. No, *I am deadly, absolutely certain, and there is not a scintilla of doubt in my mind.*" (Emphasis added.) The natural conclusion of a jury from this sentence would be that the district attorney's certainty was based not alone upon the evidence, but upon his hours spent down in the neighborhood, etc.

[6] Respondent contends that this court cannot consider the first alleged prejudicial statement for the reason that no objection was made to it at the time it was made. The general rule is that it is the defendant's duty, if he thinks any statement made by the district attorney is improper, to make known his objection at the time it is made, and having failed to do so, it is too late to raise the objection for the first time on appeal. People v. Chilcott, supra, 18 Cal. App.2d 583, 64 P.2d 450; People v. Tedesco, 1 Cal.2d 211, 34 P.2d 467. But there is an exception to this rule. As stated in People v. Podwys, 6 Cal.App.2d 71, at page 76, 44 P.2d 377, at page 379: "The general rule is that any objectionable remarks or argument of the district attorney must be objected to at the time they are made, and the court requested to admonish the jury concerning them, before they can be made a ground for appeal. However, in the case of People v. Stafford, 108 Cal. App. 26, 290 P. 920, 921, this court after stating the general rule, approved the exception stated in People v. Simon, 80 Cal. App. 675, 679, 252 P. 758, as follows: 'There is, however, a well-recognized exception to this general rule, and the exception is simply this: Where an examination of the entire record fairly shows that the acts complained of are of such a character as to have produced an effect which, as a reasonable probability, could not have been obviated by any instructions to the jury, then the absence of such assignment and request will not preclude the defendant from raising the point in this court.'"

This, then, brings us to the question of whether the first statement of the district attorney was of such a character as to have produced an effect which, as a reasonable probability, could not have been obviated by any instruction of the court. Of a similar nature, too, is the inquiry concerning the second statement to the jury, and to which the defendant did object, and as to which the court very moderately admonished the jury. Could any admonition as to the first statement and the admonition given as to the second statement obviate their effects, and if not, were the remarks so prejudicial as not to be cured by section 4½ of Article VI of the Constitution? As stated in People v. Simon, 80 Cal.App. 675, at page 679, 252 P. 758, at page 760: "The question, however, that we are called upon to determine is whether from an examination of the entire record, including the evidence, we can say that the misconduct of the district attorney was of such a character that the harmful result therefrom could probably have been entirely obliterated from the minds of the jury if an opportunity had been given the trial judge and he had made timely and proper instructions to the jury. If this were reasonably possible, then the defendant cannot remain silent and take the chance of a favorable verdict and, losing, urge as grounds for a reversal an error which, but for his silence, might have been entirely corrected. If, however, where it fairly appears, as we think it does in the case at bar, all of the record, including the evidence, considered, that the remarks of the district attorney were a factor in influencing the jury in arriving at their verdict of guilty, such result is a miscarriage of justice, and the judgment and order should be reversed."

[7] To answer those questions, it is necessary to consider the background of the case as disclosed by the evidence. We have heretofore set forth the evidence in some detail. There was no direct corroboration of the testimony of the prosecutrix, other than that the school principal corroborated the fact that the prosecutrix left school about 2 p. m. on the day the crime is charged to have been committed, and did not return that day; also that the prosecutrix had received a telephone call shortly after 12, and that she told the principal that she had received such a call and had to go down town to meet some one. Of course, in the types of crimes with which the defendant was charged, the law does not require corroboration. The testi-

mony of the prosecutrix alone, if believed, is sufficient to convict. There was indirect corroboration in the following particulars, which are mostly important because the defendant denied they occurred: The school principal testified that she saw defendant circling the school about noon on April 12th (the day Johanna claimed that defendant had phoned her and asked her to meet him). This the defendant denied. Mrs. Merrifield testified that she saw defendant around his home at the noon hour on several occasions between March 31st and April 17th. (She does not definitely place him there on the significant day, April 3d.) Defendant denied being around home at the noon hour on any of these days. Mrs. Merrifield's testimony is somewhat weakened by her bias against the Filipinos. Mrs. Lela Silva also testified in direct contradiction of defendant, that she had seen defendant around his home at noon many times in the first week of April. She could not give any exact date, nor did she definitely say that she saw defendant there on April 3d. She did not "particularly" resent Filipinos living near her property, nor does she "like or dislike" them.

While the evidence was sufficient for the jury to convict (even the testimony of the prosecutrix, as pointed out before, if believed, was sufficient in itself for that purpose), it was not a case so strong that a verdict for the defendant would have been unreasonable. The defendant's alibi (although disbelieved by the jury) was of importance. The prosecutrix admittedly had been in the hotel before so that her description of its interior could not be considered as corroboration. Primarily, it was a case of a white girl against a Filipino. Moreover, the district attorney constantly kept before the jury the fact that the defendant for some time had been living in a meretricious relationship with a white girl, whom he married shortly after his arrest. Over objection, he brought this matter to the attention of the jury three times in the cross-examination of Mrs. Hidalgo and once in the examination of Hidalgo. (He was evidently referring to this in his statement that he had spent hours in the neighborhood, and time on records and "marriage certificates.") In addition, he emphasized that relationship in both opening and closing arguments, laying great stress upon the fact of a white woman living in a home with a Filipino to whom she was not married, with other Filipinos likewise living in the house.

True, there were the constant bickerings, the heckling, the barbed wise-cracks, the constant interruptions by one counsel of the other, and from beginning to end a course of conduct about equally participated in by both sides, which should not occur in any courtroom. The defense attorney was constantly needling the district attorney and the latter was constantly needling the former. Respondent contends that this situation was such that the jury would not pay much attention to anything he might say which the court admonished the jury to disregard.

Respondent urges that the language in People v. Gordon, 78 Cal.App. 167, at page 172, 248 P. 289, at page 291, "the defendant is precluded from urging any objection to the conduct of the district attorney * * * insofar as it coincides with the example * * * set by counsel for the defendant," is applicable here. He calls attention to such actions of the defense attorney as when the district attorney said he could not understand one of the questions asked prosecutrix by defendant, defense counsel stated, "* * * maybe this child can understand things you can't"; that he claimed the district attorney "was bragging"; a reference to "the fine Italian hand of Mr. Mullins in this thing," and when Mr. Mullins replied, "Irish hand," defendant's counsel stated: "That Irish hand is big and clumsy"; the suggestion that the district attorney went to liquor establishments after midnight; that he would "straighten out a witness" before giving testimony; stating that the district attorney was "playing smarty-pants" when he said of one of defendant's objections that it was "the most frivolous objection I ever heard"; that the district attorney was stupid; that "I wouldn't like to take the skeletons out of the District Attorney's office," and other instances of indelicacy, poor taste and unfair tactics on behalf of the defense attorney. All these instances were during the trial and before argument. However, the record shows that the district attorney gave tit for tat. For example, in reply to the statement about "skeletons," the district attorney said, referring to the fact that the defense attorney had formerly been a member of the district attorney's staff, "You spent a lot of time with them there." The reference to "stupid" came after the district attorney had said, "You are known as the nine weeks lawyer" to which the defense counsel replied, "That is because I had a stupid district attorney." The defense attorney said of himself, "I think I can submit my objections in my own stupid way." Several times the district attorney stated in effect that defendant wanted to drag the case out for nine weeks. The district attorney later, when charged with anticipating a question, said, "I am a mentor." The reference to the district attorney going to liquor establishments after midnight came when defense counsel asked prosecutrix if she did not know that whiskey could not be bought in any store in San Francisco after midnight. Thereupon the district attorney said, "Oh, Counsel, you haven't been around." The district attorney constantly accused defense counsel of "making a speech" to the jury when he objected or attempted to explain his position to the court. The district attorney said to defense counsel, "It is hard enough for you to think, period." Defense counsel referred to the alleged prejudice of the neighbors, and intimated that it would show when they testified, and then said: "This is America, thank God." The district attorney said, "And not the Philippine Islands." Further tactics: "Mr. Mullins: Completely untrue, and simply injected for the purpose of getting something before this jury indirectly that he could not get in directly. Mr. Gillen: If it is completely untrue, why don't you let me go ahead and make a fool out of myself. Mr. Mullins: I don't have to let you go very far. Mr. Gillen: I have been practicing ever since you were rolling hoops. Mr. Mullins: I have been practicing quite a while, too, and was away for four years. Mr. Gillen: Glad you're back!" These are only a few of the many unnecessary interchanges between counsel. It got so bad that the court at the end of one of counsel's verbal jousts said: "Ladies and Gentlemen of the jury, isn't this most interesting? I have never had this experience before jurors. One of the Jurors: Give them a pair of boxing gloves. The Court: I think the next time we will just retire and let you have a match."

While the conduct of the defense attorney in the trial of the case was more reprehensible than that of the district attorney, nothing occurred which would justify the district attorney stating in his argument the matters hereinbefore set forth. Moreover, it must be borne in mind that while the district attorney and the defense attorney were probably enjoying themselves hugely, the defendant is the one who suffered the effects of the action of the district attorney. He is the one whose conviction could very well have been brought about, under the circumstances of this case, by the district attorney's misconduct.

As said in People v. Podwys, supra, 6 Cal.App.2d 71, at page 74, 44 P.2d 377, at page 378: "Whether or not misconduct of a district attorney is cause for reversal rests largely upon the facts in each case." There are a number of recent cases in which the court refused to reverse the judgment upon the grounds that the misconduct under the facts was not prejudicial. In People v. Gordon, supra, 78 Cal.App. 167, 248 P. 289, the alleged misconduct appeared minor and the court held that defendant's counsel expressly waived any objection to it. In People v. Chilcott, supra, 18 Cal.App.2d 583, 64 P.2d 450, there were statements made similar to those made in our case, which the court held were misconduct. However, the court felt that the failure to object to these, and the fact that the issue of the defendant's guilt or innocence was not close, caused the misconduct to be not prejudicial. In People v. Harden, 14 Cal.App.2d 489, 58 P.2d 675, the court held that the claims of misconduct on the part of the district attorney were entirely without merit, trivial in nature, and adequately cured by the instructions of the court. In People v. Gray, 52 Cal.App.2d 620, 127 P.2d 72, 93, the alleged misconduct was held to be not "flagrant or any violation of his [defendant's] rights." In People v. Summar, 26 Cal.App.2d 439, 79 P.2d 389, 390, the district attorney in his opening argument stated that the defendant was not "an ordinary crook." The defendant objected, not on the ground of misconduct, but "because there is no evidence on which that inference might be drawn." The court did instruct the jury to disregard the district attorney's statement. Another assignment of misconduct was not considered for the reason that there had been no objection made, and "The remark was not of such character that prejudice from it must be presumed." In People v. Seely, 75 Cal.App.2d 525, 171 P.2d 529, the alleged misconduct of the district attorney was disregarded by the court because the evidence against the appellant was "almost conclusive" and the remarks made were in response to similar arguments made by the defense counsel. In People v. Reed, 27 Cal.App.2d 484, 81 P.2d 162, the remarks were held to be not seriously prejudicial, as well as the fact that no objection was made to them. In People v. Wagner, 62 Cal.App.2d 597, 145 P.2d 646, 648, the alleged misconduct is not set forth, but the court states, "Without saying that either was unjustified or prejudicial, it is sufficient to state that the question is not properly raised here as appellant did not object * * *". In People v. Tedesco, supra, 1 Cal.2d 211, 34 P.2d 467, 471, the court found that the remarks of the district attorney which the defendant claimed to be misconduct "cannot, in our estimation, be interpreted as the appellant contends." In People v. Black, 45 Cal.App.2d 87, 113 P.2d 746, 753, the court found that many of the matters assigned as error were not objected to and that while in a few instances in the argument the prosecutor did depart from the record and in doing so exceeded the bounds of propriety, the trial court on numerous occasions admonished the jury to disregard such matters, and as the appellate court was satisfied of the guilt of defendants it was convinced that "such improprieties as may have existed did not result in a miscarriage of justice."

In the following cases the court found that the misconduct was serious enough to be prejudicial. In People v. Podwys, supra, 6 Cal.App.2d 71, 44 P.2d 377, the district attorney as in this case went on to assure the jury that he would not prosecute any man who was not guilty. The court held that there could be no excuse for such comment; it was satisfied that this misconduct weighed heavily against the defendant and may have brought about his conviction. The decision in the Podwys case was based upon the decision in the case of People v. Edgar, supra, 34 Cal.App. 459, 167 P. 891, where the district attorney likewise stated that he would not prosecute any man that he did not believe to be guilty, and that type of conduct was held to be highly prejudicial. In People v. Braun, 14 Cal.2d 1, 92 P.2d 402, the intimation and questions by the district attorney that the defendant, who himself was an ex-convict, consorted with ex-convicts, was held to be prejudicial misconduct, which might have been the deciding factor which had brought about his conviction. The conviction was set aside in People v. Simon, supra, 80 Cal.App. 675, 252 P. 758. The statements of the district attorney there were more flagrantly violative of the rights of the defendant than in our case. However, such was only a matter of degree. The defendant failed to except to the remarks, and the court held that they were of such a type that any admonition by the court could not cure.

In comparison of the cases in which the court found the misconduct to be prejudicial with those in which the court found otherwise, it appears that the test of whether the court is going to apply the rule that the alleged misconduct must be objected to in the lower court depends on the type of misconduct of the district attorney; on whether or not the case is close, and on whether the misconduct is of a type which in view of the closeness of the case an admonition of the trial court would or would not cure; and where objection is made and an admonition given, the effect of the misconduct. It depends somewhat upon the type of admonition given by the court. In this case, the court's admonition to the very prejudicial remarks of the district attorney was not very strong, and not particularly calculated to impress the jury with the seriousness of the district attorney's conduct. The court merely said: "I admonish the jury to disregard that statement of counsel's relative to cases in which if he is not convinced; you will disregard it. I grant that that far." Apparently what the court meant by "I grant that that far" was that it was not granting a motion for a mistrial. However, that very expression seems to weaken the admonition, and at best, the court's remarks were very mild concerning a most grevious situation.

We have examined the entire record, including the evidence, to determine if there were a "miscarriage of justice" within the meaning of section 4½ of Article VI of the Constitution. As said before, the evidence sustains the finding of the jury. However, while there was strong evidence that the defendant was around his home and Johanna's school during the noon hour in the early part of April, a fact denied by defendant and claimed impossible by his witnesses Ben Unruh and Mrs. Rosalie Hugo, justifying the inference that defendant did meet Johanna the day in question—whether they actually met and had sexual intercourse depends entirely upon Johanna's testimony—a white girl's word against that of a Filipino. It cannot be said that the evidence against defendant was such that the jury would not have been justified in finding a verdict in favor of the defendant. Moreover, had there been a verdict in his favor, it would have been supported by the evidence of himself and his alibi witnesses. Again using the language of the Podwys case, 6 Cal.App.2d 71, 75, 44 P.2d 377, 379: "* * * the defendant offered by evidence of apparent reliability, an alibi * * *". We are convinced that the misconduct of the district attorney in this case weighed heavily against the defendant and may have brought about his conviction. The error has, therefore, resulted in a miscarriage of justice, entitling the defendant to a new trial.

The judgment and order appealed from are reversed, and the cause is remanded for a new trial.

PETERS, P. J., and WARD J., concur.

79 Cal.App.2d 128

GUIDICI v. PACIFIC AUTOMOBILE INS. CO.

Civ. 13278.

District Court of Appeal, First District, Division 2, California.

April 14, 1947.

1. Automobiles ⚷368, 378

Proprietor of garage at which automobile was left for repair was a "bailee" of the automobile, and, as such, not only had the possession and control of the automobile but the exclusive right of possession supporting a lien for his services until paid. Civ.Code, § 3051.

See Words and Phrases, Permanent Edition, for all other definitions of "Bailee".

2. Insurance ⚷146(2, 3)

Ambiguities in a policy are to be construed against the insurer, but where a provision of the policy is unambiguous it must be construed according to its plain meaning.

3. Insurance ⚷434

Policy of liability insurance, which was issued to proprietor of garage, and which provided that it did not apply to property owned by, rented to, leased to, "in charge of," or transported by insured, did not cover automobile left at garage for repair, and insurer was not liable for fire damage to automobile while in garage, since proprietor was "in charge of" automobile.

See Words and Phrases, Permanent Edition, for all other definitions of "In Charge Of".

4. Bailment ⚷11

A bailee of property is "in charge of" it so long as he retains actual possession, whether he is operating it or working on it or not.

◆

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Frances Guidici against the Pacific Automobile Insurance Company to recover for fire damage to automobile which caught fire while in a garage operated by one to whom defendant had issued a policy of liability insurance. From a judgment in favor of the defendant, the plaintiff appeals.

Judgment affirmed.

Francis T. Cornish, of Berkeley, for appellant.

Harold H. Cohn, of San Francisco, for respondent.

DOOLING, Justice.

Plaintiff appeals from a judgment in favor of defendant. The case was submitted upon an agreed statement of facts from which the following facts appear: Earl Clifford operated an automobile repair and storage garage in the City of Oakland. Prior to January 12, 1944 J. A. Palmquist "left his automobile with said Earl Clifford for the purpose of repairing the carbureter thereof, and on January 12, 1944, the said Earl Clifford had removed the carbureter and placed it in a noninflammable liquid for the purpose of cleaning said carbureter and said carbureter and said fluid were placed in a pan over a gas hot plate to boil the fluid. * * * This gas plate was on a wooden bench four feet from the right side of said automobile. Earl Clifford was in another part of the building on some other work and had been away from said automobile for 20 minutes when upon returning he found the fluid had boiled over onto the wooden bench, caught fire and both the automobile and building were burning therefrom." The automobile was damaged in the sum of $1215. and Palmquist sued Clifford and recovered judgment against him for that amount and costs.

Clifford carried a policy of liability insurance with defendant herein insuring Clifford under Coverage B against liability for property damage in the operation of his place of business. Defendant denied liability to pay the judgment recovered by Palmquist against Clifford by reason of the provision of the policy providing the exclusion of liability hereinafter discussed. Palmquist assigned his claim to plaintiff and plaintiff brought this action on the policy which resulted in the judgment appealed from. A single point is presented for decision.

Under the heading "Exclusions" the policy contains the following provision:

"This policy does not apply: * * *

"(j) under coverage B, to property owned by, rented to, leased to, in charge of, or transported by the insured."

The single question presented is whether at the time of its damage by fire Palmquist's automobile was "in charge of" Clifford within the meaning of this exclusionary provision.

Identical language in similar policies has been construed by the courts of other jurisdictions. The earliest of these cases called to our attention is State Automobile Mut. Ins. Co. v. Connable-Joest, Inc., 174 Tenn. 377, 125 S.W.2d 490, 492. In that case an automobile had been delivered to the insured for the purpose of being greased and oiled and fell off an elevated grease rack in the insured's place of business. The policy of insurance contained an exclusionary provision of "damages to or destruction of property owned, rented, leased, in charge of, or transported by the assured." The supreme court of Tennessee in holding that the automobile was "in charge of" the insured at the time of the casualty said at page 492 of 125 S.W.2d:

"It is contended by counsel for plaintiff that the phrase 'in charge of' is synonymous with the associated words 'owned, rented, leased, * * *, or transported,' contained in the exclusions clause, and was intended to distinguish claims for damages to customers' automobiles from damages to automobiles in charge of the insured by reason of ownership, lease, rental, or while being transported by the insured. The construction contended for would do violence to the plain and unambiguous language of the contract. As is usual in policies of this character, the general coverage is first set forth and then the exclusions. The latter cannot, of course, be held to be in conflict with the former. The limitations of the insurance are found in the exclusions. The intent of the parties, as ascertained from the contract, was to exclude the insurance company from liability for claims for damage to property under the control and management of the insured, whether by virtue of ownership, lease, rental, or having charge of the property under any other authority, or in any other capacity."

In Clark Motor Co. v. United Pac. Ins. Co., 172 Or. 145, 139 P.2d 570 a customer's automobile was damaged while being towed by the insured. The policy contained an exclusionary provision identical with the one before us. The supreme court of Oregon said, at pages 572, 573 of 139 P.2d:

"If we were to look only to the 'Insuring Agreements' of the policy, there would be no doubt as to coverage as the automobile 'wrecker' at the time of the accident was being used in connection with the operation of the business in which the insured was engaged. However, in construing the policy, we can not exclude from consideration the plain and unambiguous language of the exclusion clause. There may be some question as to whether the towing of the car was 'transportation' within the meaning of the policy, but we think there can be no doubt that at the time Hallock's car was damaged it was 'in charge of' the assured and therefore not covered by the policy: State Automobile Mut. Ins. Co. v. Connable-Joest, Inc., 174 Tenn. 377, 125 S.W.2d 490; Parry v. Maryland Casualty Co., 228 App. Div. 393, 240 N.Y.S. 105; Root Motor Co. v. Massachusetts Bonding & Ins. Co., 187 Minn. 559, 246 N.W. 118; Berry on Automobiles, 7th Ed., vol. 6, § 6.657; Blashfield Cyc. of Automobile Law and Practice, Perm. Ed., vol. 6, § 4154; Appleman on Automobile Liability Insurance, p. 200.

"True, the exclusion clause greatly limits the liability of the insurer but it is not so repugnant to the 'Insuring Agreements' as to defeat the purpose of the policy and thereby lead to an absurd result. As said in Couch's Cyclopedia of Insurance, Vol. 1, § 187: '* * * an insurer ordinarily may insert as many exemption clauses in its policy as it sees fit, and the courts cannot change terms by judicial construction, even in the case of exemptions from liability, if the same are free from ambiguity and uncertainty as to meaning.'

"Cases involving exclusion clauses containing ambiguous language are not in point. Here the language is clear and certain. It may be that, in view of the limited number of employees of the insured who drove an automobile, that the policy was ill-advised and that one covering 'Automobile Storage Garage' would have better served its purpose but that is a matter of business judgment with which we can not be concerned.

"Counsel for the assured contends that each phrase of the exclusion clause is dependent upon the other and, when so considered, the words 'in charge of, or transported by the insured' refer only to property which the insured is using in connection with its business. In our opinion, such constructon is not warranted by the language of the exclusion clause. It may be said with a reasonable degree of certainty that there is no decision of any Supreme Court involving the construction of a similar exclusion clause in a garage liability insurance policy which supports the contention of the assured in this case. Certainly no such decision has been cited and we have found none after diligent research."

The conclusion reached in these two cases is consistent with the clear meaning of the words "in charge of". Under the noun "charge" in Webster's New International Dictionary, 2d Ed., Unabridged the phrase "in charge" is defined as follows: "a. Having the charge or care of something, esp. temporarily; as the officer or minister in charge." Among the synonyms of the word charge in the same work are given: "Custody", "keeping" and "management".

In common parlance a garage repair man to whom an automobile was entrusted for purposes of repair would unhesitatingly be said to be "in charge of" it.

Appellant cites three cases holding under their peculiar facts that the automobiles involved were not "in charge of" the several insureds. In Cohen & Powell v. Great American Indemnity Co., 127 Conn. 257, 16 A.2d 354, 131 A.L.R. 1102, the supreme court of errors of Connecticut passed upon the following situation, quoting from page 355 of 16 A.2d: "The insured sublet a definitely allocated space in this garage (the insured's) to the plaintiff for the storage of one truck. This space was reserved for the exclusive use of the plaintiff. He had keys to the outer doors of the garage with free access at all times. The truck was stored in this space almost nightly and its van, cab and ignition were then locked. The truck was damaged while it was so stored. The insured had no right or duty to repair, service, use, drive or exercise any dominion or control over the plaintiff's truck." The court in holding that the truck was not "in charge of" the insured said, page 355 of 16 A.2d:

"Neither the policy as a whole nor the exclusions other than that cited are helpful in interpreting this phrase 'in charge of'. While the word 'charge' has a very broad and varied meaning (McLoughlin v. Shaw, 95 Conn. 102, 107, 111 A. 62), a person or thing is not 'in charge of' an insured within the meaning of the policy unless he has the right to exercise dominion or control over it. This element is present in every illustration of the use of the phrase which comes to mind; for example, a nurse in charge of a child, a warden in charge of a prison, a caretaker in charge of an estate. Steffe v. Old Colony R. Co., 156 Mass. 262, 264, 30 N.E. 1137; People v. Gould, 345 Ill. 288, 323, 178 N.E. 133; 20 Words and Phrases, Perm.Ed., [page] 413. No illustration omitting this element has been suggested by the defendant by citation or otherwise. As the trial court said: 'Obviously the whole intendment of the policy is to insure Muriello against damage to the property, life and limb of others in connection with his motor transport business, but not to cover losses sustained by him with respect to property actually used or being transported by him.' The finding discloses no duty or obligation on the part of the insured with regard to the plaintiff's truck and finds affirmatively that he never did exercise nor was he authorized to exercise any dominion or control over it."

[1] The facts of the case clearly distinguish it from the one before us. In the case decided by the Connecticut court the owner of the truck was either a lessee or licensee for a consideration in occupying

the space reserved to him in the garage and the possession of the truck was in no sense given to the garage owner. In our case the insured was a bailee of the truck under a bailment for purposes of performing services thereon of the type known as locatio operis faciendi. (6 Am.Jur. 144; 8 C.J.S., Bailments, § 8, p. 243.) As such bailee he not only had the possession and control of the bailed automobile but the exclusive right of possession supporting a lien for his services until paid. (Civ.Code, sec. 3051.)

In Sky v. Keystone Mut. Casualty Co., 150 Pa.Super. 613, 29 A.2d 230, 231, the insured was driving plaintiff's automobile "without consent or permission of plaintiffs" when it was damaged. The court's holding that it was not "in charge of" the insured is based on the fact that his possession was wrongful and illegal the court saying, page 233 of 29 A.2d: "that when the act in question * * * refers to 'property of others in charge of the insured,' it does not mean mere 'possession'; and that property is not in charge of the insured unless he has the right to exercise dominion or control over it. * * * Admittedly, Kough (the insured) did not have permission or any right or authority to use plaintiffs' motor vehicle, and no duty or obligation had been imposed upon him by the owners in connection therewith. He was a trespasser on the personal property of plaintiffs, and it cannot be said that he was 'in charge of' it * * *."

The case is readily distinguishable from ours in which far from being a trespasser the insured was lawfully in possession as a bailee with the duty and obligation to perform services on the bailed car.

In Moffett v. Pennsylvania Mfrs.' Ass'n Cas. Ins. Co., 137 Pa.Super. 569, 10 A.2d 579, 581, the policy only applied while "automobiles are being operated by or are in charge of the Assured or employes of the Assured whose earnings are or will be included in the basis of premium compensation". The accident occurred while the automobile of the assured was being driven by a customer who was taking an automobile part to the customer's home at the assured's request. Since the customer was not an employee whose earnings were included in the premium compensation and neither the assured nor any such employee was in the car at the time of the accident the court held that since the customer was in charge of the automobile the liability fell outside the policy coverage. The case is not helpful on its facts.

[2, 3] Appellant argues that all ambiguities in a policy of insurance are to be construed against the insurer. This is a truism well established. Sampson v. Century Indemnity Co., 8 Cal.2d 476, 478, 479, 66 P.2d 434, 109 A.L.R. 1162. But where a provision of the policy is clear and unambiguous it must be construed according to its plain meaning. Sampson v. Century Indemnity Co., supra, 8 Cal.2d at page 480, 66 P.2d 434; Long v. West Coast Life Insurance Co., 16 Cal.2d 19, 104 P.2d 646; Coit v. Jefferson Standard Life Ins. Co., 28 Cal.2d 1, 168 P.2d 163. In our judgment the words "in charge of" as applied to the facts of this case are too clear to admit of any extraneous aid in their construction.

The crux of appellant's argument is found on p. 12 of the opening brief: "It is submitted that in order to have the property 'in charge of' the garage, the garage owner must not only have the right to exercise dominion over the property, but must, at the time it is damaged, be actually doing something to the property itself."

[4] We cannot follow appellant in this refinement of reasoning. A bailee of property is in charge of it so long as he retains actual possession whether he is operating it or working on it or not.

The judgment is affirmed.

NOURSE, P. J., and GOODELL, J., concur.

79 Cal.App.2d 125

RENCH v. HARRIS et ux. (two cases).

Civ. 13273, 13274.

District Court of Appeal, First District, Division 2, California.

April 14, 1947.

Hearing Denied June 12, 1947.

Brokers 🔑42

A transaction, arranged by agent without realtor's license, for hotel owner's purchase of hotel lease, eviction of subtenants, and leasing of hotel to telephone company at increased rental, was unlawful, so as to preclude agent's recovery of value of his services or half of profit from owner. Business and Professions Code, §§ 10130–10132, 10134, 10135.

◆

Appeal from Superior Court, Alameda County; Hon. Ezra W. Decoto, Judge.

Two actions, consolidated for trial, by L. Rench against Joseph W. Harris and wife for the reasonable value of plaintiff's services in securing a lease of named defendant's hotel and half of the profit from such transaction. From judgments of nonsuit, plaintiff appeals.

Affirmed.

See also —— Cal.App.2d ——, 172 P.2d 576.

Marvin C. Hix, of San Francisco, for appellant.

Nathan G. Gray, of Berkeley, for respondents.

DOOLING, Justice.

Two separate appeals are presented from two judgments of nonsuit. The complaints in the two actions count on the same transaction and the two cases were consolidated for trial. The plaintiff's evidence shows that defendant Joseph W. Harris was the owner of the Court Hotel in San Francisco and the hotel was leased to one Bolzendahl at $1250 per month for an extended term of years. In 1944 plaintiff was negotiating with the Pacific Telephone & Telegraph Company to secure housing accommodations for their employees and learned that the company was interested in securing a lease on the Court Hotel for that purpose. He worked out a plan involving three steps: (1) The purchase by the owner of Bolzendahl's lease; (2) the eviction of the subtenants under O.P.A. regulations; and (3) the leasing of the hotel to the telephone company at an increased rental. He then contacted Harris and presented his three point plan to him. What then ensued is quoted verbatim from plaintiff's testimony:

"Mr. Harris said, 'Carl, (addressing the plaintiff) that is fine. You go and keep on working with the Telephone Company and I will work matters out with Mr. Bolzendahl, and naturally will take care for your plan and have your submittance.'"

The transaction was carried through as suggested, plaintiff continuing to negotiate with the telephone company concerning their leasing the hotel. Bolzendahl's lease was purchased by Harris and the telephone company became lessees of the property at a considerably increased rental. Harris refused to compensate plaintiff and these actions were filed, one for the reasonable value and the other for one-half the profit from the transaction.

The nonsuits were granted on the ground that plaintiff was not a licensed realtor and the transaction as to him was therefore prohibited by law.

It is plaintiff's theory that he sold Harris an idea for which he is entitled to compensation. Plaintiff cites in support of this theory Yadkoe v. Fields, 66 Cal.App.2d 150, 151 P.2d 906; Liggett & Meyer Tobacco Co. v. Meyer, 101 Ind.App. 420, 194 N.E. 206; How J. Ryan & Associates v. Century Brewing Ass'n, 185 Wash. 600, 55 P.2d 1053, 104 A.L.R. 1353; and Brunner v. Stix, Baer & Fuller Co., 352 Mo. 1225, 181 S.W.2d 643. We need not consider these cases in detail, for even if they are applicable to the facts of the cases before us we are satisfied that the judgments of nonsuit were proper.

It is plaintiff's own testimony that a substantial part of his services agreed to be performed was to negotiate for a lease with the telephone company. "It is unlawful for any person to engage in the business, act in the capacity of, advertise or assume to act as a real estate broker or a real estate salesman within this State without first obtaining a real estate license from the division." Bus. and Prof. Code, sec. 10130. Real estate broker and real estate salesman includes any person "who, for compensation, negotiates * * * leases." Bus. and Prof. Code, secs. 10131, 10132. Under sec. 10134 one such act for compensation is sufficient to bring the person performing it under the terms of these regulations; and sec. 10135 provides:

> "When a lease or leasing is referred to in this article, it includes any lease, whether such lease is the sole transaction involved, or the principal or an incidental part of the transaction involved."

The transaction clearly falls within the language of the section last quoted since a substantial incident of plaintiff's services was, and was agreed to be, his negotiations for a lease with the telephone company. The entire transaction was thereby prohibited under the code sections above cited, since plaintiff admittedly was not licensed. See Democa v. Barasch, 212 Cal. 293, 298 P. 17; Nittler v. Continental Casualty Co., 94 Cal.App. 498, 271 P. 555, 272 P. 309.

The judgments appealed from are affirmed.

NOURSE, P. J., and GOODELL, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

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78 Cal.App.2d 915

SER-BYE CORPORATION v. C. P. & G. MARKETS, Inc., et al.

Civ. 15302.

District Court of Appeal, Second District, Division 3, California.

April 7, 1947.

Hearing Denied May 29, 1947.

1. Pleading 🔑350(1, 3)

Motion for judgment on the pleadings is in the nature of a general demurrer, and on defendant's motion allegations of complaint must be taken as true and motion granted only where there is an entire absence of some essential allegation.

2. Pleadings 🔑350(3)

Where plaintiff has a good cause of action which by accident or mistake he has failed to set out in his complaint, or where facts stated indicate that he probably has a good cause of action but has imperfectly or defectively pleaded it, and defects have not been called to his attention by demurrer or notice of motion for judgment on the pleadings, court should not grant the motion without giving plaintiff an opportunity to elect whether he will stand on his pleading or amend it.

3. Pleading 🔑37

In the absence of some representation to contrary by plaintiff's counsel, trial court may presume that plaintiff had stated his case as strongly as the known facts would permit.

4. Courts 🔑481

That another judge had previously overruled demurrer to complaint did not prevent trial judge from considering and granting defendants' motion for judgment on the pleadings.

5. Contracts 🔑318

Forfeitures are not favored by the courts and are never enforced if they are couched in ambiguous terms. Civ.Code, § 1442.

6. Contracts 🔑318

A forfeiture can be enforced only when there is a breach shown that it was the clear and manifest intention of the parties to provide for. Civ.Code, § 1442.

7. Contracts 🔑318

The burden is upon party claiming forfeiture to show that such was the unmistakable intention of the instrument, and, if the instrument can be reasonably interpreted so as to avoid the forfeiture, the court will do so. Civ.Code, § 1442.

8. Landlord and tenant 🔑76(1)

A covenant not to assign "leasehold estate" meant the lease as an entirety, and not merely shares of stock in the tenant corporation.

See Words and Phrases, Permanent Edition, for all other definitions of "Leasehold Estate".

9. Landlord and tenant ⚷76(2)

Violation of lease was not shown by allegation that lease was to corporate tenant with covenant not to assign leasehold estate, that request for leave to assign to a named person was denied, and that shares of stock in tenant were subsequently assigned to such person, who entered into possession of premises.

10. Frauds, statute of ⚷44(4)

Assignment of leasehold for longer term than one year must be by an instrument in writing subscribed by party disposing thereof unless assignment be by operation of law. Civ.Code, §§ 1091, 1624, subd. 4.

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action in unlawful detainer by Ser-bye Corporation against C. P. & G. Markets, Inc., and others for alleged failure to perform conditions of written lease. From a judgment for defendants on the pleadings, the plaintiff appeals.

Judgment affirmed.

Bloom & Bloom and L. M. Cahill, all of Los Angeles, for appellant.

Aaron Levinson and Albert E. Marks, both of Los Angeles, for respondents, C. P. & G. Markets, Inc., and Eph J. Hoffman.

Jack R. Kates, of Los Angeles, and Nathan Kates, of San Fernando, for respondents Pine and Greenblatt.

KINKAID, Justice pro tem.

The plaintiff appeals from a judgment in favor of the several defendants following the granting by the court of a motion for judgment on the pleadings. Plaintiff, as owner and lessor of premises described in its complaint as the "Meat Department, Breaking Room and Meat Cooler," and being part of a public market situated in Van Nuys, California, brought this action in unlawful detainer, pursuant to subdivision 3 of section 1161, Code of Civil Procedure, for possession after claimed failure upon the part of defendants to perform the conditions of a written lease. The defendants C. P. & G. Markets, Inc., and Eph J. Hoffman, filed separate demurrers to the complaint and the defendants, Harry Pine and B. Greenblatt, joined in a third demurrer thereto. A judge other than the trial judge overruled such demurrers, separate answers were filed and the case was set for trial. Motions for judgment upon the pleadings were made at the trial but before the introduction of any evidence and, after being argued by counsel for the parties, were granted as to all defendants. At no time during these last mentioned proceedings did plaintiff request additional time, any continuance for the purpose of meeting the arguments presented in favor of granting the motions, nor ask leave to amend its complaint in any particular. Plaintiff stands on its complaint as stating a cause of action against the defendants.

[1] "In considering whether the judgment on the pleadings was properly granted, it is but necessary to determine the sufficiency of the complaint upon the same principle as though it had been attacked by general demurrer. In other words, it is only where there is an entire absence of some essential allegation that a motion for judgment on the pleadings may be properly granted." Rannard v. Lockheed Aircraft Corp., 1945, 26 Cal.2d 149, 151, 157 P.2d 1, 2.

"Since a motion for judgment on the pleadings is in the nature of a general demurrer, the trial court in ruling thereon must treat the allegations of the complaint as true. MacIsaac v. Pozzo, 26 Cal.2d 809, 161 P.2d 449." Smith v. Beauchamp, 1945, 71 Cal.App.2d 250, 256, 162 P.2d 662, 665.

[2] If plaintiff has a good cause of action, which by accident or mistake he has failed to set out in his complaint, or when the facts stated indicate that he probably has a good cause of action but that it has been pleaded imperfectly or defectively, and the defects have not been called to his attention by demurrer or by notice of motion for judgment on the pleadings, the court should not grant the motion without first giving the plaintiff an opportunity to elect whether he will stand on his pleadings or amend them. MacIsaac v. Pozzo, 1945, 26 Cal.2d 809, 815, 816, 161 P.2d 449. As heretofore indicated, however, the defects complained of by the defendants were called

to the attention of plaintiff by three demurrers and such party, by its failure to ask leave to amend or for additional time, no accident or mistake having been shown, elected to stand on its pleading without amendment.

[3] "In the absence of some representation to the contrary by plaintiffs' counsel (and there was none), the trial court had the frequently judicially recognized right to presume that the pleader had stated his side of the controversy as strongly and as favorably as all the facts known to him would permit." Scafidi v. Western Loan & Building Co., 1946, 72 Cal.App.2d 550, 571, 165 P.2d 260, 272.

[4] The fact that another judge had previously overruled the demurrers, thereby sustaining the validity of the complaint, had no effect upon the right of the trial judge to consider and grant a motion for judgment on the pleadings. Wrightson v. Dougherty, 1936, 5 Cal.2d 257, 265, 54 P.2d 13.

Measured by the foregoing principles, we now proceed to a consideration of the sufficiency of plaintiff's complaint in the face of the successful attack made thereon by way of the motion for judgment on the pleadings.

The complaint alleges both plaintiff and the defendant, C. P. & G. Markets, Inc., to be California corporations, that plaintiff is the owner and entitled to the possession of the premises heretofore described and that on April 24, 1940, plaintiff entered into a ten-year written lease of said premises with the defendant corporation only, for a specified monthly rental, pursuant to which the defendant corporation went into possession and remained therein until about August 1, 1945. Plaintiff further alleges that "by the terms of said lease the defendant corporation covenanted that it would not mortgage or otherwise encumber or assign the leasehold estate nor sublet the leased premises in whole or in part, without the written consent of plaintiff first obtained; and that any attempt to assign, mortgage, or sublet, or other violation of the provisions of said covenant would be a breach of covenant and void and confer no right of occupancy or other right on any assignee, mortgagee, subtenant or purchaser"; that in June of 1945, the defendant corporation requested plaintiff to give its consent to a proposed assignment of the lease to defendant Hoffman, which request was refused; that on or about August 1, 1945, the defendant corporation, despite plaintiff's refusal, and in breach of its covenant not to assign or sublet said premises in whole or part, attempted to assign the whole of said premises to Hoffman by transferring to him shares of stock of said defendant corporation and that Hoffman, by virtue of said attempted and purported assignment, then entered upon said premises where he now remains in possession.

The complaint then proceeds to set forth allegations showing that plaintiff, upon learning these facts, caused an investigation to be made, and on information and belief alleges that defendants Pine and Greenblatt owned and controlled all assets of the defendant corporation, that it had filed no copy of its articles of incorporation in Los Angeles County, had no permit to sell its stock, and that such defendants are business conduits and alter ego of one another; that the corporation is merely a shield set up by such individual defendants for carrying on their copartnership business, and that the strategem of a sale of shares of stock of the defendant corporation to Hoffman was a mere sham and fraud in that no permit to issue shares of such stock had been applied for or granted and that any such attempted sale of its stock is void.

The complaint then further alleges that upon learning of defendant corporation's breach of covenant not to assign or attempt to assign or sublet it elected to declare a forfeiture, served a three day notice to that effect and upon defendant's refusal to surrender possession has been damaged in specified sums.

[5-8] As was said in McNeece v. Wood, 1928, 204 Cal. 280, 283, 284, 267 P. 877, 879: "At once we are met with the Code provision as follows: 'A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created.' Section 1442, Civ.Code. Examination of the cases in this state shows that our courts have not hesitated to give this

rule of interpretation full application. 'Forfeitures, as such, are not favored by the courts, and are never enforced if they are couched in ambiguous terms.' Cleary v. Folger, 84 Cal. 316, 321, 24 P. 280, 281, 18 Am.St.Rep. 187. 'A forfeiture can be enforced only when there is "such a breach shown as it was the clear and manifest intention of the parties to provide for."' Randol v. Scott, 110 Cal. 590, 595, 42 P. 976, 977. 'The burden is upon the party claiming the forfeiture to show that such was the unmistakable intention of the instrument. If the agreement can be reasonably interpreted so as to avoid the forfeiture, it is our duty to do so.' Quatman v. McCray, 128 Cal. 285, 289, 60 P. 855, 856." See also Universal Sales Corp. v. California Press Mfg. Co., 1942, 20 Cal.2d 751, 771, 128 P.2d 665; Keating v. Preston, 1940, 42 Cal.App.2d 110, 117, 108 P.2d 479; Nelson v. Schoettgen, 1934, 1 Cal.App.2d 418, 423, 36 P.2d 665; 32 Am.Jur. 298, par. 330.

Stripped of the surplusage plaintiff has endeavored to set forth a cause of action for possession of the demised premises based upon a claimed attempted assignment of the lease as a result of the transfer to Hoffman by Pine and Greenblatt of shares of stock in the defendant corporation, followed by an entry and remaining in possession by such transferee. This is true even though the notice to quit, a copy of which is attached to and made a part of the complaint, refers to a breach of the covenant in the lease against assigning or subletting and makes no reference to a breach by any attempt to do either.

Plaintiff, some five years previous to the claimed violation, entered into the lease with the defendant corporation. During all of that period it did business with such defendant as its tenant with full knowledge that the demised premises could not be and was not occupied by the corporation itself but only through its stockholders, agents and employees. When plaintiff chose to deal with a corporation as its tenant it must also have known that shares of stock therein might be owned by different stockholders and were subject to assignment to others in the ordinary course of business. The inhibitions against assignment run as to the lease itself and not to the stock in the lessee corporation by one or more stockholders. When, therefore, it was covenanted that the lessee should not "assign the leasehold estate" the lease as an entirety was meant (Randol v. Scott, 1895, 110 Cal. 590, 595, 42 P. 976), and not merely shares of stock in the lessee corporation.

[9] Although the complaint alleges the circumstance, by way of suspicion, that the lessee defendant had previously requested consent to a proposed assignment of the lease to Hoffman, and that shares of stock were thereafter transferred to him followed by his entry into possession of the demised premises it fails to allege any facts showing that Hoffman became the transferee of all or any substantial part of the tenant's corporate stock or that he did not merely enter into possession of the premises as an employee or agent of such original lessee. For all that otherwise appears in the complaint the possession by Hoffman may well be that of the defendant corporation itself. Had the parties to the lease intended that the sale and transfer by one or more stockholders in the lessee corporation to other persons of one or more of their shares of stock therein was to be deemed to be an assignment or attempted assignment of the lease itself, such fact should have been expressed in the lease in clear and unequivocal language.

The fact that the corporation was the lessee may not be overlooked. Control of the corporation could be passed by means of the sale of its stock. If the complaint be interpreted as alleging that Hoffman did acquire control of the corporation, it was not alleged that he did not acquire it for value and in good faith, whatever the motives of Pine and Greenblatt may have been. If the latter had a legal right, so far as plaintiff was concerned, to dispose of control of their corporation, they would not be prevented from exercising that right by the fact that the corporation held a lease which provided against transfer without the consent of the lessor.

The acts and circumstances here shown which plaintiff contends constitute a breach of the terms of the lease, may result in a forfeiture only when the language of the instrument itself shows the clear and manifest intention of the parties was to so provide. The claimed breach here alleged falls far short of meeting this requirement.

[10] Further, the assignment of a leasehold for a longer term than one year, must be by an instrument in writing, subscribed by the party disposing of the same, unless such assignment be by operation of law. Civ.Code, sec. 1091; Civ.Code, sec. 1624; subd. 4; 12 Cal.Jur. 898, par. 58. No facts showing this essential element have been pleaded nor are any alleged showing any assignment by operation of law.

The judgment is affirmed.

SHINN, Acting P. J., and WOOD, J., concur.

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79 Cal.App.2d 174

PEOPLE v. BUGG.

Cr. 582.

District Court of Appeal, Fourth District, California.

April 16, 1947.

1. Obstructing justice 🔑16

Evidence sustained conviction of willfully resisting an officer in the discharge of his duties. Pen.Code, § 148.

2. Arrest 🔑63(3)

Defendant, who had committed the crime of battery in the presence of officers as well as upon two of them, was subject to arrest by officers without a warrant. Pen.Code, §§ 242, 836.

3. Criminal law 🔑1186(4)

Where court was mistaken in its statement that defendants had exhausted their peremptory challenges and counsel for defendants joined in the mistake and failed to call court's attention to the fact that defendants were entitled to additional peremptory challenges, and there was nothing to indicate that defendants desired to exercise an additional peremptory challenge or would have done so if the mistake had not been made, the error was not prejudicial. Pen.Code, §§ 1070, 1098, 1404; Const art. 6, § 4½.

4. Criminal law 🔑814(1), 1186(4)

In prosecution for resisting an officer, where proof was that defendant had committed a battery on two officers and in presence of two others, an instruction that section of the Penal Code of California "which in so far as it applies to this case, reads as follows: 'A peace officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person for a public offense comitted or attempted in his presence' ", did not constitute prejudicial error and was applicable. Pen.Code, § 148; § 836, subd. 1; Const. art. 6, § 4½.

5. Criminal law 🔑1186(4)
Indictment and information 🔑161(4)

Where information mistakenly described the offense as a felony, whereas it was only a misdemeanor, granting district attorney leave to amend the information was proper, and fact that leave was asked in the presence and hearing of the jury could not have prejudiced defendant. Pen.Code, §§ 148, 1008; Const. art. 6, § 4½.

Appeal from Superior Court, Tulare County; Glenn L. Moran, Judge.

Alvon J. Bugg was convicted of resisting an officer and, from such conviction and an order denying his motion for a new trial, he appeals.

Judgment and order affirmed.

Jamison & Jamison, of Porterville, for appellant.

Fred N. Howser, Atty. Gen., and John F. Hassler, Deputy Atty. Gen., for respondent.

MARKS, Justice.

This is an appeal from a judgment pronounced on Alvon J. Bugg, and from an order denying his motion for new trial, in a case where he was charged, together with R. C. Bugg, with the crime of resisting an officer. R. C. Bugg was acquitted and we will hereafter refer to Alvon J. Bugg as the defendant.

We find it necessary to summarize the evidence supporting the verdict and judgment but will not concern ourselves with conflicting evidence.

O. R. McMillen was deputy constable of Porterville Township of Tulare County. Doyle E. Grigsby, Lloyd A. Hensley and William E. Vaughn were police officers of the city of Porterville in Tulare County.

On the evening of September 14, 1946, Grigsby and McMillen were on duty at the Green Mill, a dance hall located in the city of Porterville. There was a disturbance outside and the two officers went out to investigate. They saw defendant strike another person knocking him down. They went up to defendant and told him he was under arrest. Defendant hit Officer McMillen on the jaw. Officer Grigsby took defendant by the arm and defendant made "four or five passes" at him. Grigsby worked his gas gun out of his pocket and was about to discharge it at defendant's chest when defendant struck his arm forcing it up so that the gun discharged in defendant's face. Defendant cursed the officers and the attitude of the crowd was threatening. The officers sent a third party to Porterville for additional police officers. Help was slow in coming so the two officers also went to Porterville for assistance. When they returned to the Green Mill they found officers Hensley and Vaughn at the scene. They had arrived in a city police car. They were holding defendant who had kicked officer Hensley in the groin. The officers finally got one handcuff on defendant and "managed to drag him over to the (police) car."

[1, 2] It should be needless to say that this evidence is more than sufficient to sustain the conviction of defendant of the crime of wilfully resisting an officer in the discharge of his duties, (Sec. 148, Penal Code), and that it would require very serious errors of law to permit a reversal of the judgment pronounced upon him as clearly there was no miscarriage of justice in this case. Sec. 4½, Art. VI, Const. Defendant had committed the crime of battery (Sec. 242, Penal Code) in the presence of the officers as well as upon two of them and they had the legal right to arrest him without a warrant. Sec. 836, Penal Code. That he resisted their lawful attempt to place him under arrest is obvious.

Defendant urges that he was deprived of the right to peremptorily challenge prospective jurors by an erroneous order of the trial court.

As there were two defendants on trial, they were entitled to ten peremptory challenges exercised jointly and each to five additional peremptory challenges exercised separately. Secs. 1070, 1098, Penal Code. When they had exercised ten peremptory challenges the record shows that the following occurred after Ed B. Kane had been passed for cause:

"The Court: Mr. Kane is passed for cause. The Plaintiff's challenge.

"Mr. Davis: No challenge.

"The Court: You have exhausted your challenges, I believe, Mr. Jamison.

"Mr. Jamison: I beg your pardon?

"The Court: You have exhausted your challenges.

"Mr. Max B. Jamison: Yes, we have.

"The Court: Ladies and gentlemen, you will please rise.

"Mr. Max B. Jamison: Only I thought we had nine challenges.

"The Court: Ten by my count.

"Mr. Max B. Jamison: How is that? We will have to check that.

"The Court: You have had ten, Mr. Jamison.

"Mr. Max B. Jamison: Very well.

"The Court: Mr. Clerk, you will swear the members of the jury."

It appears that the court was mistaken in the statement that defendants had exhausted their peremptory challenges and that counsel joined in this mistake and failed to call the court's attention to the fact that defendants were entitled to additional peremptory challenges.

[3] There is no intimation in the record that defendant desired to exercise an additional peremptory challenge or would have done so if the mistake of law had not

been made. There is nothing to indicate that an objectionable juror had been forced on defendant or that he was dissatisfied with the jury as selected. Under such circumstances the error cannot be held to be prejudicial. Sec. 1404, Penal Code; Sec. 4½ Art. VI, Const.; People v. Schafer, 161 Cal. 573, 119 P. 920; People v. Craig, 196 Cal. 19, 235 P. 721; People v. Rambaud, 78 Cal. App. 685, 248 P. 954; Darcy v. Moore, 49 Cal. App. 2d 694, 122 P.2d 281.

Defendant complains of the following instruction given to the jury:

"The Court instructs you that Section 836 of the Penal Code of the State of California, which in so far as it applies to this case, reads as follows:

"'A peace officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person:

"'1. For a public offense committed or attempted in his presence.'"

[4] It is argued that the use of the words "in so far as it applies in this case" was prejudicial because the jury could only infer "that the arrest was made on an offense which was committed or attempted in the presence of the officers, * * * while the evidence shows that no public offense was committed in the presence of the officers or attempted in the presence of the officers." We can find no prejudicial error in the instruction and the fallacy of the argument to the effect that no public offense was committed in the presence of the officers is apparent from the summary of that portion of the evidence supporting the verdict and judgment which we have already made.

Defendant charges misconduct of the deputy district attorney while prosecuting the case in asking leave to amend the information which request was made in the presence and hearing of the jury.

[5] The information charged defendant with the "crime of felony" in violating the provisions of Section 148 of the Penal Code while the offense charged was a misdemeanor. During the trial the motion to amend the information by substituting the word "misdemeanor" for the word "felony" was granted. This procedure is expressly authorized by Section 1008 of the Penal Code. The argument that any prejudice could result from this amendment seems too unsubstantial to require detailed consideration.

The evidence is ample to support the conviction. The trial was fair and we can find no error in the record sufficiently prejudicial to warrant a reversal of the judgment.

The judgment and order denying motion for new trial are affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

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79 Cal.App.2d 64

GRAF v. HARVEY et al.

Civ. 15299.

District Court of Appeal, Second District, Division 3, California.

April 11, 1947.

Rehearing Denied May 2, 1947.

Hearing Denied June 9, 1947.

1. New trial 🔑70

Failure of motorist to be alert as to his surroundings while in the vicinity of school was sufficient evidence in action for injuries sustained by five year old boy who was struck by handle of door of automobile, of motorist's failure to exercise ordinary care, and justified order granting the boy a new trial as to the motorist.

2. Evidence 🔑590

Trial judge was not obligated to believe the testimony of one who had permission to use automobile causing the injury, where such testimony was contradicted by that of another witness.

3. Automobiles 🔑198(1)

In action for injuries sustained by five year old boy who was struck in the head by handle of door of automobile, negligence of the driver was imputable to the occupant who had permission to use the automobile.

4. Automobiles ⚿244(7)

In action for injuries sustained by a five year old boy when struck in the head by the handle of door of automobile, evidence established that the driver of the automobile was negligent in opening the door of the automobile before the automobile came to a stop.

5. Automobiles ⚿192(1)

Where son had purchased automobile and was the holder of the legal title, and the automobile was left with father who had a right to use it while the son was in the Armed Forces, and the father did not hold a conditional sales contract or chattel mortgage on the automobile, he was not the "legal owner" within the statute making legal owner of automobile liable for its negligent operation. Vehicle Code, §§ 66, 67, 402(a) (d) (f).

See Words and Phrases, Permanent Edition, for all other definitions of "Legal Owner".

6. Appeal and error ⚿977(3)

Where stipulation respecting ownership of automobile causing injury was contradictory, and it was impossible to determine therefrom who was the "legal owner" of the automobile, order granting plaintiff a new trial in an action for injuries sustained from operation of the automobile after judgment for defendant would be affirmed.

◆

Appeal from Superior Court, Los Angeles County; Martin De Vries, Judge.

Action by Frank Graf, a minor, etc., and others against George J. Harvey and others to recover for injuries sustained by the plaintiff. From an order granting plaintiff's motion for new trial after verdict and judgment for defendants, certain of the defendants appeal.

Order affirmed as to all appealing defendants.

Eugene S. Ives, of Los Angeles, for appellants.

Kenneth Sperry, of Long Beach, for respondents.

SHINN, Acting Presiding Justice.

This is an appeal by defendants George J. Harvey, Cora E. Harvey, Jack Harvey, John H. Stockwell, Sr., and Philip C. Stockwell from an order granting plaintiff's motion for a new trial after verdict and judgment in favor of defendants. Plaintiff Frank Graf, a minor aged five years, was injured March 13, 1944, the claim being made in his behalf that as he was walking in a southerly direction along the westerly sidewalk of Orange Avenue, Long Beach, an automobile was driven southerly on Orange Avenue, and as it was pulled in close to the curb, and before being stopped, the right-hand door of the car was opened in such manner that the handle came in contact with the middle of plaintiff's forehead. John H. Stockwell, Jr. was the registered owner of the car; he was overseas in the armed forces and his father, John H. Stockwell, Sr. had custody of the car. Philip C. Stockwell, another son, who was a minor, had been given permission by his father to use the car, upon the condition that it would be driven by Jack Harvey, also a minor, 18 years of age; Jack was driving the car at the time of the accident and Philip was riding with him. The Harvey boy held an operator's license which had been issued to him upon the written agreement of his parents, defendants herein, assuming liability for injuries suffered by their son in the operation of automobiles. Philip did not have an operator's license. Jack Harvey and Philip Stockwell were jointly charged with negligence in the operation of the car. The case has been tried twice. The first trial resulted in a judgment for plaintiff, and a new trial was granted. At the second trial the verdict and judgment were in favor of defendants, and a new trial was granted for insufficiency of the evidence.

On the day of the accident, Philip Stockwell, who was inconvenienced by a case of snow blindness, drove to the Harvey residence, where he picked up Jack Harvey. The two started about 8 o'clock in the morning, drove to Compton to see a cousin of young Stockwell, and remained there until about 2 o'clock, when they returned to Long Beach. The Harvey boy had often driven the car before and had driven young

Stockwell to school, sometimes in his own car, sometimes in the Stockwell car. There was a drug store at the northwest corner of 10th and Orange Avenue. North of the drug store building was a driveway, and the car was being pulled to the curb just south of the driveway. There was much uncertainty in the evidence as to where plaintiff was when he was struck and how he came to be struck. Plaintiff relies largely on circumstantial evidence to prove that he was on the sidewalk at the time he was struck. Defendants also rely upon circumstantial evidence and certain direct testimony that plaintiff was in the street at the time he was struck. As we shall see, this controverted point was not a decisive one. Plaintiff's mother testified that Frank attended a school located north of 10th Street on the west side of Orange. On returning from school he would travel south on the west side of Orange to 10th, where he would cross to the east side of Orange and proceed south toward his home. The witness had been to town and had returned on a bus, alighting at the southwest corner of 10th and Orange; she crossed to the east side and started south on Orange, when she remembered it was about time for plaintiff to return from school. She saw him coming south on the west side of Orange at about the second house north of the drug store. He was walking on the sidewalk with a group of small children. The boy passed out of her sight momentarily behind a car or a palm tree and then she heard him scream and hurried to him. The boy was then on the sidewalk near the door of the drug store and about two feet from the building. Two women were with him, also the Stockwell and Harvey boys, whose automobile had been pulled up to the curb about opposite where the plaintiff was standing. The mother asked what had happened and one of the women said the little boy had been struck by a car door; she pointed to the two boys and they said nothing. At Mrs. Graf's request, Jack Harvey drove her and the boy to a physician's office. On the way, Jack stated that as the car was coming to a stop at the drug store his pal opened the door while the car was still in motion and the door struck the boy; that the car was not going fast. In the doctor's office the mother repeated the statements of Jack Harvey, and the latter, being present, said nothing. John J. Donegan, who carried the boy up into the doctor's office, was present when Mrs. Graf recounted what the Harvey boy had said, and testified that the latter was present while Mrs. Graf spoke and made no reply. The mother testified that she had not seen the boy leave the sidewalk at any time. A police officer who examined the location shortly after the accident found blood on the sidewalk, looked in the street for blood and found none.

The Stockwell boy testified that the lock of the door of the Ford car was released by pressing down on the end of the handle toward the front of the car; that after the accident the handle was bent down or sagged a trifle and that he noticed some hair on the sharp point of the door handle; that he did not see the boy before he was struck but first saw him in the driveway and saw him run up some 30 or 40 feet to where the two women were standing. The first he knew of the accident was when he heard a "thump." He was starting to open the door before the car stopped. He saw something brown go by, started to open the door and when it was opened saw the boy in the driveway. There was another car parked just north of the driveway. He also testified that the right door lever on the inside of the car was missing, had been for several months, and that it was necessary to open the door with the outside handle. Another witness testified to the same effect. Mrs. Graf testified that she recalled definitely that when Jack Harvey drove her and the boy to the doctor's office there was a handle on the inside of the door; that she opened the door with this handle and not with the handle on the outside of the door.

One Holmes, a witness for the defendants, testified that he resided on the west side of Orange Avenue opposite the scene of the accident; that he was in his front room, heard screams, looked through the glass pane in the door and saw a small boy coming out of the street, and at that time directly in front of a car that was parked at the curb, and that the boy was then about six feet from the curb; that he saw the little boy run north on the sidewalk toward some other children and later pass to the south. He also testified that he did not see the automobile that was driven by defendant Jack Harvey and that he did not see whether the little boy was bleeding. Defendants introduced evidence that the height of plaintiff was 44 inches, that the wound on his forehead was 42 inches above the ground when he was standing erect, that the door handle was 37½ inches above the ground, and the sidewalk 11 inches above the level of the street. From these facts it is deduced that "if the child had been standing on the sidewalk, that the position of his head where the blow occurred would have been at least 15½ inches above the level of the door handle." The Stockwell and Harvey boys both testified that they were familiar with the locality, knew of the presence of the school, and saw no children on the sidewalk. The Harvey boy testified that he did not look for children and at the time of the accident was looking straight ahead.

[1] The question of the sufficiency of the evidence to establish negligence is argued separately in behalf of defendants Harvey and defendants Stockwell. In contending that there was no evidence of negligence on the part of Jack Harvey, defendants insist that plaintiff must have been in the street, for the reason that if he had been on the sidewalk and standing erect, the door handle would have been 15½ inches below the level of the wound in his forehead. The same argument could have been carried further; if plaintiff had been in the street, and standing erect, the door handle would have been 4½ inches below the level of his forehead. But the fact remains that the door handle struck his forehead. No witness saw him at the time he was struck, and the physical facts are not conclusive as to where he was, nor as to his posture, at that time. But, although it was plaintiff's contention that he was on the sidewalk, his cause of action did not depend upon proof of that fact. If he was in the street, that fact would not of itself acquit Jack Harvey of the charge of negligence. There was ample evidence to support a finding that he was negligent. He knew of the location of the school, children were walking south on the west side of Orange Avenue, and he testified that he did not see them or look for children, but that he was looking straight ahead at the time of the accident. His failure to be alert as to his surroundings was sufficient evidence of his failure to exercise ordinary care. Harrison v. Gamatero, 52 Cal.App. 2d 178, 125 P.2d 904. This conclusion supports the order granting plaintiff a new trial as to the defendants Harvey.

[2-3] It is next argued that Philip Stockwell was not negligent. Appellants say in their opening brief, "Admittedly there was blood and hair on the door handle following the accident," but is is said that there was no evidence that Philip Stockwell opened the door of the automobile before plaintiff was struck, or that any act or neglect of his contributed to the accident. As already noted, Philip Stockwell testified that he was opening the door before the car came to a stop. It is true that he testified that he had not attempted to open it before the accident, but the trial judge was not obliged to believe him and could have believed that the door was opened against plaintiff. As before noted, Mrs. Graf testified that a woman standing on the sidewalk, and who evidently saw the accident, stated in the presence of the Harvey and Stockwell boys that plaintiff had been struck by a car door; that this statement was made in the presence of the two boys and they made no response to it. Jack Harvey was driving the car at the request of Philip Stockwell, for the reason, as we have stated, that the Stockwell boy was suffering from snow blindness. He made a written statement after the accident, which he identified at the trial, in which he stated: "I had hurt my eyes in the snow a few days before and so I asked him to drive." Jack Harvey was the agent of Philip Stockwell and his negligence was imputable to Philip. Souza v. Corti, 22 Cal.2d 454, 461, 139 P.2d 645, 147 A.L.R. 861. Since the evidence was sufficient to justify a finding that Jack Harvey was negligent, the order granting a new trial as to Philip Stockwell also should be affirmed.

It is contended that Stockwell, Sr. was not responsible for the negligence of either of the two boys. It was alleged in the amended complaint that John H. Stockwell, Sr., John H. Stockwell, Jr. and Pansy A. Stockwell were the owners of the car. These allegations were denied by the answer and it was alleged that John H. Stockwell, Jr. was the owner. It was stipulated that Stockwell, Sr. was the legal owner and that Stockwell, Jr. was the registered owner, and "That the automobile was purchased from earnings of John H. Stockwell, Jr.; that when John H. Stockwell, Jr. last departed on duty with the Marines that the car was left with John H. Stockwell, Sr. and that John H. Stockwell, Sr. had the right to use that car and to declare who else was to use it and give permission to use it; that on the particular day in question, around breakfast time, Stockwell, Sr. had talked to Jack Harvey and to Philip Stockwell, and told them they could use the car after school, and that it was to be driven by Jack Harvey." It was further stipulated that Stockwell, Sr. was not the holder of a mortgage on the vehicle or a contract of conditional sale. On behalf of Stockwell, Sr., it is urged that he was not shown to have been the owner of the car within the meaning of section 402(a) of the Vehicle Code, under which an owner is liable for the negligence of one who is driving a car with the owner's express or implied permission.

Under section 66 of the Vehicle Code, an " 'Owner' is a person having all the incidents of ownership, including the legal title of a vehicle whether or not such person lends, rents or pledges such vehicle; the person entitled to the possession of a vehicle as the purchaser under a conditional sale contract; the mortgagor of a vehicle;" etc. A "Legal Owner," as defined by section 67, "is a person holding the legal title to a vehicle under a conditional sale contract, the mortgagee of a vehicle," etc.

[4] The stipulated facts were contradictory. John H. Stockwell, Jr. had purchased the car and was the holder of the legal title. Stockwell, Sr. did not hold a conditional sales contract or chattel mortgage on the car and therefore was not the "legal owner" as defined by section 67. Under section 402(f), a "legal owner," namely, a conditional vendor, before he has repossessed the vehicle, or a mortgagee out of possession, is not deemed an owner under the liability provisions of the section. The stipulation that Stockwell, Sr. was the legal owner, whatever it might mean, was not a stipulation that he held the legal title or that he was the "owner" within the meaning of sections 66 and 402(a).

[5, 6] Section 402(d) reads in part, "If the bailee of an owner with the permission, express or implied, of the owner permits another to operate the motor vehicle of the owner, then such bailee and such driver shall both be deemed operators of the vehicle of the owner within the meaning of subdivisions (c) and (d) of this section." Subdivisions c and d provide for service of process upon the operator in any action against the owner and give the owner a right of subrogation to recover from the operator the amount of any judgment rendered against him upon his owner's liability. If the operator has been served, the judgment is collectable first out of his property. The Vehicle Code does not declare that a bailee or one who borrows the car from the bailee is an owner within the meaning of section 402(a). Their liability is to reimburse the owner, and is not a primary liability to the injured person. Nevertheless, we think it would be possible for a bailee to have such an interest in a vehicle as to make him a joint owner with the bailor, although we do not intimate that such was the case here; Stockwell, Sr. may have been a mere custodian. He was sued as one of the owners of the car and not as a bailee. We cannot determine from the stipulated facts whether he had an interest in the car. All we can make out of the stipulation is that Stockwell, Jr. paid for the car and allowed his father to have possession of it and use it and loan it. However, the record does not present facts from which it would appear conclusively that Stockwell, Sr. had no interest in the car which, with his possession and control of it, would justify his being held to an owner's liability. Furthermore, since the action must be retried and, so far as we know, John H. Stockwell, Jr. may be before the court, we should not reverse the order

as to Stockwell, Sr. His status as bailee, under the stipulated facts, would render him liable upon any judgment that might be rendered against John H. Stockwell, Jr. Upon a retrial all the facts as to ownership should be developed.

The order granting a new trial is affirmed as to all appealing defendants.

WOOD, J., and KINCAID, J. pro tem., concur.

79 Cal.App.2d 34

In re REID'S ESTATE.

NILSEN v. DELTOMBE et al.

Civ. 15649.

District Court of Appeal, Second District, Division 1, California.

April 10, 1947.

1. Wills 🔑306

Evidence supported findings that testatrix never revoked or destroyed will, of which carbon copy was offered for probate, and that testatrix' divorced husband, objecting to probate, destroyed original will. Probate Code, § 350.

2. Wills 🔑384

On appeal from judgment admitting destroyed will to probate over objections, all conflicts in evidence must be resolved in proponent's favor and all legitimate and reasonable inferences indulged to uphold judgment, if possible, and, if two or more inferences can be reasonably deduced from facts, reviewing court cannot substitute its deductions for those of trial court. Probate Code, § 350.

3. Trial 🔑404(1)

The trial court's findings must be read together, and, where clear intent is plain therefrom, mere fact that clause or sentence therein, when read alone, appears to be contradictory, will not vitiate findings or render them insufficient.

4. Trial 🔑398

A special finding by trial court in conflict with general finding controls.

5. Appeal and error 🔑1177(8)

When trial court's findings are conflicting, appellate court may disregard one of them and affirm judgment thereon, so that cause may be finally disposed of by single appeal without further proceedings in trial court, unless interests of justice require new trial. Code Civ.Proc. § 956a.

6. Wills 🔑334

Trial court's findings that testatrix never revoked or destroyed will, of which carbon copy was offered for probate, that testatrix' divorced husband, objecting to probate, destroyed original will after testatrix' death, and that such copy contained all terms of will, were not inconsistent when construed together. Probate Code, § 350.

Appeals from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Proceeding by Ebba Nilsen, also known as Ebba Nelson, for probate of the will of Marie D. Reid, deceased, opposed by Albert Benjamin Deltombe and Lot E. Reid. From a judgment admitting the will to probate and appointing petitioner as administratrix with the will annexed, the objectors appeal.

Affirmed.

Bailey & Poe, Rufus Bailey, and Carl N. Huff, all of Los Angeles, for appellant Albert Benjamin Deltombe.

George I. Devor and Jacob Swartz, both of Los Angeles, for appellant Lot E. Reid.

V. P. Lucas, of Los Angeles, and Ben A. Hill, of San Pedro, for respondent.

DORAN, Justice.

The judgment from which appeal is taken is one admitting to probate, through the use of a carbon copy, a destroyed will of Marie Reid, deceased; said will bearing date of December 8, 1944, the provisions thereof being in favor of the respondent Ebba Nilsen, a friend of the deceased, who was appointed administratrix with the will annexed. No original will could be found although it was known that Mrs. Reid had executed two testamentary documents. The first of these was made in 1940 and designated decedent's husband Lot E. Reid, as the principal beneficiary. Thereafter, on August 15, 1944, the deceased and Lot E. Reid were divorced by a final decree, and the will of December 8, 1944, was executed, the latter will expressly revoking all former wills. Although divorced, it appears that the deceased and Lot E. Reid lived together from about February 15, 1945, until the death of Marie Reid on February 9, 1946.

Respondent's petition for probate alleged that the will of December 8, 1944, was in existence as of the date of the testator's death, and upon information and belief charged that Lot E. Reid, appellant herein, had fraudulently destroyed said will. Objections to the probate of this will were separately filed by Lot E. Reid, and by the appellant Deltombe who claimed to be a first cousin of Marie Reid. Appellant Deltombe did not appear at the trial and did not offer any evidence. The trial court found that the deceased had never revoked or destroyed the will of December 8, 1944, which will "was usually kept in a cedar chest which was locked and the keys to which were kept in a dresser drawer, to which * * * Lot E. Reid had access; that after the death of said Marie Reid the said Lot E. Reid removed said Last Will and Testament of Marie Reid from the said cedar chest and destroyed the same." It was further found that the duplicate carbon copy presented for probate, contained all the terms of Marie Reid's last will.

The appellant Reid contends: "(1) that the 1944 paper was not proved to be the lost or destroyed will of the deceased within the meaning of section 350 of the Probate Code; (2) that the court's findings with respect to appellant Reid are inconsistent and contradictory and unsupported by any substantial evidence in the record; and (3) that the appointment of Ebba Nelson as administratrix with the will annexed was, therefore, erroneous." Appellant Deltombe's brief likewise asserts that there is no evidence to justify the finding that the will admitted to probate was in existence at the time of the testatrix' death; and that there is no evidence that Lot E. Reid destroyed the will in question after Mrs. Reid's death. The basic contention of both appellants, therefore, is that the findings and judgment are not supported by the evidence.

[1] That the carbon copy, offered in place of the original will, correctly reflects the contents of the original, does not appear to be questioned. It likewise appears that the appellant Lot E. Reid had access to the cedar chest where the will was kept by Mrs. Reid; even after the divorce, Reid had such access. There is also evidence tending to show that Mrs. Reid believed that the will which was probated, was in existence shortly before her death and had given Mrs. Nilsen a card with the name of the attorney who had the carbon copy of such will.

Among other items of evidence the record discloses that the attorney who had drafted the will of December 8, 1944, delivered the original to Mrs. Reid, keeping in the law office the carbon duplicate in question; that Reid had seen this will in Mrs. Reid's possession about November 9 or 10, 1945, at which time Reid claims that Mrs. Reid tore up and burned the will in the presence of Reid and the witness Beck. This date, it will be recalled, was about three months prior to Mrs. Reid's death. Reid testified that when this destruction took place, Mrs. Reid stated: "This is the will I made out to Mr. and Mrs. Nilsen. Mrs.—Mr. Nilsen has passed away and I never did care anything for that Swede and I am destroying the will". Walter M. Beck narrated seeing Mrs. Reid tear up the will on November 9, 1945, but in a sworn statement made outside of court, had stated that the alleged revocation by Mrs. Reid was on November 25, 1945. Accounting for Beck's presence in the house, Reid testified that Mrs. Reid had hired Beck to do certain work on the day in question; Beck, however, stated that the employment was by Mr. Reid. It is to be noted that on cross-examination, the witness Beck was asked: *"Did you ever hear Mr. Reid say that he had destroyed the will in favor of*

Mr. and Mrs. Nilsen?", to which question Beck answered, "Yes." (Italics added.)

The record also reveals various statements made by appellant Reid which, in connection with other evidence, furnish substantial support for the trial court's finding. For example, it appears that, after Mrs. Reid's death, when search for a will was under way, appellant Reid did not impart the information that Mrs. Reid had destroyed the will in respondent's favor, but stated to the latter, "Mrs. Reid has no will made out to you." Lot E. Reid also stated to Mrs. Nilsen, "There is a chance that there is a will in your favor and there is a chance that there is a will in my favor. Will you shake hands with me that if you get it you will give me half of it and if I get it I will give you half?" Again, "I will go fifty-fifty on this if you get it or if I get it." Reid also testified to making the following suggestion: "How would it be for me to say that I knew the will was destroyed, I seen it? I think I can say that and keep within the law." Mrs. Nilsen's version of this conversation is that Reid said: "I don't want it to go to the State and I am willing to go up and testify that I destroyed the will if I don't get into any trouble"; that thereafter Reid asked "if I (Mrs. Nilsen) was going to take this to court, and I said 'I don't know.' * * * after a little while he came back in and he said, 'Mrs. Nilsen, I have a proposition to make'" (sharing the estate fifty-fifty with Mrs. Nilsen).

The witness Tom Hill testified to divergent statements by Reid that the latter had no knowledge of the will in Mrs. Nilsen's favor until the occasion when the copy of such will was read at an attorney's office, "and that he was amazed to learn that he was left out of the will"; later, "my brother asked him how he knew that this will had been destroyed, and he said he knew, and he said, 'Well, how do you know?' And he said, 'Well, I am not saying. I know it was destroyed, this first will I spoke of.'" After the decedent's safe deposit box was opened, Reid said, according to the testimony of Attorney Ben Hill, "that he didn't expect to find any will in the box," and later inquired "if it would be all right that he would be willing to go into court and testify that he himself destroyed the will." Ben Hill also testified to the following colloquy at Reid's residence: "And I said, 'Well,' I said, 'How do you know?' 'Well,' he says, 'she destroyed it.' And I said, 'Well, how do you know she destroyed it?' 'Well,' he said, 'I know.' 'Well,' I said, 'Well, when was it destroyed?' And he said, 'Well, I am not saying. * * * I am positive that I know it was destroyed, but * * * I am not talking. * * * I have seen an attorney and * * * I am not talking anymore about it. * * * When I do my talking, * * * it will probably be in a court room.'"

The record also discloses that in November, 1944, Mrs. Reid informed Ebba Nilsen that a will had been executed in favor of the latter. Again, at a later date, in October, 1945, the deceased referred to the same will and told respondent: "Now, when Mr. Nilsen has passed away I am going in to Long Beach some day and have that will changed over in your name only so you will be the administrator and not have any trouble with it."

[2] Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689, 690, cited by respondent is not dissimilar to the instant case, the controlling question in the Bristol case relating to the sufficiency of evidence to support a finding that the deceased had never cancelled or destroyed a codicil. The court there held that: "The rules of evidence, the weight to be accorded to the evidence, and the province of a reviewing court, are the same in a will contest as in any other civil case. * * * The rule as to our province is: * * * 'all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. * * * When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.'"

In Estate of Dean, 62 Cal.App.2d 418, 144 P.2d 849, findings of the trial court that the will in question was lost or destroyed fraudulently by the decedent's husband, were likewise sustained on appeal, citing the Bristol case. Although the testimony of decedent's husband raised a conflict, there was sufficient evidence to support the findings. The same may be said in respect to appellant Reid's testimony in the instant case; it raised a conflict, but evidence and legitimate inferences remain to sustain the trial court's finding that the original of the will in favor of respondent was destroyed by Reid, and that this will had not been revoked by the testatrix.

[3-6] The contention that the court's findings "are inconsistent and contradictory and unsupported by any substantial evidence" cannot be sustained. As said in respondent's brief, "Findings must be read together and where the clear intent is made plain the mere fact that a clause or sentence therein, when read alone, would appear to be contradictory such circumstances will not vitiate or render them insufficient. See Vila v. Brovelli, 3 Cal.App.2d 713, 39 P. 2d 855." In Wallace Ranch Water Co. v. Foothill Ditch Co., 5 Cal.2d 103, 118, 53 P.2d 929, 936, the rule is stated as follows: "It was formerly the rule in this state that where two findings on an essential fact are conflicting, neither can be relied upon to support the judgment. * * * It is also well settled, however, that when a general finding conflicts with a special finding, the latter controls. * * * Moreover, we are further of the opinion that under the power conferred on appellate courts by the addition of section 956a to the Code of Civil Procedure in 1927, appellate courts, where justice required it, have the power, when findings are conflicting, to disregard one of the findings and to affirm the judgment, in order that, to use the express language of the section, 'wherever possible causes may be finally disposed of by a single appeal and without further proceedings in the trial court, except where the interests of justice requires a new trial.'" In the instant case, the findings, when construed together, are not deemed contradictory or inconsistent, and even if they were, the above rule would prevent a reversal. The clear intent is made plain and there is substantial evidence to support those findings.

The judgment and order admitting the will to probate and appointing the respondent as administratrix with the will annexed, are therefore affirmed.

YORK, P. J., and WHITE, J., concur.

FISH v. SECURITY-FIRST NAT. BANK OF LOS ANGELES.

Civ. 15292.

District Court of Appeal, Second District, Division 2, California.

April 8, 1947.

Rehearing Denied April 29, 1947.

Hearing Granted May 29, 1947

1. Appeal and error ⇨843(4)

Election of plaintiff to submit its case on third count removed from consideration on appeal matter set forth in other counts except matter from such counts included by reference in third count.

2. Trusts ⇨44(1)

An express trust which is result of settlor's deliberate or intentional act, must be established by proof of definite agreement between parties thereto.

3. Trusts ⇨44(1)

An express trust in proceeds of checks for amounts paid on joint tenancy notes could not be inferred merely from delivery of checks by joint tenant who received them from maker, to co-tenant, to whom they were payable, if they had been payable to both tenants jointly or to tenant receiving them alone, in absence of clear showing that both of them intended to create trust and manifested such intention with reasonable certainty at time of such delivery.

4. Joint tenancy ⇨5

Joint tenancy moneys retain their character as such.

5. Trusts ⇨44(1)

Evidence was insufficient to support finding that one payee of joint tenancy notes held moneys paid thereon under express trust for co-tenant.

6. Trusts ⚷86

Delivery of checks to payee thereof by one who received them in payment of sums due on joint tenancy notes payable to both of such parties, without express agreement that proceeds of checks should be held in trust for tenant making delivery, warranted presumption that such proceeds became sole property of tenant to whom checks were delivered, so that there was no resulting trust, especially where such tenant kept moneys and deposited them in her separate bank accounts and co-tenant laid no claim thereto and made no objection, though they had bank account in joint tenancy. Code Civ.Proc. § 1963, subds. 8, 12.

7. Executors and administrators ⚷221(4)

In action against executor to recover amounts paid to testatrix on notes executed to her and plaintiff as joint tenants, evidence did not support finding that plaintiff was not guilty of fraud or undue influence over testatrix in procuring execution of notes.

8. Fraud ⚷7

Where one in whom another reposes confidence actively participates in transaction, from which he gains some advantage, with such other, transaction is constructively fraudulent and will be upheld only on showing of special circumstances. Civ.Code, § 2235.

9. Fraud ⚷50

Equity raises presumption against validity of transaction whereby participant, in whom other participant reposes confidence, gains advantage, even if there is only a possible benefit, and casts on superior party burden of proving affirmatively his compliance with equitable requisites, thereby overcoming presumption that transaction was without sufficient consideration and result of undue influence. Civ.Code, § 2235.

10. Trusts ⚷107

A constructive trustee, actively participating in procuring transfer of property to himself by one who reposed confidence in such trustee, has burden of showing that transfer was not induced by his influence.

11. Trusts ⚷107

A transfer of property to constructive trustee by beneficiary is constructively fraudulent, burden is on trustee to show fairness and good faith in all respects, and to sustain transfer, he must allege and prove fairness of transaction.

12. Trusts ⚷103(1)

A total lack or gross inadequacy of consideration for conveyance by one reposing confidence in transferee is evidence of dishonesty in transaction and should be considered under modern concept of fair and honest dealing between trustee and beneficiary.

13. Trusts ⚷107

The presumption of fraud and undue influence, invalidating transfer of property to constructive trustee by beneficiary, continues until dispelled by evidence produced by trustee.

14. Evidence ⚷75

A constructive trustee's failure to present any witness to rebut presumption of his fraud and undue influence in procuring execution of joint tenancy notes and corporate stock certificate to him and beneficiary indicated that evidence available to him would have been adverse, if produced. Code Civ.Proc. § 1963, subd. 5.

15. Alteration of Instruments ⚷27(1)
Evidence ⚷70

There is no presumption of validity of written instrument which has been altered or attacked and execution of which is denied.

16. Trusts ⚷107

The presumptions of good and sufficient consideration for written instrument, fairness and regularity of private considerations, intended ordinary consequences of person's voluntary act, and pursuit of ordinary course of business, apply only to contractual obligors and obligees and do not overcome statutory presumption of fraud, undue influence, and failure of consideration, invalidating transaction whereby constructive trustee gains advantage over beneficiary, as by procuring execution of joint tenancy notes and corporate stock certificate to both of them. Civ.Code, § 2235.

17. Trusts ⚷107

A transfer of property to one in whom transferor reposes confidence is presumed to have been without consideration, in absence of rebutting evidence, and such presumption is paramount.

18. Trusts ⚷107

A constructive trustee's argument that beneficiary had knowledge, from her presumed possession of recorded trustee deed including copy of secured note payable to her, that note named trustee as joint tenant, did not suffice for evidence essential to overcome presumption of trustee's undue influence over beneficiary in procuring inclusion of joint tenancy phrase, in absence of proof that county recorder followed instruction given him to mail trust deed to beneficiary.

19. Trusts ⚷107

In absence of evidence that any part of interest in checks, given in payment of sums due on joint tenancy notes to payee and one in whom she reposed confidence, was received as such constructive trustee's income or that only half thereof was applied to his income or explanation of unavailability of such evidence to trustee, evidence in his possession must be presumed to be irreconcilable with joint tenancy in proceeds of checks.

20. Trusts ⚷108

Evidence that plaintiff withdrew joint tenancy funds from bank and deposited them to joint account of himself and wife on day of testatrix's death after accompanying her to hospital and that he said she was seriously ill, and that if she recovered plaintiff would restore fund to same account, was admissible as relevant to issue of plaintiff's fraud and undue influence over testatrix in procuring execution of notes and certificate. Civ.Code, § 2235.

◆

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Action by Merle E. Fish against the Security-First National Bank of Los Angeles, as executor of the estate of Gladys Isabel Ferres, deceased, to recover moneys paid deceased for the joint use of herself and plaintiff during their lives and the survivor's sole use and benefit after either's death. Judgment for plaintiff, and defendant appeals.

Reversed with instructions.

Henry T. Moore, of Los Angeles, for appellant.

Oliver O. Clark and Robert A. Smith, both of Los Angeles, for respondent.

MOORE, Presiding Justice.

Defendant appeals from a judgment for the recovery of moneys paid to decedent for the joint use of herself and plaintiff during their lifetimes and for the sole use and benefit of the survivor after the death of either. The grounds of appeal are: (1) the pleadings do not support the judgment; (2) the findings that there was no fraud or undue influence on the part of respondent are not supported by the evidence; (3) the court erred in admitting into evidence a note for $77,511.48 and proof of the payments thereon; (4) it erred in excluding evidence offered by appellant.

Gladys Isabel Ferres departed this life August 11, 1943. She left a will and codicils under which appellant qualified as executor of her estate which was appraised at a sum in excess of $558,000. She had no descendants. She lived alone from her husband's death in 1931 to the date of her demise. During that period she was assisted in the care and management of her properties and affairs by respondent, for whom she developed a feeling of high regard and intimate friendship. She spent a large portion of her time visiting in his home. In July 1937 decedent established a bank account with the Security-First National Bank of Los Angeles in joint tenancy with respondent, and deposited therein the sum of $35,000. In May 1941 Pierce Brothers, a corporation hereinafter referred to as Pierce, executed its note in the sum of $30,000 in favor of decedent and respondent as joint tenants. Sixteen payments were made upon it to decedent aggregating $15,012.45. In May 1942 Pierce issued 1000 shares of its capital stock in favor of decedent and respondent as joint tenants. In October 1942 Pierce repurchased the corporate shares for the sum of $25,000. On the same day the $30,000 note was cancelled and Pierce issued its promissory note for the sum of $77,511.48 in favor of decedent and respondent as joint tenants, and contemporaneously executed a deed of trust upon certain real property as security for the last mentioned obligation. The constituent sums of such note were as follows: (1) a balance of $35,843.76 due decedent on a $45,000 note; (2) a balance of $16,666.72 unpaid by Pierce on the $30,000 obligation; (3) the $25,000 paid for the corporate shares. In addition to the sixteen payments made on the $30,000 note Pierce had made eleven payments aggregating $14,000 on the $77,511.48 trust deed note prior to decedent's passing. The checks for all such payments were delivered by respondent to decedent who deposited them in her savings account in which they remained until the executor of her estate qualified.

[1] The complaint is in three counts. Count 1 demands the $15,012.45 while count 2 demands judgment for the $14,000 paid on account of the note for $77,511.48. Each of such counts alleges that the receipt of such sum by decedent was without any agreement with respondent that the joint tenancy character of the moneys would be altered. The charging paragraph of count 3 alleges that between May 19, 1941, and her death on August 11, 1943, decedent "received from Pierce Brothers, a corporation, various installments of money aggregating $29,012.45. Said sums were paid to and received by the said Gladys Isabel Ferres as trustee for the joint use of herself and this plaintiff during their lifetimes and for the sole use and the benefit of the survivor after the death of either." At the time of submitting the case plaintiff elected to stand upon the third count. The effect of such election was to remove completely from consideration on this appeal any matter set forth in counts 1 and 2 except those allegations in count 1 with reference to the corporate identity of appellant and of its qualification as executor of decedent's estate. Lord v. Garland, 27 Cal.2d 840, 850, 168 P.2d 5; Hopkins v. Contra Costa County, 106 Cal. 566, 570, 39 P. 933.

[2] Inasmuch as the remaining third count bases the claim of respondent squarely upon an express trust his right to recovery must depend upon the presence in the record of proof of an express trust. There is no probata corresponding to such allegata. An express trust must be established by proof of a definite agreement between the parties. It is the result of a deliberate or intentional act of the settlor. Howard v. Foskett, 96 Or. 446, 189 P. 396, 398; Learned v. Tritch, 6 Colo. 432, 439. Not only did respondent fail to prove any agreement between himself and decedent with respect to her possession of the moneys, but he contented himself with a declaration before the trial court that "the trust arose when the moneys were received by her to which she did not have the absolute title, but in which Dr. Merle Fish had a fifty per cent interest as a joint tenant. The trust continued during her lifetime as long as the funds remained in her bank account, for the benefit of him, to the extent of his interest and upon her death immediately the trust attached to those funds for the entire fund because upon her death Dr. Fish as sole survivor became the owner of all of it."

[3] In the foregoing declaration of respondent's counsel it is to be observed that he takes it for granted that respondent's fifty percent interest in the notes is already established. But such is not the fact. The primary issue in the case is the validity of the two joint tenancy notes. The foundation of respondent's contention arises out of the fact that he voluntarily delivered the checks from Pierce to her and that the funds represented by the checks were kept in such a bank account as made it possible to trace them. While there is no evidence that the checks were delivered to decedent under an agreement that she was to hold the funds in trust for herself and respondent, yet from the fact that respondent himself made the delivery of the checks it is just as reasonable to infer (1) that they both agreed that the money should be hers or (2) that respondent knew that she thought that the moneys belonged to her. Even if the checks had been made payable to both jointly an express trust could not be inferred from the mere fact of his delivery of them to her. Or if they had been made payable to respondent alone an ex-

press trust in decedent could not be inferred from the mere delivery of the checks to her. But before it can be determined that there was an express trust created at the time of the delivery of the checks to decedent it must be made clearly to appear that both parties intended to create a trust, and such intention must have been manifested at the time with reasonable certainty. (54 Am.Jur., Trusts, § 33.) Moreover, respondent's delivery of the checks to decedent might reasonably justify the inference that all payments made upon the notes during her lifetime were to be her sole property without any claim of respondent against them. The record teems with evidence that a number of stock certificates had been issued to decedent and respondent and to decedent and one Stella Pettigrew as joint tenants. In each instance, however, the dividends were consistently paid to decedent only.

[4] Respondent urges with an ardent zeal that joint tenancy moneys retain their character. Of this there can be no doubt. In re Kessler, 217 Cal. 32, 34, 17 P.2d 117; Siberell v. Siberell, 214 Cal. 767, 773, 7 P.2d 1003; Estate of Harris, 169 Cal. 725, 726, 147 P. 967; Wallace v. Riley, 23 Cal.App. 2d 654, 665, 74 P.2d 807. But the question of the permanency of the character of an estate in joint tenancy does not improve the argument of respondent any more than to proclaim that an estate in fee simple continues to be an estate in fee simple until it is terminated by an alienation of the property so held.

[5] The finding, therefore, that decedent held the moneys under an express trust is without evidential support.

[6] As to the claim that there was a resulting trust, if it was not an express trust, respondent is equally unfortunate. There is neither direct testimony to support the claim of a resulting trust nor is there any circumstance given in testimony that would justify a court in holding that there was a resulting trust. In making his claim that the funds paid to decedent by means of the Pierce checks constituted payments upon the joint tenancy notes, respondent again assumes that the right of respondent as a joint tenant with decedent had already been established by his mere ipse dixit. But such conclusion cannot be assumed, and if it could be the evidence is uncontradicted that the payments were made by Pierce to decedent with respondent's knowledge and consent, were made in her name alone, and the checks were actually delivered in person by respondent to decedent. The delivery of the checks to decedent without any express agreement warrants the presumption that the funds so delivered became her sole property. Code Civ.Proc. § 1963, subds. 8 and 12. Such presumption finds support in the facts that she kept the moneys, that she deposited them in her separate accounts, that during the three years that she held them respondent laid no claim thereto, and, finally, that he made no objection notwithstanding the fact that he and decedent had a bank account in joint tenancy.

It follows that inasmuch as the pleadings and the findings would support no conclusion other than that decedent held the moneys under an express trust, and since neither an express trust nor a resulting trust was proved, the judgment is wholly without support.

[7] Notwithstanding the failure of respondent to establish an express trust as alleged we are not disposed to adjudicate the rights of the parties upon this technicality but now proceed to demonstrate that the finding that there was no fraud or undue influence on the part of respondent is not supported by the evidence.

That a relation of personal confidence obtained between decedent and respondent over a period of 12 years there is no doubt. In his complaint the latter alleged that "she had no children or descendants and lived alone during the greater portion of the time from 1931 to the date of her death in 1943; during such period said Gladys Isabel Ferres required assistance in the care and management of her property and affairs and also the companionship of others in relief from loneliness; that a feeling of high regard and great friendship arose between the said Gladys * * * on the one hand and this plaintiff and the members of his family on the other, and from about the year 1931 up to the date of her death this plaintiff constantly advised with and assisted said Gladys * * * in the care and management of her property and affairs. In addition thereto, said Gladys spent a large portion of her time visiting in the home of plaintiff; innumerable automobile trips were taken by her in company with plaintiff and members of his family, and said Gladys * * * was contacted almost daily by plaintiff or some member of his family in the performance of some service or other friendly act * * * from about the year 1931 up to the date of the death. * * *"

In its answer appellant alleged "that over a course of several years immediately prior to the death of decedent, plaintiff undertook to advise, and did advise decedent upon worldly as well as spiritual matters and particularly with respect to the use, management and disposition of her property and with respect to business transactions; and that as a result thereof a relation of personal confidence arose between plaintiff and decedent in fact and in law and such confidential relationship existed between them at all of the times referred to herein." The court found such allegation to be true.

[8-13] The finding of the existence of such confidential relationship between decedent and respondent makes applicable the time-worn presumption (Civ.Code, sec. 2235) that if A, in whom confidence is reposed by B, actively participated in a transaction with B and gained some advantage such transaction is constructively fraudulent and is to be upheld only upon a showing of special circumstances. Even if there is only a possible benefit equity raises a presumption against its validity and casts upon the superior party the burden of proving affirmatively his compliance with equitable requisites and of thereby overcoming the presumption that the transaction was without sufficient consideration and under undue influence. Odell v. Moss, 130 Cal. 352, 357, 62 P. 555; Estate of Cover, 188 Cal. 133, 143, 204 P. 583. When a constructive trustee has actively participated in procuring the transfer to himself by one who has reposed confidence in him the burden is upon him to show that such transfer was not induced by his influence. Estate of Lances, 216 Cal. 397, 404, 14 P. 2d 768; Allen v. Meyers, 5 Cal.2d 311, 314, 54 P.2d 450. Such transactions are constructively fraudulent, the burden is cast upon the superior party "to show fairness and good faith in all respects," and in order to sustain such transfer to himself he must allege and prove the fairness of the transaction. Johnson v. Clark, 7 Cal.2d 529, 535, 61 P.2d 767. A total lack or a gross inadequacy of consideration for a conveyance by one who has reposed confidence in the transferee is evidence of dishonesty in the transaction and should be considered under the "more modern and common sense concept of fair and honest dealing." Herbert v. Lankershim, 9 Cal. 2d 409, 476, 71 P.2d 220, 253. The presumption of fraud and undue influence in such a transaction continues until it is dispelled by evidence produced by the trustee. Andrew v. Andrew, 51 Cal.App.2d 451, 455, 125 P.2d 47.

[14] In the case at bar respondent did not assume the burden thus cast upon him to show that he paid anything for an interest in the Pierce stock, the $30,000 note or the $77,511 note. Neither did he show that he explained to Mrs. Ferres that she was making gifts to him or that she was under no obligation to him to make such gifts. No evidence was offered to prove that the influence of respondent was not used to obtain the interest. Not only did respondent decline to offer himself to make proof of his good faith but, so far as the record goes, during the years decedent visited in his home not a word was said by her to indicate her desire to compensate respondent for his kindnesses nor did he ever explain that such gifts would be gratuities. He made no attempt to explain that the transactions were fair or just or reasonable. Not only is the presumption conclusive evidence of the fraud and undue influence of respondent in the absence of proof to overcome it, but his failure to present any witness to rebut the presumption can mean nothing less than that whatever evidence was available to him would have been "adverse if produced." Code Civ.Proc. § 1963, subd. 5.

[15-17] Also, there was no testimony that decedent heard the conversations in the Pierce office when respondent and Mr. Mark Pierce prepared the notes. She was deaf, wore a hearing aid and her auricular disability had grown progressively worse. In a long conversation she became "flustered, would get red in the face and seem to be incapable of taking in" what was said. When the note for $77,511.48 was prepared the terms of the note were discussed only by Mr. Pierce and respondent; Mrs. Ferres said nothing. And it is not shown that she ever read either such note or the one for $30,000. Neither is there proof that she knew that they created estates in joint tenancy with respondent. No one told her so. In fact her name alone first appeared as payee in the larger note but was erased and both her name and respondent's as joint tenants were substituted. No proof was offered in explanation of such irregularity. Instead respondent urges that the presumptions of undue influence and failure of consideration (Civ.Code § 2235) must yield to the "countervailing presumptions" of a "good and sufficient transaction * * * private considerations have been fair and regular * * * a person intends the ordinary consequences of his voluntary act * * * the ordinary course of business has been followed", citing Donovan v. Security-First National Bank, 67 Cal.App. 2d 845, 853, 155 P.2d 856; Dimond v. Sanderson, 103 Cal. 97, 101, 37 P. 189.

But no presumption of validity arises from a written instrument which has been altered and whose execution is denied. Neither does such presumption arise if the writing is attacked. In the Donovan case the presumption of validity was applicable because the genuineness and due execution of the writing were admitted. In the case at bar the creation of a joint tenancy estate was denied. Moreover, the asserted "countervailing presumptions" apply only to the obligors and the obligees of a contract. There is nothing in any of them to overcome the rule of section 2235; nothing in them to show that respondent's influence over decedent was not used to gain the inclusion of his name as a joint tenant in any note or in the stock certificate. See Dimond v. Sanderson, supra. In the Donovan case the writings were signed by the parties against whom the presumption was invoked by the other party to the writing. But in the instant case Pierce, the maker of the notes in question, is not a party In the absence of rebutting evidence the transfer of property to one in whom confidence is reposed is presumed to have been without consideration, and such presumption is paramount. McKay v. McKay, 184 Cal. 742, 195 P. 385.

[18, 19] In respondent's attempt to overcome the lack of evidence he argues that his confiding friend had knowledge of the joint tenancy phrase from her presumed possession of the trust deed which included a copy of the note. While the county recorder was instructed to mail to decedent the trust deed there was no offer to prove that such instruction had been followed. Such proof was as a matter of custom and procedure in the keeping of the county official and was of course available for the trial. But, at its best, argument does not suffice for evidence which is essential to overcome the presumption of undue influence. The mutual treatment by decedent and respondent of the payments made on the notes indicates that she was sole payee in both of them. Respondent received and conveyed the checks from Pierce, payable to Mrs. Ferres only, to be applied on the notes. He delivered them to her without a word of protest or of reservation of a right to any payment or of an interest in any payment. She said nothing about his having an interest in the checks but deposited them in her own bank account, notwithstanding there was extant a bank account in joint tenancy between them. That the checks for all payments were payable to her; that respondent in person made delivery thereof to her; that he failed to show that any part of the interest was received as his income or that only one half of it was applied to the income of respondent—these facts should have been proved by respondent to entitle him to recover. Such evidence wanting, it was incumbent upon the latter to explain its unavailability. In the absence of such proof it must be presumed that the evidence in the possession of respondent could not be reconciled with a joint tenancy.

Respondent never asserted his claim of joint tenancy in decedent's lifetime. In fact he did not advise Mr. Hibbard, decedent's counsel, until two days following her demise that the two notes were in joint tenancy. At that time he merely stated that he should receive the unpaid balance of the notes. His secrecy in such matter is itself a circumstance deserving of consideration as a further support of the presumption of fraud and undue influence in obtaining the notes to be made in joint tenancy. Longmire v. Kruger, 80 Cal.App. 230, 241, 251 P. 692. If he was her business manager and was rendering compensable services would it not have been the most likely occurrence for him to tell a friend or a member of his family? Such event would have been admissible to overcome the implications arising from his continuous silence prior to August 11, 1943. If she had intended him to take the total of the $77,511 and the prior payments on the $30,000 note at her death for his services, is it not a remarkable oversight, exuding grave inferences, that she did not nominate him as her executor whereby he might have supplemented his gifts with another $5,000 or more? He saw the opportunity and sought to take advantage of it by asking her attorney to change her will by naming him as executor. This inspired dream evidently gained no favorable reaction in the heart of Mrs. Ferres.

[20] Finally, the zeal of respondent to profit from his association with the good lady and to gain advantage by her passing would have been proved by a more judicious ruling of the court. The executor offered to prove that on the afternoon of the very day of her death after he had accompanied her to the hospital respondent called at the bank at which the joint tenancy account was carried, withdrew the funds and made a deposit of the same moneys to the joint account of himself and his wife. The offer of proof included respondent's statement that Mrs. Ferres was then seriously ill in a hospital; that if she recovered he would restore the fund to the same account, and that he desired to withdraw the money to avoid difficulty. Such evidence was relevant to the issue of respondent's obligation to attempt to clear himself of fraud and undue influence, but was erroneously excluded. That in the final terrestrial hour of his benefactress he as her minister would leave her for the purpose of transferring money from an account which had previously been controlled and used by decedent only supports the statutory presumption (Civ.Code, § 2235) that he had unduly exercised his influence over her to gain the execution of the memorials of the joint tenancy.

In view of the sentiments above expressed discussion of the other assignments would be superfluous.

Since the finding of respondent's freedom from the exercise of fraud and undue influence and his claim of an express trust are without evidential support, the judgment is reversed with instructions to enter judgment in favor of appellant.

McCOMB and WILSON, JJ., concur.

79 Cal.App.2d 350

MIDDLE FORK GOLD MINING CO. v. GREEN et al.

Civ. 7386.

Sac. 5834.

District Court of Appeal, Third District, California.

April 25, 1947.

Appeal and error 🔑346(1)

Where judgment was entered on July 8, written notice of entry was received by defendants on August 1, and defendants filed notice to move for new trial on August 12, and on August 27 defendants filed a petition for new trial, cancellation of judgment and time to file exceptions, and on September 30 a motion to vacate judgment and enter another judgment, and motion for new trial was denied on September 13, and notice of appeal was not filed until November 30, motion to dismiss appeal because notice of appeal was not filed in time was granted. Code Civ.Proc., § 659; Rules on Appeal, rules 2, 3.

Appeal from Superior Court, El Dorado County.

Action by Middle Fork Gold Mining Company, a corporation, against F. I. Green and Mabel Green, and the Sliger Gold Mining Company, a corporation, wherein the defendants filed a cross-complaint. From an adverse judgment F. I. Green and Mabel Green appeal, and the Sliger Gold Mining Company moves to dismiss the appeal.

Motion to dismiss granted and appeal dismissed.

Wm. E. Colby, of San Francisco, for defendant & cross-complainant & cross-defendant & appellee.

No appearance for respondent.

ADAMS, Presiding Justice.

This is a motion by appellee, Sliger Gold Mining Company, to dismiss the appeal of appellants F. I. Green and Mabel Green. The motion is supported by two certificates of the clerk of the trial court, and the affidavit of Wm. E. Colby, attorney for movant. No appearance was made by appellants.

The aforesaid certificates and affidavit show the following facts. Judgment was entered July 8, 1946. Written notice of entry of judgment was mailed to appellants by the clerk of the court on July 29, 1946, and received by them on August 1, 1946. On August 12, 1946, appellants filed a "Notice of Intention to Move for New Trial," and on August 27th filed what was designated as a "Petition for New Trial, Cancellation of Judgment and Time to File Exceptions." On September 30, 1946, they filed a "Motion to Vacate a Judgment and Enter Another and Different Judgment."

On September 13, 1946, the trial court denied the motion for a new trial and the "Petition for New Trial, Cancellation of Judgment and Time to File Exceptions." On November 16, 1946, the "Motion to Vacate a Judgment and Enter Another and Different Judgment" was denied. On November 30, 1946, the Greens filed Notice of Appeal.

This motion to dismiss the appeal is based upon the proposition that the said notice of appeal was not filed in time.

Rule 2 of the Rules on Appeal provides that a notice of appeal must be filed within 60 days from the date of entry of the judgment unless the time is extended as provided in Rule 3.

Rule 3 provides that when a valid notice of intention to move for a new trial is served and filed within 60 days after entry of judgment, if the motion is denied the time for filing the notice of appeal from the judgment is extended until 30 days after denial of the motion. It also provides that where a motion to vacate a judgment and enter another and different judgment is made within 60 days after entry of judgment, if the motion is denied, or not decided by the superior court within 120 days after entry of the judgment, the time for filing the notice of appeal from the judgment is extended until 30 days after entry of the order denying the motion to vacate, or 120 days after entry of the judgment, whichever shall be less.

Appellants did not bring themselves within these rules. While their notice of motion for a new trial was made within 60 days after entry of judgment, it was not filed within 10 days after receipt of notice of entry of judgment as provided by Code of Civil Procedure, sec. 659. But even assuming that it was valid though not filed in conformity with the code section, it was denied on September 13th, and the notice of appeal was not filed until November 30th, more than two months after denial of the motion, and some 145 days after entry of judgment.

Also, while their "Petition for a New Trial, Cancellation of Judgment and Time to File Exceptions" was filed within 60 days after entry of judgment, it was denied on September 13th, and the notice of appeal was not filed within 30 days thereafter. So if same be considered as a motion to vacate judgment and enter another and different judgment under the rules, it is obvious that the appeal was taken too late.

If, on the other hand, that petition was not of that nature, and time to appeal is to be measured in connection with the "Motion to Vacate a Judgment and Enter Another and Different Judgment," which was filed on September 30th, it is apparent that same was neither filed nor made within the 60 days after entry of judgment and was therefore too late. Regarding such a motion the rule provides, not that it must be filed within the 60 days after entry of judgment, but that it must be made within that time; and the record before us shows that said motion was not made until November 8th. The notice did not specify a date for hearing of the motion, and the hearing was noticed by the clerk and brought up for hearing on said notice without action to that end on the part of appellants. The motion was therefore not made until November 8th, at which time appellants appeared and argued in support of same. This was 123 days after entry of judgment, and was too late. See Estate of Corcofingas, 24 Cal.2d 517, 521, 150 P.2d 194.

The motion to dismiss is granted and the appeal is dismissed.

THOMPSON, J., and SCHOTTKY, J. pro tem., concur.

79 Cal.App.2d 178

BANDONI v. WALSTON et al.

Civ. 13319.

District Court of Appeal, First District,
Division 1, California.
April 17, 1947.

Rehearing Denied May 17, 1947.
Hearing Denied June 12, 1947.

1. Contracts 🔑10(1)

The doctrine of mutuality of obligation is inapplicable to unilateral contracts.

2. Contracts 🔑18

A court should interpret an offer as contemplating a bilateral, rather than a unilateral, contract.

3. Corporations 🔑121(6)

In action for damages because of defendant's failure to deliver all shares of corporation stock purchased by plaintiff, court properly instructed jury as to necessity of mutuality of obligation on theory that plaintiff's offer to buy stock was offer for bilateral, not unilateral, contract.

4. Trial 🔑237(1)

Instruction that if jury believed from preponderance of evidence that plaintiff offered to buy stated number of shares for specified sum and delivered check therefor to defendants, jury should find that defendants' acceptance of check constituted acceptance of offer and created binding contract, in absence of full and satisfactory explanation, was erroneous as placing on defendants excessive burden of proof by preponderance of evidence and beyond reasonable doubt. Code Civ.Proc. § 2061.

5. Evidence 🔑596(1)

The burden of going forward with explanation does not impose burden of proving explanation beyond reasonable doubt, unless a statute specifically so provides.

6. Appeal and error 🔑1064(1)
Trial 🔑237(3)

Instruction imposing on defendant burden of proof by preponderance of evidence and beyond reasonable doubt that no binding contract was made for sale of number of shares which plaintiff offered to purchase was prejudicial error. Code Civ. Proc. § 2061.

7. Witnesses 🔑329

In action for defendant brokers' breach of contract in failing to deliver all shares of corporation's stock purchased by plaintiff, evidence that plaintiff knew that such stock was oversubscribed was admissible on cross-examination of plaintiff's witnesses at least to test their credibility.

8. Corporations 🔑121(5)

In action for damages because of defendant's failure to deliver number of shares of corporation's stock purchased by plaintiff, as evidenced by his check for total amount of purchase price at agreed sum per share and defendant's receipt therefor, evidence of extent of plaintiff's knowledge of distinction between receipt for money and confirmation of sale was admissible on question whether receipt was in fact a sale contract. Civ. Code, § 1649.

9. Corporations ⚷116

A receipt, given for check for account of maker for specified number of shares of corporation's stock, was insufficient as contract to sell such shares, but was bare acknowledgement of receipt of check.

10. Trial ⚷33

Testimony involving a collateral issue will not be admitted, where such inquiry, in its probative bearing on main issues, is not worth the time and necessary complication of issues involved.

11. Witnesses ⚷268(16)

In action for brokers' breach of contract by failure to deliver number of shares of corporation's stock alleged to have been purchased by plaintiff from defendants, who contended that plaintiff offered only to buy such number of shares or so many shares as defendant might allocate to plaintiff, evidence that stock was oversubscribed, as defendants' witnesses testified, because of purchase of shares thereof by members or employees of defendants' firm, was admissible on cross-examination of such witnesses by plaintiff.

12. Appeal and error ⚷1060(1)

In action for damages because of brokers' failure to deliver number of shares of corporation's stock purchased by plaintiff, argument to jury by plaintiff's counsel, containing general accusations of defendants' dishonesty, direct charge that defendants purchased shares of such stock for their own benefit, causing oversubscription to plaintiff's detriment, after exclusion of evidence of such fact, and statement that evidence warranted inference that defendants individually were distributees of allotment of such stock, constituted prejudicial misconduct.

13. New trial ⚷29

Where counsel for party obtaining jury's verdict was guilty of misconduct in argument to jury, new trial should be promptly granted to adverse party, unless verdict clearly was not affected by such misconduct.

Appeal from Superior Court, Santa Clara County; M. G. Del Mutolo, Judge.

Action by Attilio Bandoni against Vernon C. Walston and others, doing business as co-partners under the firm name and style of Walston, Hoffman & Goodwin, such co-partnership, and others, for damages caused by defendants' failure to deliver shares of corporation's stock purchased by plaintiff from defendant co-partnership. Judgment for plaintiff, and defendants appeal.

Reversed.

Claude N. Rosenberg and Bacigalupi & Salinger, all of San Francisco, for appellants.

Boccardo & Williams, of San Jose, for respondent.

WARD, Justice.

This is an appeal from the judgment of the Superior Court of Santa Clara County providing that plaintiff recover from "Vernon C. Walston, C. P. Hoffman and Claire V. Goodwin, etc., et al. the sum of Four Thousand & 00/100 ($4,000.00)...... Dollars, with interest."

The complaint alleges that on or about September 27, 1945, plaintiff purchased from defendant Walston, Hoffman & Goodwin, a co-partnership, and the individual defendants who are partners thereof, 1100 shares of Kaiser-Frazer Corporation stock for $11,000, which sum defendants receipted for in writing, and agreed in writing to deliver 1100 shares to plaintiff. It further alleged that defendants delivered 100 shares; that demand has been made for delivery of 1000 shares; that the reasonable market value of 1000 shares on the date that delivery thereof should have been made was $14 per share, and that plaintiff has been damaged in the sum of $4,000.

Defendants' answer denied that plaintiff purchased 1100 shares, but admitted that on or about September 27, 1945, plaintiff paid to defendants $11,000 which was receipted for in writing, and that defendants delivered 100 shares—when the market value was $14.00 per share. As an affirmative defense, defendants alleged that on or about September 26, 1945, plaintiff deposited

$11,000 with defendant Walston, Hoffman & Goodwin, and informed said defendant that he desired to purchase some shares of Kaiser-Frazer Corporation stock at $10.00 per share; that plaintiff was informed that said defendant would be unable to sell him more than 100–200 shares; that thereupon plaintiff stated that he would purchase and accept delivery of such number as said defendant elected to sell him; subsequently, on September 28, 1945, said defendant elected to sell plaintiff 100 shares at $10.00 per share and so informed plaintiff in writing.

Plaintiff, a rancher in Santa Clara County, testified that he communicated by telephone with Guy E. Marshall, the general manager of the San Jose office of the defandant firm, informing Marshall that he would like to have 1000 shares of Kaiser-Frazer Corporation stock, to which Marshall replied "You can have all you want." Defendants' testimony showed his reply to be, "'I have a check for $11,000, I'll take 1100.' That is how we arrived at the amount of 1100 shares." Marshall sent his secretary for said check which constituted the proceeds of another transaction. This check and the receipt for same "For Account of Attilio Bandoni......for 1100 Kaiser-Frazer Corp.," constitute the agreement "in writing" upon which the action was brought.

The evidence also shows that plaintiff requested a friend to inform Marshall that the order be cut down to 500 shares, and that this message was delivered. There is a conflict in the evidence as to whether subsequently plaintiff ordered 1100 shares from Marshall. Plaintiff testified that when he received only 100 shares of Kaiser-Frazer Corporation stock, he demanded the balance of 1,000 shares. He admitted that he received a confirmation of sale of only 100 shares.

The evidence submitted by the defense tended to contradict the evidence of plaintiff. During the cross examination of plaintiff, without the presence of the jury, defendants' counsel made an offer to prove that in past transactions where Bandoni purchased a security he received a confirmation of the sale, and that in each instance where he made a payment he received a receipt. The trial court refused to allow the evidence of other transactions even though it was argued that such evidence would show that plaintiff realized the distinction between a receipt for money and a confirmation of sale.

Marshall denied that he had said Bandoni could have as much stock as he desired. On the contrary, he testified: "I told Mr. Bandoni at the time that there had been a lot of activity and inquiries about the stock, and in my opinion, I would do well if I got him 100 or 200 shares of stock, that I could not guarantee to make any delivery to him." Plaintiff's objections were sustained as to the propriety of questioning Bandoni as to his knowledge of an oversubscription of the stock.

Vernon C. Walston, a member of the defendant firm, testified that the firm sold Kaiser-Frazer Corporation stock at $10.00 a share as indicated in the prospectus, and that in a few days, in over-the-counter transactions, it went up to $14.00 a share. The court sustained an objection to questioning Walston as to whether he purchased any Kaiser-Frazer stock himself. Walston's testimony sheds light on prior dealings of the parties. "We're under the regulations of the Federal Reserve Bank in the extension of credit. We have had, a month or so prior to this transaction, repeated violations by Mr. Bandoni of payments. I had notified Mr. Marshall that we would henceforth not accept any orders from Mr. Bandoni unless the funds were on deposit with us." It appears that although plaintiff was financially responsible, his life as a rancher delayed his payments to defendant firm. Walston testified: "We accepted this check from him, not as an agreement that we had sold him 1100 shares, because * * *. At the time we received that check from Mr. Bandoni, we could not sell the stock. We did not know how much stock we were going to get. It wasn't until the next day that we were advised by the underwriters how much stock they allocated to us. Then, we attempted to—we did allocate that in full among the various orders that we had. We naturally favored customers that had

had proper dealings with us in that allocation."

Daniel J. Cullen, sales manager and a partner of the firm, was called as a witness. The defense offered to prove that Bandoni understood the significance of the various documents introduced in evidence. The court sustained an objection. The record shows the following: "Mr. Boccardo: Counsel, will you stipulate that we can go into whether or not the partners bought any themselves? Mr. Rosenberg: No, I won't go into that, or any other customer, because that's a matter of privacy, which you're not entitled to inquire into. * * * Q. Will you state whether or not, Mr. Cullen, on September 27th, 1945, the firm of Walston, Hoffman & Goodwin had any shares of Kaiser-Frazer stock? I'll withdraw that. State whether or not on September 27th, 1945, the defendant firm of Walston, Hoffman & Goodwin allocated to its customers all of the shares of stock which it received out of the underwriting agreement, pertaining to Kaiser-Frazer stock?" An objection by defendants was sustained.

During the course of the trial the court made the following statement to the jury: "* * * whatever the attorneys may say is not evidence, and you're not bound to decide this case on what Counsel say. You're to decide this case solely on the testimony of witnesses, and whatever arguments Counsel may make, if they are of any help to you, you may follow them, but whatever statements that the attorneys make is not evidence."

The evidence shows that Bandoni sold his 100 shares of Kaiser-Frazer stock a few days after the original transaction at a profit, but before the case was submitted the court expressed the opinion that such evidence had nothing to do with the case. The same ruling applied to an alleged profit made on the sale of Bank of America stock which defendants claim was purchased with the remaining portion of the $11,000 after 100 shares of Kaiser-Frazer were purchased.

The following testimony is in the record: "Q. And then when you finally got ahold of Mr. Marshall after this, you received this confirmation, now, what did you say to him on that occasion over the telephone? A. Well, I says I didn't get my stock, I was going to sue them. Q. And what did Mr. Marshall say? A. Well, he says, I didn't have a leg to stand on, and I said maybe I was kidding."

Defendants specify as error that "1. The court erred in instructing the jury. 2. The court erred in excluding evidence which was admissible to explain the receipt and determine the intention of the parties. 3. Opposing counsel was guilty of prejudicial misconduct in commenting on evidence excluded by the trial court."

[1-3] Defendants claim that the following instruction is erroneous as being a misstatement of the law. "A contract must be mutual. It must be binding upon both parties or neither. There is no such thing as a contract which is binding upon one party to it and not binding upon the other.

"If you find from the evidence in this case that Mr. Bandoni was bound to purchase the stock; that is, that he was obligated to purchase at a given price the 1100 shares of Kaiser-Frazer Corporation stock involved in this action, then you are instructed that the defendants were bound and obligated to sell the stock to Mr. Bandoni at the price stated."

In the paragraph preceding the last instruction, the court instructed that "When a buyer agrees to buy a thing and the seller promises to sell it, a binding contract is made," indicating that the court treated the case as involving a bilateral contract. Whether or not the court erred in instructing on mutuality of obligation depends upon whether or not a bilateral contract had been entered into by the parties to this action. Conceivably, plaintiff's offer to purchase Kaiser-Frazer Corporation stock was an offer for a unilateral contract—in exchange for a broker's act of getting the desired stock, the offeror promises to pay the purchase price. The doctrine of mutuality of obligation is inapplicable to unilateral contracts. (6 Cal.Jur. 213; 1 Williston on Contracts, 19-20.) It is also conceivable that plaintiff's offer was an offer for a bilateral contract—in exchange for the broker's promise to get the desired stock, the offeror promises to pay the purchase price. Plaintiff's testimony supports this view of the case. A court should interpret an offer as contemplating a bilateral rather than a unilateral contract. (Restatement of the Law, Contracts, § 31; 1 Williston on Contracts 76.) It does not appear that the court committed error in instructing as to mutuality of obligation.

[4, 5] The only other instruction which need be considered is attacked by defendants as shifting the burden of proof: "If the jury believes from the preponderance of the evidence in this case, that the plaintiff made the defendants an offer to buy 1100 shares of the stock of the Kaiser-Frazer Corporation for the sum of $11,000 and delivered to the defendants, at or about the time he made that offer, a check for the sum of $11,000, which the defendants received, accepted and cashed, then, in the absence of a *full and satisfactory explanation,* the jury should find that the acceptance of the check constituted an acceptance of the plaintiff's offer to buy the 1100 shares of stock, and that a binding contract was then created by which defendants became obligated to sell and deliver to plaintiff 1100 shares of that stock." (Emphasis added.) The instruction places a burden on defendants greater that the law requires, namely, proof "according to the preponderance of evidence." Code Civ.Proc. § 2061; Pullen v. Heyman Bros., 71 Cal.App.2d 444, 162 P.2d 961.

In Hobart v. Hobart Estate Co., 26 Cal. 2d 412, 159 P.2d 958 an expression similar to that used in the quoted instruction, namely, a requirement that "conclusive" evidence be introduced, together with other instructions upon the same subject, was held to require a reversal. In the Hobart case the ground for reversal, namely, the requirement of conclusive evidence, is coupled primarily with an instruction that a party has an "absolute right" to rely upon an expressed statement of an existing fact made by one "with full means of knowledge." The instruction that a plaintiff had an absolute right to rely upon a statement of an existing fact, the truth of which was known to the maker of the statement, was error. The court said (at page 447 of 26 Cal.2d, at page 977 of 159 P.2d): "Reliance must be justifiable * * * ". In the present case the jury was instructed that the explanation must be not only satisfactory, *but* it must be "full," which was merely another way of saying that the evidence which the defendants are called upon to present must be clear, complete, conclusive and of the highest degree, that is, *absolutely* satisfactory. In a civil case the burden of going forward with an explanation does not impose the extra burden of proving the explanation beyond a reasonable doubt, unless a statute specifically so provides, which is not true in this case. A full and satisfactory evidentiary explanation is equivalent to proof beyond a reasonable doubt (17 Words and Phrases, Perm.Ed., p. 772), except in such matters where the statute sets forth the quality and quantity of evidence necessary as proof in a particular action (Cumulative Annual Pocket Part, 17 Words and Phrases, Perm.Ed.).

In the Hobart case the Supreme Court commented upon the fact that the jury had requested certain clarifying instructions. The Supreme Court did not quote the instruction requested by the jury but stated (at page 449 of 26 Cal.2d, at page 978 of 159 P.2d): "It is obvious that the jury was confused in a close case in which the evidence was sharply conflicting. The errors in the instructions related to matters vital to defendants, and, when considered together, must be regarded as prejudicial. * * * Since the judgments must be reversed, and as it is unlikely that the errors complained of will be repeated upon a retrial of the case, it is unnecessary to discuss them here." It is not necessary in the present case to discuss several instructions containing statements erroneous to a minor degree. It may be assumed that upon a retrial the errors will not be repeated.

[6] Was the error in the last instruction prejudicial? The answer depends upon the facts. The closeness of the case on its facts, when considered with the Pullen and the Hobart cases, and the pronounced views in the opinion in the latter case, together with other errors which will be referred to, necessitates a reversal of the judgment.

[7, 8] The second point urged on appeal is that the trial court *committed re-*

versible error in excluding certain evidence offered by defendants. It is admitted that the check for $11,000 and the receipt for same "For Account of Attilio Bandoni ... for 1100 Kaiser-Frazer Corp.", constitute the agreement "in writing" upon which suit was brought. Defendants argue that it was pertinent to inquire not only what plaintiff understood the transaction to be, but also what defendants understood it to be. (Civil Code, sec. 1649.) Evidence introduced by defendants that plaintiff knew the issue of Kaiser-Frazer Corporation stock was oversubscribed, was a proper subject for cross examination if for no other reason than to test the credibility of the witnesses. Evidence of the extent of plaintiff's knowledge of the distinction between a receipt for money and a confirmation of sale should have been admitted as indicating whether the receipt was in fact a contract of sale.

[9] Citizens' Nat. Trust & Savings Bk. of Los Angeles v. Arrowhead Springs Beverage Co., 126 Cal.App. 550, 14 P.2d 821, involved an action to recover money paid under a stock subscription agreement. In addition to the subscription agreement, two receipts were offered and admitted in evidence. The first read: "'Received of Annie W. Stimson * * * check for the sum of Thirty Thousand Four Hundred Dollars on account of his (sic) subscription for 3040 shares of * * * Preferred shares of said Company on the terms set forth in his (sic) subscription contract * * * [Signature] * * * and seven hundred shares of Common.'" The second receipt read: "'Received of Annie W. Stimson * * * 152 shares of * * for which I agree to deliver to her 3040 shares of the preferred stock and 700 shares of the common stock of * * * or I agree to return the sugar stock received.'" The issue was whether the subscription agreement included the sale of 700 shares of common stock. The parties differed as to whether the two receipts could be looked to, to determine this issue. The court, at page 554, of 126 Cal.App., at page 823 of 14 P.2d, described the first receipt in the following terms: "[It] is but a bare acknowledgment that the agent received a check, it is a mere receipt," citing Greer v. Los Angeles Athletic Club, 84 Cal.App. 272, 276, 258 P. 155. The second receipt, however, is described as "both a receipt and a contract because, in addition to acknowledging receipts of the stock, the agent agrees to deliver specified stock therefor or to return the stock so received." The receipt here involved, set out supra, resembles the first of the two receipts involved in the Citizens' Bank case. It is insufficient and incomplete as an agreement to sell.

[10] It is true that "testimony involving a collateral issue will not be permitted where such inquiry, in its probative bearing on the main issues, is not worth the time and necessary complication of issues involved." (10 Cal.Jur. 805.) Whether a contract of sale of 1100 shares of Kaiser-Frazer Corporation exists, is a vital question in this case. The evidence offered by defendants was "worth the time and necessary complication of issues involved."

In view of the foregoing it is unnecessary to consider defendants' objection to the exclusion of certain evidence relative to the function of the cashiering department which issued the receipt.

[11] It is now proper to consider another ground for reversal, namely, misconduct on the part of plaintiff's attorneys. There is evidence offered by the defendants that the stock was oversubscribed. The court prohibited plaintiff from asking any questions on cross examination as to why it was oversubscribed. This was error. Such evidence was admissible. The main issue presented to the trial court was whether a binding contract was entered into for 1100 shares. Defendants were contending that no such contract was entered into, and that there was only an offer to buy 1100 shares or so many shares as defendants might allocate to plaintiff. The court was entitled to consider the legal effect of the contrasting interpretations. If defendants' contention was correct, and if the brokers could have refused to allocate any shares at all to plaintiff, and if the reason that no such shares were allocated was that members of the firm or employees subscribed and took advantage of the raise in price, the trial court was entitled to

know that fact in determining how to interpret the contract. Obviously, an interpretation that is fair and equitable is to be preferred to one that places all the burden on one side and confers all the rights on the other.

[12] But although this evidence was admissible the trial court ruled it inadmissible. Plaintiff nevertheless persisted in referring to it after repeated admonitions by the court. General accusations of dishonesty on the part of defendants were made, as well as the direct charge that defendants had purchased individually and otherwise the Kaiser-Frazer stock for their own benefit, thus causing an oversubscription to the detriment of plaintiff who was unable, on account of the acts of defendants, to secure the requested number of shares.

An example of general charges of dishonesty appears in the following from the opening argument of counsel for plaintiff: "* * * it's a skin game. It's a case of heads I win, and tails you lose. It's a stock broker's trick that they're trying to practice on this man. They're trying to put themselves in the position where they have the orders and the money, which will fortify themselves, so that they can get every share of stock they want sold at that minimum price, regardless of what happens, and then if they're fortunate and the stock issue appeals to the public, and there are a lot of subscriptions to it, they can say, 'Oh, it's too bad, you know you ordered 1100 shares and paid $11,000, but we'll just dish you out 100 shares, and we'll call it square. That's all right. You've got nothing against us at all. There's no contract. You can't hold us.' Now, is that legitimate business? * * * do you think there's any faithfulness in a situation where a man puts up his money, and orders stock, and they can hold him if the stock goes down, and yet if the stock goes up, he doesn't get the benefit of it?"

Relative to the direct charge that the members of the defendant firm had bought the stock and caused the oversubscription the following appears in the opening argument: "I asked Mr. Walston on the stand here, if he individually had bought any stock. The Court sustained an objection to the question. It wasn't answered, so there's no evidence that he did buy any stock, but, Ladies and Gentlemen of the Jury, *there's no evidence that he did not buy some of the stock.* There is no evidence that his partner, Mr. Hoffman, did not buy some of the stock. There is no evidence that his partner, Mr. Goodwin, didn't buy some of the stock. There's no evidence that this gentleman over here did not buy some of the stock, (referring to Mr. Cullen). In other words, if they thought that stock was going up they had an object in making a profit, maybe this oversubscription which they're complaining about here was due to the fact that the insiders put in their own individual orders for so much of the stock that there wasn't any left for their customers. Now, that's a fair inference from this situation." (Emphasis added.) The statement was assigned as misconduct. Thereupon counsel for plaintiff made the following statement: "I've simply shown that there's no evidence to show here what was the cause of the oversubscription, and it's absolutely open to the inference of the Jury that the oversubscription was due to orders that were placed by the individual partners of this concern, and I respectfully submit, your Honor, that that's a perfectly legitimate offer." The court directed plaintiff's counsel to discontinue that line of argument.

Defendants' attorney in his argument replied to the foregoing charges of plaintiff's attorney in the following manner: "I might say that he has undertaken, also, to anticipate some of the instructions that the Court is going to give you in this case. He neglected, however, to mention that one of the instructions that the Court is going to give you is that in this case you are not to be influenced by sympathy, prejudice, or passion of any kind. I mention that in light of his reference to dishonesty and unfairness in dealings, and his reference to the fact that in this transaction, this reputable firm of defendants was guilty of sharp practice and stockbrokers' tricks, and I submit to you that the only purpose of those remarks, and remarks of that category could possibly have would be to inflame you against these defendants, and cause you, in the rendition of your verdict, to be influenced by some prejudice or some passion that he's attempted to create in your minds contrary to the law that he knows you're obligated to conform to in the discharge of your oaths as jurors. * * * Mr. Bandoni would have you believe that this firm agreed to sell him 1100 shares of stock. We deny that. I think the evidence all points the other way, but, at any rate, on September 28th he found out he was only getting 100 shares of stock. * * * Now, do you think that a man doing business with an investment concern, if he felt that they had cheated him out of $4,000 by violating their agreement with him, would continue doing business with that firm? You know that he wouldn't. Mr. Bandoni is a business man. That's utterly illogical, and still the evidence is uncontradicted that within two weeks after this transaction, he purchased, made another purchase of securities from the same concern, and then he ultimately sold those securities through the same concern, the same concern that was guilty of these dishonest practices, this stock-broker's trick, Mr. Bandoni continued to do business with * * *."

In closing, defendants' attorney called attention to defendant Walston's testimony, "because I'm sure that there has been an attempt to create an impression that there was some ulterior purpose in these defendants not delivering this stock to Mr. Bandoni, and the *implication is,* that any stock they didn't deliver to him, they could *sell to somebody else for more money.* Here is Mr. Walston's testimony right here, 'We did allot that in full among the various orders that we had.' The testimony is uncontradicted, that whatever shares of stock that these defendants had to sell, they sold at $10.00 per share, and *I'll ask Mr. Williams* [plaintiff's counsel] to tell me, *what possible purpose,* or benefit, these defendants could gain by *not delivering* shares of stock *to Mr. Bandoni,* on which they'd make approximately $1.00 a share, *when they could only do one thing, and that's deliver them to somebody else* and only make $1.00 a share." (Emphasis added.)

The answer of plaintiff's counsel, after direction to discontinue argument with reference to whether defendants individually purchased the stock, exceeded the bounds of the question posed. He told the jury: "I'll tell you Ladies and Gentlemen, what benefit these people had in not delivering that stock to Mr. Bandoni. As a firm, they may have distributed that stock, but as individuals, I assure you, Ladies and Gentlemen, and you can take that as an inference from the evidence here, that they individually were distributees of that allotment of stock." The attorney for defendants requested the court to instruct the jury to disregard that statement, but plaintiff's attorney enlarged to the jury the "inference that you can draw in this case." *During neither plaintiff's closing argument nor during the instructions of the court to the jury was an admonition given to disregard the remarks, nor was reference made to the rule that statements of counsel are not evidence.*

[13] "* * * instances of misconduct are the wilful bringing in or attempting to bring in of irrelevant, *previously excluded,* or incompetent evidence for the purpose of prejudicing the opposing party; the persistent pursuit of an incompetent course of questions * * *." (Emphasis added.) (53 Am.Jur., pp. 360-361, § 459.) "While a large discretion is allowed an attorney in presenting his case, nevertheless, where, in doing so, he oversteps the bounds of propriety and fairness which should characterize his conduct as an officer of the court, such conduct, where not cured by a proper instruction, may, if proper and timely objection is made, be ground for a new trial or for reversal of the case by the reviewing court." (53 Am.Jur., p. 360, § 458.) As said in People v. Ah Len, 92 Cal. 282, 285, 28 P. 286, 287, 27 Am.St.Rep. 103: "It follows that the only safe and just rule to apply in such cases is to make it impossible for a party to derive any advantage from such misconduct of counsel by promptly granting a new trial to the adverse party, unless it is clear that the verdict was not affected thereby." The purpose of the injected remarks was so apparent that it is doubtful whether the jury could have obliterated the effect thereof if a proper admonition had been given. Mangino v. Bonslett, 109 Cal.App. 205, 292 P. 1006.

On the grounds of cumulative effects of error in an instruction, of exclusion of admissible evidence, and of prejudicial misconduct, the judgment is reversed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; CARTER, J., dissenting.

79 Cal.App.2d 22

In re RICH'S ESTATE.

AITKENHEAD et al. v. WILLS et al.
Civ. 15551.

District Court of Appeal, Second District,
Division 1, California.
April 10, 1947.
Hearing Denied May 29, 1947.

1. Evidence 🔑472(8)

Permitting lay witnesses, over objection that question called for a legal conclusion, to express an opinion as to whether testatrix was mentally competent to make a valid will, was error, since mental competency to make a will involves a question of law and fact and expression of such opinion invaded province of both court and jury. Code Civ.Proc. § 1870, subd. 10.

2. Evidence 🔑474(4)

Old friends on terms of social intimacy with testatrix were "intimate acquaintances" of testatrix qualified under statute to express an opinion as to her sanity. Code Civ.Proc. § 1870, subd. 10.

See Words and Phrases, Permanent Edition, for all other definitions of "Intimate Acquaintance".

3. Appeal and error 🔑971(2)
Evidence 🔑498½

Whether a particular witness is an intimate acquaintance of testator qualified under statute to express an opinion as to his sanity rests in sound discretion of trial court, whose determination will not be disturbed except for a clear abuse of discretion. Code Civ.Proc. § 1870, subd. 10.

4. Evidence 🔑568(2)

The weight to be given testimony of intimate acquaintances as to sanity of testatrix was a question for jury. Code Civ. Proc. § 1870, subd. 10.

5. Appeal and error 🔑1031(1)

Constitutional provision for setting aside a judgment only if error resulted in a miscarriage of justice abrogated former rule that prejudice is presumed from an error of law. Const. art. 6, § 4½.

6. Wills 🔑427

Admission of holographic will to probate established prima facie, for all the purposes of will contest, that will was duly executed in the manner required by law, by a testator who was competent, free from undue influence, etc., and contestants had the burden of establishing its invalidity.

7. Wills 🔑52(1)

Contestant has burden of proving lack of testamentary capacity, and only where contestant has established a prima facie case of absence of such capacity does proponent of will have the burden of meeting such case.

8. Wills 🔑52(1), 55(1)

Testamentary capacity is presumed to exist until the contrary is established, and contestant has the burden of showing affirmatively by a preponderance of the evidence that, at time of executing will, testator was of unsound mind and that such unsoundness of mind actually affected or controlled testamentary capacity.

9. Wills 🔑21

In will contest on ground of lack of testamentary capacity, the question is not what may have been testator's mental state when will was executed, but what such mental state actually was.

10. Wills 🔑55(1), 390

Evidence established that testatrix was of sound and disposing mind when she executed holographic will bequeathing entire estate to half-sister by adoption who was also her half-niece by blood, and hence permitting lay witnesses, over objection, to express opinion that testatrix was mentally competent to make a valid will, was not reversible error. Code Civ.Proc. § 475, Const. art. 6, § 4½.

11. Wills ⟹50

"Testamentary capacity" exists when testator understands the nature and situation of his property and recalls and understands his relation to persons who have claims upon his bounty and whose interests are affected by provisions of the will.

See Words and Phrases, Permanent Edition, for all other definitions of "Testamentary Capacity".

12. Wills ⟹54(1)

Evidence that testatrix committed suicide was admissible in will contest as tending to establish insanity, but such fact did not destroy testamentary capacity.

13. Wills ⟹21

To invalidate a will, mental derangement must be insanity of such broad character as to establish mental incompetency generally or some specific and narrow form of insanity under which testator is the victim of some hallucination or delusion, and it must be shown that the abnormality of mind had a direct influence upon the testamentary act.

14. Evidence ⟹571(2)

Testimony of psychiatrist, in response to hypothetical question, that testatrix whom he had never known was insane when she executed will, was unsatisfactory and was insufficient to affect validity of will in absence of showing that insanity which he ascribed to testatrix had a direct influence on her testamentary act.

15. Wills ⟹52(1)

Satisfactory proof that testator was unable to understand and carry in mind the nature and situation of his property and his relation to relatives and those around him, with clear remembrance as to those in whom, and those things in which, he had been mostly interested, and was incapable of understanding the act he was doing, and the relation in which he stood to the objects of his bounty, is necessary to overcome the presumption of testamentary capacity.

Appeal from Superior Court, Los Angeles County; Fred Miller, Judge.

Proceeding in the matter of the estate of Maude R. Rich, deceased, wherein George G. Aitkenhead and another and Norman Rich filed contests to probate of an holographic will, making Mrs. Clara Wills, legatee, and others, parties defendant. Verdict and judgment denying the petitions to revoke probate of the will, and contestants appeal.

Judgment affirmed and attempted appeal from verdict dismissed.

A. Brigham Rose, Ben C. Cohen, and Leo Shapiro, all of Los Angeles, for appellants.

Thomas J. Kelley and Vernon W. Hunt, both of Los Angeles, for respondents.

WHITE, Justice.

On the morning of March 2, 1944, decedent Maude R. Rich, then 66 years of age, executed an holographic will by the terms of which her entire estate was bequeathed to Mrs. Clara Wills, who had been legally adopted when she was seven years of age, by decedent's mother. This holographic will was placed by decedent in her safety deposit box at the Bank of America at San Pedro, California, at 10 o'clock on the morning of the same day it was executed. Shortly thereafter the testatrix boarded a train at San Pedro, bound for Los Angeles, where at about noon of the same day she committed suicide by jumping out of the 8th story window of an office building in downtown Los Angeles.

On July 11, 1944, the aforesaid testamentary document was admitted to probate. On January 9, 1945, a written contest and opposition to the probate of said holographic will was filed by appellants herein, George C. Aitkenhead and Catherine Aitkenhead, praying that the probate of the aforesaid holographic will be revoked and that a will executed by decedent on December 1, 1943 be admitted to probate as the last will and testament of the decedent.

By the terms of this last-mentioned will, substantial devices and bequests were made to the aforesaid appellants George C. Aitkenhead and Catherine Aitkenhead, long time friends of the testatrix, and to appellant Norman Rich, a nephew of the testatrix' predeceased husband. Appellant Norman Rich also filed his written contest in opposition to the probate of the holographic will and also prayed for the admission to probate of the will dated December 1, 1943. In her will just mentioned, decedent also remembered with bequests other relatives and friends, as well as the Episcopal Church, of which she was a communicant.

Both the aforesaid contests were predicated upon the ground that at the time decedent executed the holographic will of March 2, 1944, she was not of sound and disposing mind.

Separate answers to both contests were filed by respondents Clara Wills and Bank of America National Trust and Savings Association, named as executor in the holographic will.

Following trial before a jury upon the issue of whether or not testatrix was of sound and disposing mind at the time she executed her holographic will on March 2, 1944, a special verdict was returned finding that at such time decedent was of sound and disposing mind. Accordingly, judgment was entered upon said special verdict, denying the petitions of appellants to revoke the probate of the aforementioned holographic will of March 2, 1944. Motions for a new trial were made by appellants and denied. From the judgment, and "from the verdict of the jury," this appeal is prosecuted.

The contentions of appellants are twofold: (1) That the trial court committed prejudicial error in "permitting lay witnesses called by respondents to testify that in their opinion decedent was competent on March 2, 1944 to make a valid will"; (2) that no sufficient foundation was laid to qualify such witnesses as "intimate acquaintances" within the rule (Sec. 1870, Civ. Code Proc., sub. 10) permitting an intimate acquaintance to give an opinion concerning the soundness of mind of a decedent, and that objections made to the questions propounded to these witnesses as to the mental competency of decedent on March 2, 1944, should have been sustained.

[1] As to the first of appellants' claims, the record reflects that the challenged question was as follows: "Do you have an opinion as to whether or not Maude Rich was mentally competent to make a valid will?" Appellants' objection to the question on the ground that it called for "a legal conclusion" was overruled. The ruling was erroneous. The latter part of the question "mentally competent to make a valid will", involving as it did a question of law and fact, was the identical question to be determined by the jury under instructions of the court. Subdivision 10 of section 1870 of the Code of Civil Procedure permits the asking of a subscribing witness to a will and also of an intimate acquaintance, questions eliciting the opinion of the witness as to the mental sanity of the person executing the testamentary instrument, the reasons for the opinion being given, but the question of competency is for the jury. In other words, when a witness has given an opinion as to the mental soundness of the decedent, the jury may judge the value or weight of such opinion in the light of the reasons upon which it was based. And if, for instance, the opinion given was that the testator was not mentally sound, the next question for the jury to determine, if they deemed the opinion correct, would be whether such mental unsoundness affected the capacity of the testator to make a will. And in determining this question, the jury would have to be guided by the instructions of the court as to the nature and degree of mental unsoundness which would render the testator incapable of disposing of his property. In allowing a witness to answer the aforesaid question, the province of both the court and jury was invaded and the whole issue of law and fact was determined by the mere opinion of the witness. The vice of the question lies in the fact that capacity to make a will is not a simple question of fact, but is a conclusion which the law draws from certain facts as premises. In support of what we have herein stated there is a veritable forest of authorities, including Estate of Taylor, 92 Cal. 564, 567, 28 P. 603; Estate of Perkins, 195 Cal. 699, 710, 235 P. 45; Estate of Short, 7 Cal.App.2d

512, 523, 47 P.2d 555; In Re Hill, 13 Cal. App.2d 326, 329, 57 P.2d 155; Estate of Martin, 170 Cal. 657, 668, 151 P.2d 138; 10 Cal.Jur. 1002; In re Lomax's Will, 224 N.C. 459, 31 S.E.2d 369, 155 A.L.R. 278.

Respondents insist that without objection from appellants similar testimony was elicited from Ben A. Hill, attorney for and close friend of the decedent. However, resort to the statement on appeal discloses that attorney Hill was asked for and merely gave his opinion as to the mental capacity of the decedent on the day she executed the holographic will. This, as we have herein pointed out, is proper because such an opinion does not impinge upon the province of the jury to determine, under the instructions of the court, whether the decedent possessed the mental capacity sufficient in law to enable her to make a valid disposition of her property.

Respondents earnestly urge that the specific question with which we are here concerned received the imprimatur of the Supreme Court of this state in Estate of Finkler, 3 Cal.2d 584, 594, 46 P.2d 149, 153. We, however, do not regard the quotation of the court, taken from a decision of the prerogative court of New Jersey, that "It is proper and legal to ask a witness his opinion as to the mental capacity of the individual to discharge the duty in question," as intended to approve the asking of a question which seeks to elicit from the witness an opinion as to whether, at the time the will was executed, the testator was possessed of the requisite mental capacity and intelligence that in law is deemed sufficient to enable him to make a valid disposition of his property.

[2-4] Coming now to appellants' second contention that the witnesses Mattie Goodrich and Josie M. Davis were not sufficiently qualified to express an opinion as intimate acquaintances of the decedent, we are satisfied that such contention cannot be sustained. Both of these witnesses were old friends of the testatrix; they were on terms of social intimacy with her and in the case of Mattie Goodrich she discussed decedent's business affairs with her and as late as July, 1943, accompanied the latter in the collection of rents on her property. Mrs. Davis saw the decedent in January, 1944, and talked with her on February 29, 1944, only two days prior to the latter's death. We are satisfied that both witnesses were "intimate acquaintances" under any definition of that term as employed in the code section. Because it is difficult to lay down any definite rule as to what constitutes an "intimate acquaintance," it has been repeatedly held by the courts of this state that the determination of that fact, under the statute, must be committed to the sound discretion of the trial court, and when that court has determined, from their testimony, that given witnesses were "intimate acquaintances" and permitted them to express an opinion, an appellate tribunal will not interfere with the exercise of that discretion, unless there has been a clear abuse of it. A consideration of the evidence of the two witnesses here in question as reflected by the statement on appeal precludes us from saying that there was any such abuse. In re Wax's Estate, 106 Cal. 343, 350, 351, 39 P. 624; Estate of Lenci, 106 Cal.App. 171, 175, 288 P. 841. The weight to be given the opinions expressed by these witnesses was of course a question for the jury to determine.

[5] We must now determine whether, under the circumstances here present, the erroneous consideration by the jury of the testimony given in answer to questions to which objections were improperly overruled, assuming that such testimony was considered, resulted in appellants' suffering substantial injury; that a different result would have been probable if the testimony had been excluded, and that the erroneous ruling of the court upon the admission of the challenged testimony resulted in a miscarriage of justice. Const. Cal., Art. VI, Sec. 4½; Code Civ.Proc., Sec. 475. The adoption of the constitutional provision just quoted abrogated the former rule that prejudice is presumed from an error of law.

[6-9] The admission to probate of the holographic will of March 2, 1944, "established prima facie for all the purposes of the contest, that it was duly executed in the manner required by law by a testator

who was competent, free from undue influence, etc. The burden of proof was on the contestants to establish its invalidity." Estate of Baird, 176 Cal. 381, 384, 168 P. 561, 562. Generally, the burden of proof as to the issue that decedent was not of sound and disposing mind is cast upon the contestant or the person who alleges such lack of mental capacity. It is only where the contestant has established a prima facie case of the absence of testamentary capacity that the proponent of the will has the burden of meeting it. And, until the contrary is established, testamentary capacity is always presumed to exist. The burden of showing affirmatively and by a preponderance of the evidence that *at the time* of executing the will the testatrix was of unsound mind and that such unsoundness of mind actually affected or controlled testamentary capacity rests upon the contestant. It is not a question of what *may* have been the testator's mental state at the time of the testamentary act, but what it *actually* was.

[10] In the instant proceeding we are persuaded that the evidence taken as a whole leads overwhelmingly to the conclusion that by the verdict rendered herein there has been no miscarriage of justice; that were a retrial to be had there is no probability of a different result; and that under the aforesaid constitutional and code provisions the judgment can not be disturbed.

At the trial, the appellants offered testimony that shortly before noon on March 2, 1944, testatrix committed suicide by jumping from an 8th story window of a downtown office building; that two days before her death the decedent was dissuaded from carrying out a threat of self-destruction; that on the last two Sundays preceding her death the decedent, while attending church services, "was in a highly nervous state. She murmured under her breath during the services. She seemed to be distracted about something"; that decedent was having considerable trouble with her eyes, was very discouraged about that condition; that one of the decedent's eyes had been removed many years before her death, since which operation she had gone to San Francisco once or twice a year to an eye hospital in connection with the trouble she was experiencing with the sight of her remaining eye. It was further shown that during the last several years prior to her death decedent made several wills; that from time to time she changed the provisions in such testamentary instruments; that since July 2, 1936, up to February 21, 1944, some ten days before the execution of the holographic will and decedent's suicide, she had written a series of nine letters in one of which she wrote, "I had it out with myself in the still of last night and I know that I must stop worrying or something will snap in my brain. I have had a very bad spell with my nerves and my eye is not the best. I pray the good God in heaven to take care of me and to stop this worry." In another communication the testatrix stated "my great trouble is not sleeping—but I will try no more tricks. Do hope as time goes on you will forgive me and put it down to a mental crackup." That in the summer of 1943 decedent was seen on her front porch "shaking her fist in the air and talking aloud to herself and pointing and shaking her finger. There was no one there other than the decedent." Called as a witness for the contestants, her attorney who drew the previous wills for the decedent testified that at the time said wills were prepared and executed in 1937, 1939, January 11, 1943, July 9, 1943, July 30, 1943, and December 1, 1943, she was of sound and disposing mind. It was further established that at the time these wills were drawn decedent discussed her property with the attorney, the nature, location and extent of it. By a physician, appellants offered testimony that on December 7, 1943, decedent "was in a highly nervous state. I prescribed phenobarbital * * * I gave it to her to stabilize her nervous system." This physician further testified that when he saw the decedent on February 6, 1944, less than a month prior to the execution of the holographic will, "she seemed very highly nervous and seemed rather confused." It was shown at the trial that appellants Mr. and Mrs. Aitkenhead were not related to the decedent but were oldtime friends of hers, while the appellant Norman Rich was a half-nephew of the deceased husband of the testatrix. A qualified psychiatrist who had never known, seen nor heard of the testatrix in her lifetime, in answer to a lengthy hypothetical question, testified that in his opinion she was insane at the time she executed the holographic will on March 2, 1944.

In opposition to the foregoing, we have testimony given in behalf of the respondents at the trial that decedent managed her business and residential properties capably up to the very last; that she knew the names of and showed normal interest in her relatives; that appellants Mr. and Mrs. Aitkenhead were carrying on normal correspondence with decedent up to February 2, 1944; that up to practically the day of her death decedent was carrying on her regular social, church and club activities and attending to the maintenance and repair of her properties; that respondent Clara Wills, legatee under the holographic will, was the half-sister of decedent by adoption and a half-niece by blood; that in connection with the care and management of her property, decedent gave intelligent, accurate, business-like instructions to her gardener; that the expressed intention of decedent to commit suicide in the latter part of February, 1944, was not the first expression of such intention; that as far back as 1932, following the death of her husband and the removal of one of her eyes, she had indicated a like intention, saying, "she had nothing to live for."

[11, 12] It is fundamental that testamentary capacity exists when the testator understands the nature and situation of his property, recalls and understands his relation to the persons who have claims upon his bounty, and whose interests are affected by the provisions of the will. Estate of Garvey, 38 Cal.App.2d 449, 457, 101 P.2d 551. We fail to find in the record herein any substantial evidence that decedent did not possess such understanding. It must be conceded that the testatrix was unquestionably in great distress and mental agony at the time she wrote her holographic will, and that it was written in contemplation of self-destruction. The fact that the testatrix was a suicide was properly received in evidence as tending to establish insanity, but there must be much more than the mere fact of suicide to show that the insanity was so complete as to destroy testamentary capacity. As was said by the Supreme Court in Estate of Finkler, 3 Cal.2d 584, 595, 46 P.2d 149, 153: "So, again, it may be well and perhaps soundly reasoned that all persons who commit crime and that all persons who commit suicide are aberrant, abnormal, and therefore insane. But such is not the insanity which the law has in mind." Again, in the case just cited, it is said, 3 Cal.2d at page 596, 46 P.2d at page 154:

"Every mental departure from the normal will not destroy a testamentary disposition, otherwise valid, of the testatrix' estate. It is not the rule of law that no person who is insane may make a valid will The real rule is that the will of a person, who by reason of insanity is incapable of making valid testamentary disposition of his estate, shall not be upheld. Estate of Chevallier, 159 Cal. 161, 113 P. 130; Estate of Wasserman, 170 Cal. 101, 148 P. 931."

[13] The same case is authority for the statement that in order to invalidate a will mental derangement must be insanity in one of two forms: "(1) insanity of such broad character as to establish mental incompetency generally, or (2) some specific and narrower form of insanity under which the testator is the victim of some hallucination or delusion." And furthermore, it must be shown that the abnormality of mind had a direct influence upon the testamentary act. Conceding that the testatrix understood her physical condition and was greatly worried, nervous and disturbed about it, such worry and concern was but natural and not an evidence of mental infirmity. In the instant case there is not even a suggestion that the decedent was the victim of any hallucinations or delusions.

Appellants concede that on December 1, 1943 (three months prior to her death), when decedent executed the will for which appellants sought admission to probate, she was of sound mind and possessed of testamentary capacity. There is no evidence to indicate any change in her mental capacity thereafter and until her death. The evidence shows without contradiction that on the morning of her death, when she executed the holographic will, the testatrix was keenly aware of what she was doing, and was very methodical in what she did. She knew exactly what time her bank opened that morning and appeared there promptly at the opening hour of 10 o'clock. Proceeding to the safety deposit department of the bank she deliberately and correctly signed the paper entitling her to access to her safety deposit box, signing her name in clear and steady handwriting. She then placed in her safety deposit box the will here under consideration. She enclosed the testamentary document in an envelope addressed to the manager of the bank which she had named executor.

A photostatic copy of the will has been brought here on this appeal and an inspection of the physical characteristics of the same, the addressed envelope in which it was enclosed, and the safety deposit admission slip bear mute but impressive and convincing evidence that it was not prepared by one bereft of the competency required by law for the legal execution of a testamentary instrument. It is titled "My last will," is dated, declares the maker to be "of sound mind and no undue influence being used," the name and address of the beneficiary is given, and an executor is nominated. No nervousness or trembling on the part of the testatrix is apparent in the document. The following language of a trial court, quoted with approval in Estate of Arnold, 16 Cal.2d 573, 589, 107 P. 2d 25, is particularly pertinent to the cause now engaging our attention: "The will is a perfectly natural will and bears no evidence upon its face of any mental weakness of the testator, much less anything amounting to mental incapacity in a legal sense. On the contrary it is convincing evidence of his testamentary capacity, for it contains within itself direct evidence of every element of competent ability in this regard." Furthermore, the holographic will here in question is a perfectly natural will. The sole beneficiary thereunder is the sister of the testatrix by adoption, but she was also actually a blood relative of the decedent by reason of the fact that decedent and the beneficiary's mother were half-sisters by blood, being born of the same mother. On the other hand, appellants Mr. and Mrs. Aitkenhead were but oldtime friends of the testatrix, while appellant Norman Rich was a half-nephew of the deceased husband of the testatrix.

[14] We are not unmindful of the testimony of the physician, and psychiatrist who, while he had never seen the decedent, declared under the promptings of a hypothetical question, too long to be here repeated, his belief that the testatrix was insane at the time she executed her holographic will, but his testimony must be construed in connection with the other evidence in the case which showed that the testatrix attended to her ordinary business, managed her properties, collected the rents thereon, directed the activities of her employees in the maintenance and upkeep of her properties, and was actively interested in church and club work. The type of evidence given by the psychiatrist in the instant case was thus characterized in Estate of Dolbeer, 149 Cal. 227, 243, 86 P. 695, 702, 9 Ann.Cas. 795: "The witnesses were skilled alienists, it may be conceded, but the evidence thus adduced of one who has never seen the person, and who bases his opinion upon the facts given in a hypothetical question, is evidence the weakest and most unsatisfactory. Such questions themselves are always framed with great particularity to meet the views of the side which presents the expert. They always eliminate from consideration the countervailing evidence, which may be of a thousand fold more strength than the evidence upon which the question is based. They are astutely drawn, and drawn for a purpose and that purpose never is the presentation of all the evidence. It is never to present the fair and accurate view, but the purpose always is to frame a question such that the answer will announce a predetermined result. This kind of expert testimony, given under such circumstances, even the testimony of able and disinterested witnesses, as no doubt these were, is in the eye of the law of steadily decreasing value." Furthermore, there was no showing in the testimony of the psychiatrist that the insanity, with

which in his opinion testatrix was afflicted, was of such a character that except for it she would have divided her property in a way other than she actually did. In other words, the testimony of the alienist did not establish the fact that the abnormality of mind which he ascribed to the testatrix had a direct influence on her testamentary act when she executed her holographic will.

[15] Taking all the evidence adduced by appellants as true, it falls far below the requirements of the law as constituting satisfactory rebuttal of the inference of testamentary capacity, the existence of which is destroyed only when it is satisfactorily shown that a testator was unable to understand and carry in mind the nature and situation of his property and his relation to his relatives and those around him, with clear remembrance as to those in whom and those things in which he has been mostly interested, incapable of understanding the act he is doing, and the relation in which he stands to the objects of his bounty. Applying the rule hereinbefore refered to to the facts disclosed by the record herein, and on the authority of a multitude of cases, including Estate of Chevallier, 159 Cal. 161, 113 P. 130; Estate of Little, 46 Cal.App. 776, 189 P. 818; Estate of Gould, 188 Cal. 353, 205 P. 457; Estate of Dolbeer, supra; Estate of Garvey, 38 Cal. App.2d 449, 101 P.2d 551; Estate of Schwartz, 67 Cal.App.2d 512, 155 P.2d 76; Estate of Lewis, 64 Cal.App.2d 480, 149 P. 2d 51; Estate of Finkler, 3 Cal.2d 584, 46 P.2d 149; Estate of Arnold, 16 Cal.2d 573, 107 P.2d 25; Estate of Agnew, 65 Cal. App.2d 553, 151 P.2d 126; Estate of McGuirk, 50 Cal.App. 352, 195 P. 279; Estate of Johanson, 62 Cal.App.2d 41, 144 P.2d 72; Estate of Morey, 75 Cal.App.2d 628, 171 P. 2d 131; Estate of Peterkin, 23 Cal.App.2d 597, 73 P.2d 897, and Estate of Wright, 7 Cal.2d 348, 60 P.2d 434, it must be held that a judgment founded upon any other verdict than the one rendered herein would not be supported by the evidence.

The aforesaid erroneous rulings of the trial court permitting the introduction of inadmissible evidence cannot therefore be held to have resulted in a miscarriage of justice, nor can it be said that a different verdict might have ensued but for the hereinbefore noted errors of law. Under the provisions of the Constitution of California, Article VI, Section 4½ and section 475 of the Code of Civil Procedure, the judgment rendered herein cannot be disturbed.

The attempted appeal from the verdict of the jury is dismissed. The judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

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SCHIED v. BODINSON MFG. CO.

SAME v. BODINSON.

BODINSON MFG. CO. v. SCHIED.

Civ. 7229.

District Court of Appeal, Third District, California.

April 14, 1947.

1. Evidence 🔑434(8), 441(1), 442(1)

When a completed contract is reduced to writing and executed by the respective parties, it is ordinarily deemed to include, and it supersedes, all previous negotiations and agreements or warranties, rendering incompetent evidence of prior oral warranties or agreements in conflict with the contract except oral evidence of material misrepresentations constituting fraud which render the contract void from its inception. Civ. Code, § 1625.

2. Sales 🔑51

Purchaser of gold dredging equipment, which specifically affirmed sales contract in writing with full knowledge of all material facts relating to alleged fraudulent representations on part of seller and agreed to by the terms of the contract, thereby recognized the contract as valid and binding.

3. Sales 🔑273(3)

When the seller of goods or machinery is informed by the purchaser of the purpose for which the articles are to be used, and relies upon the seller's skill or judgment with relation thereto, there is an implied warranty that the goods shall be fit for such purpose. Civ.Code, § 1735(1).

4. Sales ⚷273(3)

The statutory provision that, when the seller of goods or machinery is informed by the purchaser of the purpose for which the articles are to be used and relies upon the seller's skill or judgment in relation thereto, there is an implied warranty that the goods shall be reasonably fit for such purpose, is a part of every sales contract when applicable. Civ.Code, § 1735(1).

5. Sales ⚷273(1)

There is a distinction between an implied warranty that machinery is reasonably fit for the purpose for which it was purchased, and a mere statement that the machinery is superior to some other type or that it will perform the desired work better. Civ.Code, § 1735(1).

6. Sales ⚷284(4)

The implied warranty of fitness is fulfilled if the machine sold is reasonably fit to perform the work for which it is purchased, but there is no implied warranty that a machine is the best on the market, or that it will accomplish a particular degree of efficiency. Civ.Code, § 1735(1).

7. Fraud ⚷58(1)

In buyer's action for damages for alleged fraudulent representations by seller respecting efficiency of gold dredging equipment sold, evidence sustained finding that alleged fraud was waived by buyer by subsequently agreeing in writing to abide by terms of the contract and by accepting from the seller, and profiting by, repairs, work, labor, and machinery of substantial value which were not required by the terms of the contract.

8. Fraud ⚷35

A party to an executory contract, who, with full knowledge of facts constituting the fraud complained of, subsequently, with intention to do so, affirms the contract and recognizes it as valid, either by his written agreement or by acts and conduct, and accepts substantial payment, property, or the performance of work or labor not required by the original contract, thereby waives his right to damages on account of the fraud.

9. Fraud ⚷31

When a party has been induced by fraud to enter into a contract, he may elect either to rescind contract by restoring whatever he has received under it, or he may affirm the contract, retaining whatever advantage he may have acquired, and still have his action for damages for deceit practiced upon him in making the contract, subject to limitations.

10. Contracts ⚷100

The question of whether the declarations and conduct of a party to a voidable contract shows his intention to waive asserted fraud in procuring its execution is a problem of fact for trial court or jury.

11. Fraud ⚷66

In buyer's action for damages for alleged fraudulent representations by seller respecting efficiency of gold dredging equipment sold, failure to find that the alleged fraud was continuing after the execution of the contract was not error, where court had determined that all alleged fraud was waived by subsequent declarations and conduct of the buyer.

12. Fraud ⚷59(3)

The measure of damages for fraud exercised in the sale of property is the difference between the actual value of that with which the purchaser parted and the actual value of that which he received, together with any additional damage ariseing from the particular transaction. Civ. Code, § 3343.

13. Fraud ⚷58(1)

In buyer's action to recover loss sustained in operation of gold dredging equipment as result of alleged fraudulent representations by seller of the equipment with respect to the effiziency of the equipment, record not showing cost of operation did not prove net loss sustained and would not support judgment of damages. Civ.Code, § 3343.

Appeal from Superior Court, Trinity County; James M. Allen, Judge.

Consolidated actions by William Schied, as trustee in bankruptcy of Golden Gravels Mining Company, a bankrupt, substituted as plaintiff in the place and stead of the bankrupt, against Bodinson Manufacturing Company, a corporation, and against Frederick William Bodinson, as administrator with the will annexed of the estate of Frederik Johan Bodinson, also known as Fred J. Bodinson, and also known as F. J. Bodinson, deceased, substituted as defendant in the place and stead of the decedent, to recover payments made on purchase price of gold mining dredge and machinery, and by Bodinson Manufacturing Company, a Corporation, against William Schied, as trustee in bankruptcy of Golden Gravels Mining Company, a bankrupt, substituted in the place and stead of the bankrupt, for money due under the contract of sale. From an adverse judgment, William Schied appeals.

Affirmed.

Ernest Clewe, of Oroville, and Edwin J. Regan, of Weaverville, for appellant.

Maurice E. Gibson, of San Francisco, for respondent.

THOMPSON, Justice.

Three suits growing out of a conditional sale contract to purchase a dragline gold dredge and equipment were consolidated for trial. The actions involve the same issues. The first suit was brought by Golden Gravels Mining Company, a corporation, against Bodinson Manufacturing Company, a corporation, to recover money paid on the purchase price of the gold mining dredge and machinery, together with loss sustained in its operation as the result of alleged fraud and misrepresentations with respect to the efficiency of the equipment. The second suit was brought by the same plaintiff against Frederik Johan Bodinson who died during the pendency of the action. William Frederick Bodinson, as administrator of his estate, was substituted. The other suit was instituted by Bodinson Manufacturing Company against the purchaser, for money due under the contract of sale. Pending the trial, the mining company was adjudged to be bankrupt and William Schied was appointed trustee of that bankrupt estate and substituted as a party to the suits. For convenience we shall refer to Bodinson Manufacturing Company as "seller," and to Golden Gravels Mining Company as "purchaser."

The purchaser of the dredging machine claimed that the seller was guilty of fraud and deceit in procuring the sale contract, and that it was therefore entitled to recover some $8,500 advanced on the purchase price and for costs incurred in making necessary repairs, together with about $39,800 lost profits in operating the alleged defective machinery. The defective attachments to the dredge consisted chiefly of a system of "Bodinson-Heath jigs" used with the aid of an amalgamator for recovery of gold from the sand and gravel handled which the court found was inferior to "riffle boards," commonly used, and which the purchaser originally desired to obtain. It was also asserted that the barge, upon which the derrick and machinery were installed, lacked adequate buoyancy and was top-heavy, resulting in frequent submerging of the deck and the capsizing of the boat on one occasion. Other defects were also alleged.

The contract does not contain express warranties regarding the apparatus complained of. Paragraph 8 does warrant that each jig will handle at least twelve cubic yards of material per hour, and it provides that, upon demand, riffle boards will be substituted therefor if the Heath jigs are considered unsatisfactory. The evidence shows that the jigs would actually handle twenty cubic yards of material per hour. No demand for substitution of riffle boards was made until June 2, 1939, after operations had been discontinued. Expert evidence was adduced to prove that neither the Heath jig system nor other defects complained of were inadequate when the dredge and machinery were properly operated by experienced workmen and ordinary care was exercised. But that is immaterial since the court determined that the seller was guilty of constructive fraud in orally misrepresenting the efficiency of the Heath jig system and other machinery alleged to be defective. We are bound by those findings since there is adequate evidence to support them.

The trial court otherwise adopted findings favorable to the manufacturing company. It found that, while the Heath jig attachments were less effective than the riffle board system would have been and that the dredge was therefore operated at a considerable loss of gold, the net value of the gold recovery was, on account of the absence of evidence of the cost of operation, too uncertain, speculative and incapable of ascertainment to furnish a basis for damages on that account. The court further found that the purchaser, with full knowledge of the fraudulent representations and of all material facts, waived its right to damages by subsequently agreeing with the seller, in writing, to abide by the contract and to fulfill its terms, and by profiting from the subsequent supplying of certain machinery and repairs at the cost of seller. Based upon those findings, judgment was rendered against the purchaser, from which William Schied, the trustee of the bankrupt mining corporation, has appealed.

The important issue to be determined in these cases is the question as to whether the purchaser of the dragline gold dredge and its equipment, with full knowledge of the misrepresentations, defects and material facts, intended to and did waive damages on that account by its subsequent conduct and agreement to abide by and to fulfill the terms of the original sales contract, and by profiting from the new agreement.

The Bodinson Manufacturing Company of San Francisco was engaged in constructing and selling machinery for extracting gold and minerals from gravel, sand or loam. It owned the dragline gold dredge and equipment which were sold September 14, 1938, to the mining company on a conditional sale contract, for $38,110, payable in installments, $7,000 of which was paid in cash and the balance to be paid in monthly installments of $3,000, together with 15% of the gross production of gold derived from operation of the enterprise. The Golden Gravels Mining Company proposed to conduct a gold dredging enterprise in Trinity County. It sought to purchase from seller a dredge equipped with riffle boards, which the court found would recover in operation substantially 85% of the free gold contained in the soil handled. The president of the manufacturing company persuaded the mining company to buy the dragline gold dredge to which was attached eight steel hull pontoons, derrick and other necessary machinery, together with "Bodinson-Heath roughing jigs," instead of "riffle boards" which the purchaser originally desired, by orally representing that the former were superior to the latter system, and that the jig system, which is commonly used, would reclaim 95% of the gold contained in the material handled. Delivery of the dredge was accepted in Shasta County, where the purchaser had previously watched its successful operation, and the dredge was transported by it to its mining property in Trinity County. The dredge was operated from a barge floated on the surface of a pond of water, to which boat there were attached the pontoons to regulate its buoyancy. Operations were conducted intermittently from October 11, 1938, to June 25, 1939. It appears from the evidence that during the time the dredge was operated it handled 209,000 cubic yards of soil from which it recovered gold of the value of $56,902, and that the use of riffle boards would have produced the gross amount of $96,633. But there is no proof of the cost of operation and overhead expenses. The court therefore found that it was impossible to estimate the net amount of damages resulting from the use of the Heath jig system. Delays in operation occasionally occurred on account of lack of preparation, broken machinery or alleged defects of equipment. There is evidence that the deck of the barge was sometimes submerged beneath the surface of the water, and that the barge once capsized because it was top-heavy. It appears that the barge lacked buoyancy only because it was overloaded, and for the reason that the pontoons were not properly used. During about eight months of continuous operation the purchaser failed to complain to the seller of any deficiency of gold recovered on account of the Heath jig system, and no demand to replace the jigs was made until after operations practically ceased, on June 2, 1939. With full knowledge, on the part of the purchaser, of the alleged fraud and misrepresentations and of all material facts relied upon, at the purchaser's request the seller furnished at its cost new pressure pumps and two additional steel pontoons, the cost of which, amounting to $1,150, by agreement was divided equally between the respective parties. Repairs of machinery were also made at the cost of the seller.

With full knowledge of the alleged fraud and deceit of the seller and of the defects of the jig system and apparatus, the buyer sent to the seller the following letters:

"February 20, 1939

"* * *

"This letter will confirm our conversation of recent date wherein it was agreed that Bodinson Manufacturing Company would furnish a water pressure pump on the dredge now being operated by Golden Gravels Mining Company, also that Bodinson Manufacturing Company would manufacture a pontoon to be used on the said dredge; the cost of said pontoon to be shared equally by Bodinson Manufacturing Company and Golden Gravels Mining Company; *also that the schedule of payments covering the purchase price of the dredge would continue as heretofore.*" (Italic added)

"February 24, 1939

"* * *

"Kindly consider as withdrawn our letter to you dated February 4, 1939.

"We expect to resume mining operations on or about March 1, 1939, after a shutdown period of approximately seven weeks. *Regular payments on the Conditional Sales Contract covering drag line dredge will then be resumed. It is our hope that any arrearage in payments will be met as soon as possible.*" (Italics added)

The court determined that the foregoing letters of acceptance of the terms of the original contract by the purchaser, with full knowledge of the material facts, and assurance that it would abide thereby and pay all stipulated installments, together with the supplying of added equipment at the cost of the seller, constituted a new contract and waiver of damages for fraud.

After the modification and renewal of the contract, which may be deemed to constitute a compromise of previous differences between the parties, the purchaser resumed operation of the enterprise which was continued until June, 1939. It was again in default of payments of installments upon the purchase price of the dredge and equipment. After notice, the seller repossessed the dredge on July 1, 1939, and removed it from the mining property. The first one of these actions was commenced by Golden Gravels Mining Company, January 14, 1941.

[1] This is not a suit for rescission of the contract for breach of either an express or an implied warranty contained therein. No such warranties are contained in the contract. The only express warranty contained in the contract is that each jig would handle twelve cubic yards of material per hour. Each jig actually handled at least twenty cubic yards per hour. The rule of law is well established that when a completed contract is reduced to writing and executed by the respective parties, it is ordinarily deemed to include, and it supersedes, all previous negotiations and agreements or warranties, rendering incompetent evidence of prior oral warranties or agreements in conflict with the contract. Sec. 1625, Civil Code; Kullman, Salz & Co. v. Sugar Apparatus Manufacturing Co., 153 Cal. 725, 731, 96 P. 369; Monahan v. Watson, 61 Cal.App. 417, 421, 214 P. 1001; Calpetro Producers Syndicate v. Chas. M. Woods Co., 206 Cal. 246, 252, 274 P. 65.

[2-6] The foregoing principle does not preclude oral evidence of material misrepresentations constituting fraud which render the contract void from its inception. Such alleged fraud does not vary the terms of a written instrument, nor recognize the contract as valid. It is competent on the theory that no valid contract exists because it was rendered void on account of the fraud. Palm v. Smither, 52 Cal.App.2d 500, 506, 126 P.2d 428; Darrow v. Houlihan, 205 Cal. 771, 272 P. 1049; Jones on Evidence, Civil Cases, 3rd Ed., p. 660, sec. 435. But the appellant in the present cases did not contend that the sale contract was void on account of fraud or otherwise. The mining company specifically affirmed the contract in writing with full knowledge of all material facts, and agreed to abide by its terms. It thereby recognized the contract as valid and binding. It is also true that when the seller of goods or machinery is

informed by the purchaser of the purpose for which the articles are to be used, and relies upon the seller's skill or judgment with relation thereto, "there is an implied warranty that the goods shall be reasonably fit for such purpose." Sec. 1735, subd. 1, Civil Code. That provision, when applicable, may be deemed to be a part of every contract. But there is a distinction between an implied warranty that machinery is *reasonably fit* for the purpose for which it is purchased, and a mere statement that it is *superior* to some other type or that it will perform the desired work better. There is no implied warranty that a machine is the best on the market, or that it will accomplish a particular degree of efficiency. The implied warranty is fulfilled if the machine is *reasonably fit* to perform the work for which it is purchased.

[7] But regardless of the competency of the evidence of prior parol statements of the seller not contained in the written contract, which we do not determine, we are of the opinion the court's finding that such alleged fraud was waived by the purchaser by subsequently agreeing in writing to abide by the terms of the contract and by accepting from the seller, and profiting by, repairs, work, labor and machinery of substantial value which were not required by the terms of the contract, is sustained by the evidence.

[8] The authorities are uniform in holding that a party to an executory contract, who, with full knowledge of the facts constituting the fraud complained of, subsequently, with intention to do so, affirms the contract and recognizes it as valid, either by his written agreement or by acts and conduct, and accepts substantial payments, property or the performance of work or labor not required by the original contract, thereby waives his right to damages on account of the fraud. Burne v. Lee, 156 Cal. 221, 104 P. 438; Tucker v. Beneke, 180 Cal. 588, 595, 182 P. 299; Ball v. Warner, 80 Cal.App. 427, 251 P. 929; Monahan v. Watson, supra; Howland v. Scott, 117 Cal.App. 275, 4 P.2d 200; Schmidt v. Mesmer, 116 Cal. 267, 48 P. 54; Holcomb v. Long Beach Investment Co., 129 Cal.App. 285, 292, 19 P.2d 31; Jackson v. Meinhardt, 99 Cal.App. 283, 289, 278 P. 462; Blackburn v. McCoy, 1 Cal. App.2d 648, 658, 37 P.2d 153; Smith on Law of Fraud, p. 156, sec. 136; 12 Cal.Jur. 792, sec. 57; 37 C.J.S., Fraud, § 69, p. 362; 106 A.L.R. 172, note.

[9] The rule with respect to waiver of fraud is stated in Burne v. Lee, supra, as follows:

"Now, it is well settled that when a party has been induced by fraud to enter into a contract, he may elect either to rescind the contract by restoring whatever he has received under it, or he may affirm the contract, retaining whatever advantage he may have acquired, and still have his action for damages for deceit practiced upon him in making the contract. This rule is, however, subject to limitations which apply whether the contract, to which the charge of fraud is addressed, is an executed or executory contract. One of these limitations is that *when a party claiming to have been defrauded, enters, after discovery of the fraud, into new arrangements or engagements concerning the subject-matter of the contract to which the fraud applies, he is deemed to have waived any claim for damages on account of the fraud.* The rule is clearly expressed in Schmidt v. Mesmer, 116 Cal. 267, 48 P. 54, where it is said:

"'If, after his knowledge of what he claims to have been the fraud, he elects not to rescind, but to adopt the contract and sue for damages, he must stand toward the other party at arm's length; he must on his part comply with the terms of the contract; *he must not ask favors of the other party, or offer to perform the contract on conditions which he has no right to exact, and must not make any new agreement or engagement respecting it; otherwise he waives the alleged fraud.*'" (Italics added)

[10] The foregoing rule has been consistently followed in numerous cases. It is the accepted rule in all jurisdictions. It appears to apply perfectly to the facts of these present cases, and therefore bars the appellant from recovery of damages for the alleged fraud, as the trial court speci-

fically determined. We think it conclusively disposes of this appeal. With full knowledge of the fraud complained of, the purchaser of the gold mining dredge and its equipment subsequently bargained for, and received from, the seller advice, work, labor, repairs and machinery of substantial value, which the original contract does not provide for, and it deliberately "withdrew" in writing its previous complaint of alleged deficiency of machinery contained in a letter dated February 4, 1939, and specifically acknowledged the validity of the original contract and agreed to abide by its terms and to pay the stipulated installments, without reservations or further conditions. Certainly that conduct clearly indicated an intention to waive the previous alleged fraud and misrepresentations with respect to the efficiency of the machinery. The question of the exercise of fraud and of the application of the doctrine of estoppel depends on the facts of a particular case. The question of whether the declarations and conduct of a party to a voidable contract shows his intention to waive asserted fraud in procuring its execution is a problem of fact to be determined by the trial court or jury. (French v. Freeman, 191 Cal. 579, 217 P. 515.) It is said in that regard, 191 Cal. at page 590, 217 P. at page 519 of the case last cited that:

> "The question of waiver or nonwaiver was one of fact for the trial court to pass upon, and the acts or conduct which defendant claims constituted said waiver were the evidence to be considered in determining the ultimate fact of waiver or nonwaiver. * * *
>
> "Whether or not a person has ratified a voidable contract, or elected to affirm it rather than to rescind it, depends primarily upon his intention, and this is shown by his declarations, his acts, or his conduct, which are matters of fact. The question is therefore a question of fact for the determination of the jury. Del Vecchio v. Savelli, 10 Cal.App. 79, 82, 101 P. 32; Wilder v. Beede, 119 Cal. 646, 651, 51 P. 1083; 27 C.J. 22, 77."

We may not hold, as a matter of law in the present cases, that the appellant did not intend to waive the fraud.

Each of the cases cited by the appellant in support of its contention that the alleged fraud was not waived is distinguishable from these actions by the facts which were involved therein.

[11] Finally, the appellant contends that the court erred in failing to adopt findings "upon the issue of the continuation of fraud following the execution of the contract." It is claimed appellant was entitled to a finding on that issue under the allegations of paragraph XIV of the third amended complaint, which reads in part:

> "Throughout the entire period during which said dredge was in the possession of plaintiff [appellant] *until on or about May 18, 1939,* * * * said company urged plaintiff to continue the use of said jigs; consulted with officers and representatives of plaintiff with reference to and suggested methods and means of remedying the said defects *in said gold recovery system;* offered and extended its aid, advice and assistance gratis for that purpose; furnished plaintiff without charge parts for said system intended and designed for said purpose." (Italics added)

The court did not err in failing to find that the alleged fraud was continuing. The court determined that *all* alleged fraud was waived by the subsequent declarations and conduct of the purchaser. That finding includes the conduct of the seller previously quoted and any other alleged acts of fraud contained in the pleadings. Moreover, the foregoing quoted language upon which the appellant relies adds no new acts of fraud. It merely states that the seller "urged plaintiff to continue the use of said jigs" up to May 18, 1939, and "suggested methods and means of remedying the said defects." In fact, the affirmative allegations of the purchaser admits that it entered into "new arrangements * * * concerning the subject-matter of the contract to which the fraud [previously alleged] applies," after it had discovered and had full knowledge of the misrepresentations regarding the failure of the jig system to recover as much gold from the material handled as the riffle boards would have secured. That fact brings it directly within the rule of waiver announced in the Burne case, supra. Under paragraph 8 of the contract the purchaser had a right to immediately demand a substitution of riffle boards for the jig system when it became dissatisfied with the latter. It did not do so until after operations ceased in June, 1939. It is apparent that if further findings on that subject had been adopted they would be bound to be adverse to the appellant.

[12, 13] The measure of damages for fraud exercised in the sale of the property is the difference between the actual value of that with which the purchaser parted "and the actual value of that which he received, together with any additional damage arising from the particular transaction." Sec. 3343, Civil Code. There is a total absence of evidence of the actual value of the jig appliances which appellant received. Assuming that the jig system recovered only an amount of gold much less than the riffle boards would have reclaimed, there is no evidence of the cost of operation. Therefore, there is no proof of the net loss sustained by appellant on that account and the record would not sustain a judgment of damages in any sum whatever.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

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79 Cal.App.2d 151

TREAGER et al. v. FRIEDMAN.

No. 13236.

District Court of Appeal, First District, Division 1, California.

April 15, 1947.

Rehearing Denied May 15, 1947.

Hearing Denied June 12, 1947.

1. Trusts 🔑89(5)

Plaintiffs suing to quiet title on theory that defendant held property in trust for plaintiffs under a resulting trust had the burden of proving trust by clear and convincing evidence.

2. Trusts 🔑86

Any presumption of a resulting trust in favor of mortgagees arising from fact that purchaser at foreclosure sale under deeds of trust on realty and chattel mortgages paid no money but used the credit of indebtedness secured by such instruments was overcome by evidence that such indebtedness was fictitious and entire transaction, including giving of mortgages and foreclosure thereof, was solely for purpose of protecting property from mortgagor's creditors. Civ.Code, § 853.

3. Evidence 🔑589
Trusts 🔑87

The court is not bound to credit the testimony of parties claiming a resulting trust, and the conduct of the parties after claimed establishment of the trust, should be considered.

4. Trusts 🔑72

A "resulting trust" is not founded on money or property of another to purchase property but on fact that as between them, consciously and intentionally, one has advanced the consideration wherewith to make a purchase in the name of the other, the presumption arising therefrom that they intended that ostensible purchaser should acquire and hold the property for the one with whose means it was acquired, but such presumption is rebuttable, and if the evidence or the circumstances show that such intention did not exist, no trust arises. Civ. Code. § 853.

See Words and Phrases, Permanent Edition, for all other definitions of "Resulting Trust".

5. Trusts 🔑138

Where purchase of apartment buildings at foreclosure sale under deeds of trust did not create a resulting trust, though purchaser paid no money but used the credit of indebtedness secured by deed of trust, the rule that trustee's possession is not adverse to beneficiary until there is a repudiation or violation of the trust was not applicable and statute of limitations began to run as soon as purchaser took title and possession.

6. Adverse possession 🔑17

The statute providing that land is deemed to have been possessed and occupied for the purpose of constituting an adverse possession founded upon a written instrument where it has been used for the "ordinary use of the occupant" uses quoted words as meaning such use as is appropriate to the occasion and character of the property. Code Civ.Proc. § 323.

See Words and Phrases, Permanent Edition, for all other definitions of "Ordinary Use of the Occupant".

7. Adverse possession 🔑17

Acts of purchaser at foreclosure sale under deeds of trust in assuming exclusive authority in renting and operating apartment houses and in dealing with them without regard to mortgagees constituted use of the property for "ordinary use of the occupant" within adverse possession statute. Code Civ.Proc. § 323.

8. Adverse possession 🔑31, 37

That purchaser of realty at foreclosure sale under deeds of trust made fiduciary income tax returns to federal government, purporting to hold the realty as trustee for mortgagees did not render purchaser's claim to property less open, notorious or exclusive so as to prevent her from acquiring title by adverse possession as against mortgagees who claimed under a resulting trust, where mortgagees did not know of such returns and purchaser dealt with property as her own.

9. Evidence 🔑208(6)

In action to quiet title to realty, plaintiffs' allegation that defendant had held property adversely to plaintiffs since stated date constituted an admission against interest, though plaintiffs sought to amend pleading so as to change such date in order to defeat defendant's claim of title by adverse possession.

10. Trusts 🔑74

That mortgagor's fiance used the credit of indebtedness secured by deeds of trust on apartment houses and chattel mortgages on furnishings given mortgagor's brothers and sisters in bidding in the property at foreclosure sale did not establish a resulting trust in favor of mortgagees, where such mortgages were given solely for the purpose of defeating mortgagor's creditors and indebtedness secured thereby was fictitious. Civ.Code, § 853.

11. Pleading 🔑229

A party will not be allowed to file an amendment contradicting an admission made in his original pleadings.

12. Equity 🔑65(2)

That giving of deeds of trust on realty and chattel mortgages to secure fictitious indebtedness and bidding in of property by mortgagor's fiance at foreclosure sale were in fraud of mortgagor's creditors did not establish that purchaser at foreclosure sale held property under a resulting trust in mortgagees' favor, since if parties came into court with unclean hands on account of such fraud, the court would leave the property and the parties where it found them.

13. Equity 🔑65(3)

"Clean hands" doctrine was not applicable to prevent court from quieting title to property in purchaser at foreclosure sale under deeds of trust and chattel mortgages, though giving of such mortgages to secure fictitious indebtedness and bidding in of property by mortgagor's fiance at foreclosure sale were in fraud of mortgagor's creditors, where action of court in thus quieting title was not based on original transaction but on adverse possession of purchaser for statutory period. Code Civ. Proc. § 323.

14. Equity 🔑65(3)

The misconduct which brings "clean hands" doctrine into operation must relate directly to transaction concerning which complaint is made and must infect the cause of action before the court, and plaintiff will not be denied relief in connection with a transaction itself untainted with fraud merely because he has acted improperly in the past, even though such conduct indirectly affects the problem before the court.

See Words and Phrases, Permanent Edition, for all other definitions of "Clean Hands".

◆

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Frances Treager and others against Beatrice Friedman to quiet title to apartment houses and their furnishings and for an accounting. Upon the death of named plaintiff, J. Treager, administrator of her estate was substituted as a party plaintiff. Judgment for defendant and plaintiffs appeal.

Judgment affirmed.

Charles N. Douglas, Mueller & Westover and Jesse A. Mueller, all of San Francisco, Donahue, Richards & Hamlin, of Oakland, and George K. Ford, of San Francisco, for appellants.

Sullivan, Roche, Johnson & Farraher, of San Francisco, for respondent.

BRAY, Justice.

Appeal from judgment for defendant in an action to quiet title to four furnished apartment houses, and their furnishings, in San Francisco, and to require defendant to account to plaintiffs for the profit from defendant's operation of such houses.

The complaint, filed January 19, 1943, alleged that plaintiffs were the owners of four certain apartment house properties together with their furniture, furnishings, and personal property; and in the usual terms of a quiet title action, that the defendants claimed an interest in and to said real and personal property, but that such claims were without right. Frances Treager, one of the original plaintiffs, died during the proceedings, and her husband as administrator of her estate was duly substituted in her place. The defendants were Beatrice Friedham and a number of fictitious defendants. Mrs. Friedman was the only defendant sued, and from henceforward we will treat the pleadings and case as though she were the only defendant. The complaint then went on to state that defendant had been in possession of the real and personal property described since on or about December 28, 1937, and had been collecting, and still continued to collect the rents, issues and profits thereof, retaining the same and claiming without right to be the owner thereof; that said rents, issues and profits were the property of and belong to plaintiffs; that defendant refused to account, and that defendant "now hold[s] the said real and personal property hereinabove described in trust for these plaintiffs." The plaintiffs prayed that their title be quieted, that a receiver be appointed to take charge of the apartment houses and collect the rents, and that defendant be required to account for the net profits of her operation of the houses.

Defendant's answer denied that the property belonged to the plaintiffs and alleged that defendant claimed the ownership of the real and personal property in fee simple absolute; admitted that defendant had been in possession since December 28, 1937, collecting the rents, issues and profits; alleged that she intended to continue collecting the same; and claimed to be the owner thereof. The answer then set up the defense of the statute of limitations, alleging that plaintiffs' alleged cause of action was barred by the provisions of sections 318 through 326, and sections 336 (2), 337 (1), 338 (1), (2), (3), 339 (1), and 343, Code of Civil Procedure. Defendant then alleged her adverse possession for more than five years.

This answer was filed April 8, 1943. The complaint did not allege the type of trust under which it was claimed defendant held the property, the date of the origin of that trust, or the date of any repudiation thereof. The defendant did not demur, but answered. On April 10, 1944, over a year after the answer was filed, in an endeavor to cure the defects in their complaint, plaintiffs moved to amend on the ground that the allegations in the complaint concerning the alleged trust "should be amplified." The court denied the motion.

Prior to the time of trial, the court on motion of defendant ordered that the affirmative separate defenses in the answer—statute of limitations and title by prescription—be tried before the trial of any other issues in the case. On these issues, after a lengthy trial (the reporter's transcript contains 2,341 pages) the court found for defendant on each of the affirmative separate defenses and entered judgment accordingly. At the trial, plaintiffs renewed their motion for leave to file an amended complaint, which motion the court, although at one time intimating that it should be granted, finally denied. Plaintiffs claim on appeal that the court erred in denying their motions to amend, but say in their opening brief, "These motions probably become important only if the issues made by the complaint and answer, other than the affirmative separate defenses, are hereafter tried."

This litigation grew out of the purchase at foreclosure sale by defendant of the property above mentioned, under a deed of trust and chattel mortgage executed by

Dr. Aaron Friedman to his brothers and sisters, the plaintiffs, and a deed of trust and chattel mortgage executed by another brother, Joseph Friedman, to two of the plaintiffs, Isaac and Abe Friedman. At the time of the foreclosure sale, defendant, who was then known by her maiden name, bid in the properties under the name "B. Silverman," the latter being her former married name. About 11 months after the sale defendant married Dr. Friedman, who died November 29, 1940.

Plaintiffs contend that the deeds of trust and chattel mortgages were given by Dr. Friedman and by Joseph Friedman to them to secure bona fide debts owed them, and that when defendant bid the property in at the foreclosure sale, she paid no money but used the credit of the indebtedness which the instruments secured; that thereby a resulting trust was created under which defendant held the property for them, which trust she did not repudiate prior to March 14, 1942 (less than a year before the suit was filed), and hence that no statute of limitations could apply, and there could be no prescriptive title.

It was defendant's position that with the exception of $27,000 which Dr. Friedman admittedly owed to plaintiffs Abe and Isaac Friedman, doing business as Friedman Bros. Glass Co., the entire debt set forth in the instruments was fictitious, and that the deeds of trust and chattel mortgages were made to protect Dr. Friedman and Joseph Friedman against the claims of a certain creditor of theirs. In other words, defendant claimed that the encumbrances were fake to protect them against the claims of another; that when she purchased at the foreclosure sale she was acting under the instructions of Dr. Friedman; that while she paid no moneys and used the credit of the apparent debt, there actually was no indebtedness and the foreclosure sale was merely for the purpose of getting the title into her to be held for herself; and that from the day of the foreclosure sale on she held the title and the properties adversely against all the plaintiffs.

The trial court found in accordance with the contention of the defendant, after a lengthy trial in which there was a definite conflict of testimony. Because there was no conflict as to certain important facts, plaintiffs take the position that the "conflict of testimony" rule does not apply, and that as a matter of law the court from such facts should have found that defendant held under a resulting trust. Before discussing this contention, it will be well to set forth the facts of the case. It is impracticable, due to the voluminous amount of evidence adduced, to set it all out here, but the main portions of the evidence will be discussed.

Disregarding all conflicts in the evidence and giving the evidence of defendant the weight to which it is entitled in an appellate court, an examination of the evidence confirms the findings of the trial court and shows the following to be the situation:

Prior to 1933, Joseph Friedman, a brother of plaintiffs and of Dr. Friedman, had given to one Palmer and his associates (hereinafter referred to as the Palmers) a promissory note for $65,000, secured by a deed of trust on certain Mission Street property. Dr. Friedman had endorsed this note. The note was not paid, and the attorneys for the Palmers made demand upon Joseph Friedman as maker and Dr. Friedman as endorser, for payment of the note. It not being paid, the preliminary legal steps were taken so that on May 10, 1933, notice of default and election to sell under the deed of trust was given. Dr. Friedman and Joseph Friedman became afraid that a deficiency judgment would result against them and that they would lose all their property. At that time Dr. Friedman owned the four apartment houses in question here and their furnishings.

To protect his properties against any claim of the Palmers, Dr. Friedman prepared the following documents, all dated August 17, 1933:

(1) A deed of trust covering the four apartment house properties, to Anglo California Bank as trustee, to secure a total purported indebtedness of $105,632.73, to the following persons in the following amounts:

Plaintiff Frances Treager, $20,170.67, with interest from August 15, 1933;

Plaintiffs Isaac Friedman and Abe Friedman, doing business as Friedman Bros. Glass Co., $27,000, without interest;

Plaintiff Sarah Stoff, $58,462.06, with interest from August 15, 1933.

(2) Chattel mortgages covering the furnishings of the four apartment houses to the same persons, to cover the same purported indebtedness.

(3) A pledge of 150 shares of stock of Sidley Co., a corporation, to the same persons to secure the same purported indebtedness.

(4) A pledge of 280 shares of stock of Sidley Co. to the same persons and for the same purposes.

It is interesting to note that there was no promissory note accompanying, nor secured by these instruments, nor was there any due date for principal or interest mentioned in any of the instruments.

On the same day, Joseph Friedman, whose note Dr. Friedman had endorsed, executed the following documents:

(1) Deed of trust to Anglo California Bank as trustee and plaintiffs Isaac Friedman and Abe Friedman, as beneficiaries, to secure a purported indebtedness of $8,500, covering the Cole Street property, which was one of the four properties described in the Dr. Friedman deed of trust and in the complaint here.

(2) Chattel mortgage to Friedman Bros. covering (a) furnishings of the Cole Street apartments; and (b) the equipment of the bottling works owned by Joseph Friedman.

That these encumbrances executed by Dr. Friedman and Joseph Friedman were to protect the property of both of them from a possible Palmer deficiency judgment cannot be doubted. Among other things, plaintiff Abe Friedman testified that when Dr. Friedman brought the deed of trust to Friedman Bros. he indicated that he was in financial difficulties; that Dr. Friedman initiated the idea of the deed of trust and brought out the chattel mortgages for Abe and Isaac to sign. Plaintiff Isaac Friedman testified that he did not discuss the deed of trust with Dr. Friedman prior to its preparation, and that Dr. Friedman "took care of all of it." Plaintiff Sarah Stoff in her deposition testified that at the time the deed of trust was made, she knew there had been a threat of foreclosure of the Mission Street property belonging to her brother Joseph, and that was the reason for the deed of trust. At the trial she repudiated this testimony. As to the mortgages plaintiff Abe Friedman testified it was "Just a passing event * * * we weren't interested in that." Plaintiff Isaac Friedman testified that he did not know that Friedman Bros. had taken the chattel mortgage made by Joseph Friedman to Friedman Bros. It is also apparent from his testimony that he knew nothing about the deed of trust made to him and Abe covering the Cole Street property. Plaintiff Sarah Stoff testified that she did not remember ever signing the mortgages, although she actually did sign as mortgagee.

As to the pledge of the Sidley stock, plaintiff Abe Friedman testified that he made no investigation of it, that "that was his [Dr. Friedman's] baby." Plaintiff Isaac Friedman said he never saw the pledge before the trial, did not recall it ever having been mentioned, and never knew that Friedman Bros. ever had any interest in the Sidley Co. Plaintiff Sarah Stoff testified that she never saw the pledge.

Attorney Harry S. Young testified that he prepared the deeds of trust and the chattel mortgages at Dr. Friedman's request, receiving the particulars from Dr. Friedman. He mailed the deeds of trust, the chattel mortgages and pledges and also the Joseph Friedman deed of trust and chattel mortgage to Dr. Friedman with instructions as to how these were to be signed.

All plaintiffs concede that Dr. Friedman determined the amounts of the purported debts which should be inserted in the instruments. None of plaintiffs went over them. Plaintiff Sarah Stoff testified that she did not know whether her claim was $50,000 or $70,000.

When Dr. Friedman was preparing the figures to give to Attorney Young for preparation of the encumbrances, he told defendant "figures were very funny things, that you could make them say almost anything you wanted them to say." He first made out a list which included the amounts stated in the deeds of trust plus $11,219.90 as an alleged indebtedness to his sister Belle Friedman. This made a total indebtedness of $116,852.62. He then scratched out the Belle Friedman amount, thereby arriving at the $105,632.73, the figure in the deeds of trust as executed. At that time Dr. Friedman owed Belle nothing as he had already repaid her $11,000 which he had at one time borrowed from her.

After the foreclosure sale at which defendant obtained title, a suit was brought on behalf of the Palmers to set aside the trust deed and sale on the grounds that they were fraudulent. A few days before the trial in that action Dr. Friedman phoned plaintiff Sarah Stoff to come to his office so that he could show her "how he figured out the family's interests." He dictated the figures and she wrote them down, and he said, "Now you do this and you give this one to Frances and you take this one for yourself to be sure that these are your interests and you know that these are your interests." Sarah did not attend the trial. The testimony indicates that she kept out of sight. Dr. Friedman did attend the Palmer trial and testified to the figures, but was thereafter worried that the Palmers might go further with the matter. A few days after he testified, that case was settled.

Plaintiff Sarah Stoff's testimony as to the purported indebtedness of $58,462.06 (stated in the trust deeds, chattel mortgages and pledges) is very confusing and not convincing. From 1908 to 1918 she was employed as a saleswoman. In 1918 she had to give up work due to an injury. After 1918 she spent considerable time in rest homes, in one for a period of two years. She did not adequately explain where she got the money to loan her brother. As to $12,500 of the amount, she first said that her father gave that sum to her when he passed away. But plaintiff Isaac Friedman testified that Sarah received only $1,500 from that source, and that she drew it out at $75 per month and had but $365 coming on distribution of his estate. Then she stated that Isaac and Abe put up the $12,500 because she was sick and they wanted to take care of her. She did not know whether they gave or loaned it to her. Plaintiff Isaac Friedman testified that the $12,500 was a gift from her six brothers, including Dr. Friedman.

At one time plaintiff Sarah Stoff testified that the Sacramento Street property, which was exchanged for the Frederick Street property (one of the four apartment properties involved here) was held by her in trust for the family, but not including Dr. Friedman. Then she stated that it belonged to her, and finally that Dr. Friedman owned it and she owned no interest in it. In her deposition she testified that she did not loan any moneys to Dr. Friedman. On the trial she testified that she did. At one time she claimed to have given him $2,354.93 to be put into the purchase price of one of the properties. Her bank account at that time shows no withdrawal of any such sum. Dr. Friedman's bank account shows the withdrawal of that amount which with the $10,000 from Belle Friedman went into the purchase price of that property. This $10,000 Dr. Friedman paid back to Belle in monthly instalments.

The Palmers sold the Mission Street property (under the trust deed of Joseph Friedman) on May 28, 1934, leaving a deficiency of over $28,000. June 9, 1934, they sued Dr. Friedman and Joseph Friedman and wife for this deficiency, obtaining judgment on November 7, 1935. Dr. Friedman was busy covering up. While the notice of foreclosure sale was running and on May 24, 1934 (four days before the Palmer foreclosure sale took place), Dr. Friedman had the bank accounts covering the four apartment houses transferred to plaintiff Sarah Stoff's name, giving as an excuse, according to Sarah, that he had been dabbling in property with certain men. Dr. Friedman also transferred to plaintiff Sarah Stoff a claim for over $26,000 against one Barron and then had her assign it to an employee in Attorney Young's office. Sarah testified that she had no recollection of any claim against Barron, that Dr. Friedman never spoke to her about it, and she did not remember the assignment. Dr. Friedman even transferred his automobile into Sarah's name. She did not have "any recollection of that at all." However, Dr. Friedman continued to operate the car.

Joe Friedman was also continuing to cover up. On June 12, 1936, Joe gave Friedman Bros. a chattel mortgage on his four automobile trucks, purporting to secure the same money with interest covered by the trust deed given them in 1933. Joe also pledged to plaintiff Abe Friedman his shares of Magnavox stock. Abe, when asked about this, practically admitted that it was done for the purpose of preventing any levy on the stock by the Palmers.

The foreclosure of the encumbrances given by Dr. Friedman to plaintiffs and by Joe to Friedman Bros. was brought about by Dr. Friedman. He arranged to have his attorney, Harry Young, take the necessary steps for foreclosure, and he paid the costs and attorneys' fees. The sale was first set for August, 1937, but had to be called off and a new date given because the notice of sale had not been served on the Palmers. The sale of the pledge of the Sidley stock was not postponed. On July 2, 1937, all of the plaintiffs signed a notice of sale under the pledge. Plaintiff Sarah Stoff testified that she never read the notice; that when Dr. Friedman came with anything for her to sign, she signed it. The next day all the other plaintiffs signed an assignment of all their interest in the pledge of this stock to Sarah. She testified she did not remember the incident. The certificate of sale under the pledge shows the stock as being sold to the plaintiffs for $10,000, credited as follows: Plaintiff Frances Treager, $1,889.86; Isaac Friedman and Abe Friedman doing business as Friedman Bros., $2,530.44; Sarah Stoff, $5,474.70. Sarah testified that she never got the money. If the sale was bona fide, Dr. Friedman should have received credit on his purported indebtedness to each plaintiff in the amount set forth, and the plaintiffs would have been the owners of the stock.

Abe Friedman testified that Friedman Bros. never claimed any interest in Sidley Co.; that that was the doctor's business and Abe did not pay any attention to the sale, as irrespective of the foreclosure, he considered the stock the doctor's property and that "we" did not claim any interest in it. Isaac's testimony indicates that he knew nothing of the doctor's pledge, or its assignment, stating that he never read the papers his brother Dr. Friedman brought to him to sign. He stated that Friedman Bros. did not claim any interest in Sidley Co. Friedman Bros. gave no credit on their books to Dr. Friedman for the $2,530.44 credited to them out of the proceeds of the pledge sale. Sarah likewise claimed no interest in Sidley Co. or in its stock.

Although the Sidley Co. stock was bid in in the names of the plaintiffs, and the interest of Dr. Friedman purportedly sold out, Dr. Friedman thereafter continued to exercise ownership of it. He had purportedly pledged the Sidley Co. stock, but thereafter, in June, 1936, he had a contract drawn up between Sarah Stoff, Sidley Co., and himself, together with a form of resolution for Sidley Co. directors to adopt. The contract and resolution stated that Sarah Stoff had paid Sidley Co. $28,078.81, of which $9,981.95 had been applied on stock, and that 278 shares in the name of Dr. Friedman were being transferred to her as her absolute property. On the envelope in which the agreement and resolution were submitted to Dr. Friedman he wrote "Agreement nullified by certificate of sale July 9, 1937." Sarah testified that she was positive that she never put any money in or loaned any money to Sidley Co. Because of labor troubles in the operation of its business, the corporation was dissolved after Dr. Friedman's death. Defendant as administratrix of his estate sold all of the property formerly owned by the corporation, consisting of merchandise, machinery, name, patent rights, patterns, etc.

The situation with reference to the Sidley stock is informative. Although bid in at the pledge sale in the names of the plaintiffs, none of them ever claimed nor do they now claim any interest in it, or the moneys which came from the dissolution of the corporation. It is obvious that the four apartment houses and their furnishings are in the same category as the Sidley stock. All were given as security for the "real" $27,000 debt to Friedman Bros. (hereinafter more particularly discussed), and the fictitious debts to Sarah Stoff and Frances Treager, and it was never anticipated that any interest in or claim to these properties should ever come into being in favor of plaintiffs.

Other loans on the properties, ahead of the plaintiffs' trust deed, were coming due, and Dr. Friedman came to Abe and Isaac and told them that a foreclosure would have to be held because of need of refinancing. None of the plaintiffs ever requested or ordered the foreclosure sale, and neither Isaac nor Sarah knew of the call for a sale in August.

December 27, 1937, was selected by Dr. Friedman and his attorney for the sale. Abe testified that Dr. Friedman figured the amounts of the bid to be made on the foreclosure sale. Dr. Friedman told defendant that he was fixing the bid high enough so that if the Palmers wanted the property they would have to pay for it. Isaac testified that the foreclosures were had for the purpose of refinancing. None of the plaintiffs ever discussed with Dr. Friedman or defendant the amount which defendant was to bid for the properties, except that Isaac was present in Attorney Young's office when Dr. Friedman instructed her the amount to bid. Sarah was surprised to hear of the foreclosure sale, although she testified she did not know whether she heard about it before or after it took place. Dr. Friedman told defendant that he wished her to bid in the properties for her own account since they were about to be married and he wanted her to have the properties; that he did not want them to fall into the Palmers' hands; that together they could handle the properties and make something out of them. After the sale, Dr. Friedman told defendant that he did not need to make a will or take out life insurance because she already had the properties. To keep the Palmers from learning that it was Dr. Friedman's fiancee who bid at the foreclosure sale he instructed her not to bid in her maiden name, by which she was generally known, but to bid in her former married name, "B. Silverman." Sarah Stoff testified that when she heard that B. Silverman had bid in the properties she did not know who B. Silverman was. The attorney for Palmer told defendant that he had difficulty in finding out who the bidder was and was amazed to learn that B. Silverman was not a man. Apparently plaintiffs thought that the indebtedness against the property (other than the fictitious $105,632.73) was all it was worth as the family told Dr. Friedman he was foolish trying to save it.

Defendant bid in all the real and personal properties covered by the trust deeds and the chattel mortgages. The Sidley stock was bid in the name of Friedman Bros., Sarah Stoff and Frances Treager, and the equipment of Joseph Friedman's water business was bid in in the name of Friedman Bros. Joe continued to run his water business until he sold it out in 1942, and Friedman Bros. claimed no rights in it at any time, nor did they carry it on their books as part of their assets. When asked if it was not a fact that the giving of the chattel mortgage on Joe's water company equipment and its foreclosure and sale were "for the purpose of preventing his creditors, including Palmer and his associates, from enforcing any claim or judgment against Joe Friedman," Abe replied, "I don't know whether it is or not." Joe's indebtedness to Friedman Bros. was carried on their books of account until it was written off as a bad debt in January, 1944, and deducted as such in their income tax report.

The Barron claim which had been assigned to Sarah Stoff was compromised for $7,000 paid by Barron to Dr. Friedman. No part of this money was ever received or claimed by Sarah.

Defendant freely admits that her husband, Dr. Friedman, did owe $27,000 to Friedman Bros. But the evidence shows and the court found that this indebtedness was never used by her as a credit on the $99,500 she bid for the properties at the execution sale. Had it been so used then Dr. Friedman would have no longer owed that sum to Friedman Bros. Yet the testimony of Friedman Bros.' bookkeeper shows that this same $27,000 was carried on their books unchanged from 1931 except that in 1943 the balance was shown on the books as $26,992.40 and as owing from defendant instead of Dr. Friedman. $20,000 of this indebtedness originally had been borrowed by Isaac Friedman from the Anglo bank and turned over to Dr. Friedman. Thereafter Dr. Friedman paid the interest to the bank. After his death, defendant paid the interest up until the commencement of this suit, and even paid a part of the principal. The claim that the $27,000 was a credit on the foreclosure sale purchase price is not consistent with the fact that defendant paid and Friedman Bros. accepted payment from her thereafter of interest and a portion of the principal. The Friedman Bros. books showed no security for this debt, and in January, 1944, the $26,992.40 was written off as a bad debt and deducted as such on the 1943 income tax return of Friedman Bros. In 1944 the Friedman Bros. partnership was dissolved and this debt, charged to "Beatrice Friedman," was divided half to Isaac and half to Abe. The bookkeeper testified that he considered the account as still owing from Dr. Friedman's estate. The fact that it is still shown as a debt due from either defendant or Dr. Friedman's estate is strong evidence that it had not been used by defendant as a "credit" on her bid at the foreclosure sale. Again, the books of Friedman Bros. nowhere show any claim of interest in the four properties, although they do show other apartment houses in which the partnership held interests. If defendant were holding any interest in these properties in trust for Friedman Bros., it seems unreasonable that their books do not show some evidence of it. Again, it is significant that in all the financial statements made by Friedman Bros. to banks from time to time from 1933 to 1944, in which they listed their assets, no reference was ever made to the deeds of trust or chattel mortgages, nor to any claimed interest in the properties. On a statement given by Friedman Bros. to the Anglo bank the Dr. Friedman indebtedness of $27,000 is noted. One of the bank officials wrote on the statement concerning this item, the following: "June 30, 1934, April 1931 for note given to Anglo by Friedman Bros., account of Dr. A. Friedman. No note has been given to Friedman Bros. to secure this indebtedness. I am informed certain real estate assignments, unavailable for inspection, were made by Dr. A. Friedman to the company. These assignments were principally, however, to protect Dr. A. Friedman in legal proceedings."

A year and a half after the execution of the trust deed, a financial statement of Dr. Friedman reciting his indebtedness to Friedman Bros. lists the four properties as belonging to him, and gives the bank loans as the only encumbrances.

It is clear that prior to this action, the plaintiffs did not claim that defendant was holding the properties as their trustee. Take the Frederick Street property, for example. Defendant bid it in (with the other properties) on December 27, 1937. It required financing almost immediately. There was a prior trust deed on it securing an indebtedness of $43,500. Plaintiff Sarah Stoff and her husband had signed the note and deed of trust. To enable the refinancing, defendant deeded this property to Sarah. Sarah and her husband executed the new note and deed of trust, renewing the loan. They then conveyed the property to the City Title Co. under a holding agreement. Shortly after Dr. Friedman's death, and in January, 1941, Sarah and her husband went to the office of Albert Axelrod, who was the attorney for Mr. Stoff and also for the Dr. Friedman estate. In the presence of Sarah, Mr. Stoff told Attorney Axelrod that Sarah did not own the Frederick Street property and that it was confusing the income tax returns of himself and wife, and they wanted the attorney to prepare instructions to the title company to deed the property to defendant, who owned it. Thereupon Axelrod prepared a letter of instructions to that effect, directed to the title company, and both Stoffs signed it. The title company then conveyed the title to defendant.

Shortly after acquiring the properties, defendant refinanced the Ellis Street and Cole Street properties, going on the note herself; and the Jackson Street property, she and her husband going on this note. In March, 1942, there was a bad fire at the Frederick Street apartments, just after defendant had finished refurnishing and renovating the building. Defendant made the necessary proofs of loss and collected the $8,100 paid by the fire insurance company for the damage done by the fire. Defendant alone contracted for the necessary repairs. On March 25, 1938, defendant signed and filed a third party claim in one of the Palmer suits, claiming as owner all the personal property in the Cole Street apartments.

Abe Friedman testified that in February, 1940, over two years after the sale to defendant, when the Jackson Street property was being financed, he was not claiming any ownership in it, and that in the period between December, 1937, and August, 1938 (which period was after the sale to defendant), he had no interest in the Cole Street property, except "by way of a loan."

At the trial, Sarah testified that she claimed no interest in the Cole Street property nor in the rents from it. It is impossible to reconcile this testimony with plaintiffs' claim that in bidding in the properties (of which the Cole Street property was one) defendant was acting as a "dummy" for plaintiffs, for if this were true, then Sarah would necessarily have a $\frac{58,462.06}{105,632.73}$ interest in the Cole Street property.

Frances Treager having died prior to the time of the trial, no testimony was available from her. However, there is no evidence that she ever asserted any claim to the properties; in fact, the evidence is to the contrary. Moreover, in 1943, Friedman Bros., in an income tax return, deducted as a bad debt the sum of $716.30 owing them from Frances. This fact, although of minor importance, is inconsistent with the claim that at that time she owned $\frac{20,170.67}{105,632.73}$ of the four apartment houses and contents. Frances owned a one-third interest in an apartment house in which her brothers Abe and Isaac each owned a third. It is significant that their interest in this apartment house was carried on the Friedman Bros. books, while the four apartment houses here in question were not even mentioned.

During the five years which elapsed from the purchase by defendant at the foreclosure sale until the filing of this suit, none of the plaintiffs evidenced any interest in the properties nor in the care being taken of them by defendant. The properties were heavily encumbered; the total indebtedness against the several properties amounted to over $257,000 (not counting the purported indebtedness to plaintiffs); the annual taxes were over $8,500; there was over $18,000 per year interest to pay; there were many vacancies; the furnishings needed replenishing; and altogether the defendant had a difficult time in operating them and in paying taxes, expenses and interest. The plaintiffs admit that they did not assist defendant in arranging for refinancing, and none of them ever asked defendant for an accounting or for any information concerning her management of what they now claim is their property, or whether or not it was making or losing money.

Defendant testified that all of the plaintiffs told her that she was foolish in trying to protect the property, and that in so doing she was merely working for the banks.

[1] Plaintiffs had the burden of establishing their claimed resulting trust "by clear and convincing evidence." Gomez v. Cecena, 15 Cal.2d 363, 367, 101 P.2d 477, 478. Plaintiffs rely for their claim of resulting trust on the fact that in bidding $99,500 at the foreclosure sale defendant paid no money. It is undisputed that defendant put up no money for her purchase at the foreclosure sale. She bid the sum of $99,500 under the deed of trust of Dr. Friedman to the Anglo California Bank with plaintiffs as beneficiary, which sum was apparently credited against the $105,000 original indebtedness. She also bid $10,000 on the foreclosure of the Joe Friedman deed of trust on the Cole Street property. While plaintiffs' brief claims that there was an agreement entered into between plaintiffs and defendant at a meeting in Attorney Young's office that defendant was to act as "dummy" for plaintiffs, there is no evidence to support that contention. Isaac Friedman, who was the only one of the plaintiffs at that meeting, did not testify to any such agreement. Isaac testified that nothing was said about bids or the amount of money to be bid, and in his deposition in referring to de-

fendant said, "I never knew the woman at that particular time. Just casually, that is all." Abe testified that he did not know defendant prior to the foreclosure sale. The testimony of the lawyers there present and the defendant shows that Dr. Friedman made all of the arrangements, and fixed the amount which defendant should bid, and that Dr. Friedman wanted her to bid the property for herself. There can be no question but that the foreclosure sale was merely a device figured out by Dr. Friedman as part of his scheme to protect his property and that of Joe Friedman against possible claims of the Palmers, by which he could get rid of the fraudulent trust deeds and chattel mortgages and get the title to the property in his fiancee, who would hold it for him and her. The credit of the $99,500 and the $10,000 was merely a paper transaction on a fictitious debt. The testimony does not support the plaintiffs' claim that defendant was "dummy" for them in the transaction. Abe testified, referring to the fact that as a result of the foreclosure sale defendant was the title holder of the properties—"I didn't know why she was there in the first place. I never could figure it out." Nor does the evidence support their claim that Dr. Friedman was indebted to them as set forth in the trust deed, nor that any indebtedness was used by defendant in buying the property. All of the indebtedness in the encumbrance was fictitious, excepting the $27,000 due Friedman Bros., which sum, however, while thrown into the deed of trust by Dr. Friedman as further protection against the Palmers, was never considered by any of the parties as secured by said deed of trust or the properties described in it.

[2-4] The mere fact that defendant paid no money for the properties but bid in a sum apparently credited on the alleged indebtedness to plaintiffs does not establish, as claimed by plaintiffs, that defendant was buying them in trust for plaintiffs. While from that fact alone, a presumption might arise to that effect, such presumption may be rebutted by proof to the contrary. In determining the facts the court is not bound to credit the testimony of the parties claiming such trust, and the conduct of the parties subsequent to the claimed establishment of the trust should be considered. Gomez v. Cecena, supra, 15 Cal.2d 363, 367, 101 P.2d 477. In Lezinsky v. Mason Malt W. D. Co., 185 Cal. 240, at page 251, 196 P. 884, 890, the following is said: "A resulting trust is not founded on the simple fact that money or property of one has been used by another to purchase property. It is founded on a relationship between the two, on the fact that as between them, consciously and intentionally, one has advanced the consideration wherewith to make a purchase in the name of the other. The trust arises because it is the natural presumption in such a case that it was their intention that the ostensible purchaser should acquire and hold the property for the one with whose means it was acquired. *But this presumption is rebuttable, and, if the evidence or the circumstances show that such intention did not exist, no trust arises.*" (Emphasis added.)

So, then, even if the evidence herein showed incontrovertibly—which it certainly does not—that Dr. Friedman was actually indebted to all of the plaintiffs in the sums set out in the various securities, and that defendant actually used those credits of plaintiffs to bid in the property, it would seem that the inference or presumption that a resulting trust was created might be successfully rebutted by the plentitude of evidence to illustrate that the complete transaction, from beginning to end, was only part of the machinations of Dr. Friedman to hinder the Palmers, and that it was not, in the language of the Lezinsky case, supra, "consciously and intentionally" meant that plaintiffs were actually to acquire any type of beneficial interest in the properties.

[5] Plaintiffs claimed that the court erred in applying the statute of limitations and finding that defendant had acquired title by adverse possession. They claim that adverse possession could not lie because there was no repudiation of the resulting trust which they claimed existed until less than five years before suit, and cite 1 Cal.Jur. 539, sec. 31, notes 7, 8, and Leviston v. Tonningsen, 212 Cal. 656, 299 P. 724, to the effect that a trustee's posses-

sion is not adverse to the beneficiary until there is a repudiation of the trust, or a violation of the trust. Of course, the court found, and properly so under the testimony, that there was no trust; therefore the statute began to run the moment defendant took title and possession.

But assuming that from the mere circumstance that defendant paid no money, but used merely a credit on the deed of trust in buying the properties, a resulting trust was created, the evidence shows that immediately upon taking possession defendant treated the property as her own (or at least as hers and Dr. Friedman's) that she collected the income, paid all expenses, arranged for all financing, never accounted in any manner for her management of the properties, and that the plaintiffs at all times knew that she was so doing and never during the prescriptive period ever claimed the property as their own.

[6, 7] "For the purpose of constituting an adverse possession * * * founded upon a written instrument * * * land is deemed to have been possessed and occupied in the following cases. * * * (3) Where * * * it has been used * * * for the ordinary use of the occupant." (Code Civ.Proc., sec. 323.) In Posey v. Bay Point Realty Co., 214 Cal. 708, 7 P.2d 1020, 1022, it was held that where property is adversely claimed under a written instrument, the above quoted requirement for the "ordinary use of the occupant" means such use may be made of the property as is appropriate to the location and character of the property, and that each case must stand upon its own peculiar facts. Defendant's acts in assuming full and exclusive authority in renting and operating the four apartment houses and in dealing with them without regard to plaintiffs is a use appropriate to the location and character of the property.

Defendant paid the taxes over that period. It is true that the checks for about three years taxes were signed by plaintiff Sarah Stoff. But the evidence demonstrates that Sarah Stoff was merely holding the bank account in her name as another covering up of Dr. Friedman. She never made out any checks, but either signed them in blank or signed such filled out checks as Dr. Friedman presented to her. She signed as many as 50 to 75 blank checks at a time. She had no interest in these bank accounts which Dr. Friedman put in her name, had none of her own money in them, and never drew any money out of them. While the money which went into the bank account and with which the taxes were paid came from the income from the properties, it was clear that defendant and Dr. Friedman were claiming these moneys for their own and they actually were their own. Shortly after Dr. Friedman's death, these bank accounts in Sarah's name were closed out and transferred to defendant.

Dr. Friedman also transferred to Sarah his Sidley Co. accounts and had her sign the checks therefor, a fact which Sarah at first did not remember because "Sidley transactions never registered in my mind at all." He also placed in her name the bank account of the Lassen Shop in which he was interested, another transaction Sarah did not remember too well. She admitted that she never had any interest in the Lassen Shop or its moneys. She signed checks for both these accounts whenever asked by Dr. Friedman so to do.

[8] Plaintiffs lay great stress upon the fact that defendant for the four years following her purchase of the properties made fiduciary income tax returns to the federal government. As the plaintiffs did not know that she was doing so, such a fact does not render defendant's claim to the property less open, notorious or exclusive. The title of the returns was "B. Silverman Trust," and in 1938 and 1939 were made out by Dr. Friedman, evidently pursuant to his plan of covering up. These covered only three of the properties. Mrs. Stoff during the same two years was making a personal income tax return on one of the properties, the Frederick Street apartments, although she claimed no interest in it. These likewise were prepared by Dr. Friedman. The 1939 return covered all the properties, was prepared by Dr. Friedman, and showed that Sarah Stoff had been paid $1,500 as beneficiary. Sarah had not received that amount, or any other amount, and did not claim to be entitled to it.

[9] When defendant came to make a return for 1940 she consulted an accountant, telling him that she owned the property and wanted to file returns in her own name. He told her to consult an attorney, but in the meantime to follow her husband's example. For 1940 and 1941 he made out for defendant a fiduciary return covering three of the properties. Plaintiffs claim that because of the fact that the 1941 fiduciary return was signed by defendant March 14, 1942, there could have been no repudiation of the trust prior to that date. But, these returns were a continuation of Dr. Friedman's scheme of covering up, and probably for some reason between the taxpayer and his government. They were unknown to plaintiffs, and therefore did not interrupt the adverse claim which defendant made to the properties from the very moment of her bidding them in, which adverse claim the evidence shows and the court specifically found to have been known to plaintiffs. It must be remembered that in their sworn complaint, plaintiffs alleged that the date when defendant took possession adversely to them was December 28, 1937, the same date that defendant claims and the court found. Even though their complaint were to be amended, this statement would still be an admission against them.

[10] Plaintiffs quote Civil Code section 853: "When a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made." But the evidence here shows that the consideration for the purchase by defendant under the deeds of trust was not paid for by the plaintiffs, nor in fact that any actual consideration was paid. It was merely a paper transaction apparently crediting money on what was a nonexistent debt.

Plaintiffs also quote from Viner v. Untrecht, 26 Cal.2d 261, 158 P.2d 3, to the effect that where the elements of a resulting trust are present, the fact that an oral agreement made by the parties that the transferee merely held the property in trust was in violation of the statute of frauds, does not prevent such a resulting trust from arising. However, that rule of law is not applicable for the reasons, first, that the evidence fails to disclose that there were elements of a resulting trust present, and secondly, that there was no oral agreement between plaintiffs and defendant that the property would be held in trust for the plaintiffs.

In view of our determination that the trial court was justified under the evidence in finding in favor of the defendant upon the special issues tried, it becomes unnecessary to pass upon the court's rulings denying plaintiffs permission to file an amended complaint. The bar of the statute of limitations and the determination that defendant has acquired title by adverse possession eliminate the possibility of another trial and hence the necessity under any theory of an amended complaint.

Upon this question of amendment it is interesting to note the grounds upon which the court denied permission to file the proposed pleadings. As to the amended complaint first proposed, the court found, first, that over 15 months had elapsed between the filing of the original complaint and the filing of the motion to amend, and that "no excuse has been made or offered or appears for the aforesaid delay"; secondly, that the reason given by plaintiffs for asking permission to amend "is sham and is not the real or true reason"; thirdly, that the plaintiffs did not advise the court of the fact that the important date "December 28, 1937" set forth in the original complaint was changed in the proposed amended complaint to June 5, 1942" and that this change was attempted without any claim that the first date was inserted through mistake or inadvertence; that plaintiffs "have given no explanation whatsoever concerning the reason for changing" said dates; fourthly, that the affidavit of one of the plaintiffs filed in support of the motion "is sham"; fifthly, that the real reason plaintiffs desired to file the amended complaint "is merely to avoid the Statute of Limitations and the other defensive matters" pleaded in defendant's answer; sixthly, that neither the motion nor the proposed pleading was offered or made in good faith; and seventhly, that permitting the amendment "would not be in furtherance of justice, but would, on the contrary, be subversive of justice."

[11] The second proposed amended complaint alleged that defendant agreed with plaintiffs to buy in the properties at the foreclosure sales and to hold the legal title to such properties as trustee of a resulting trust for plaintiffs. The court in the findings of fact, gave as the reason for denying permission to file the proposed amended complaint that "The evidence fails to establish any such agreement so sought to be pleaded. The evidence does establish, and this Court finds, that there was not any such agreement as alleged in said tendered amended complaint." The proposed pleading also changed the date when defendant started to claim adversely to plaintiffs from December 28, 1937, as alleged in the original complaint, to June 5, 1942. The court gave as another reason for denying permission to amend, the fact that it found that the evidence established December 28, 1937, as the correct date. This proposed pleading was offered "to conform to the proof." The court found that it not only did not conform to the proof, but was actually contrary to it. While the case was tried on the issues presented by the special defenses, all the evidence which could have been introduced under the proposed amended complaint was actually heard and considered. In fact, plaintiffs' main contention is that the evidence established a resulting trust. The court on the evidence found that there was no such trust as plaintiffs were attempting to plead. Moreover, there is substantial authority to the effect that a party will not be allowed to file an amendment contradicting an admission made in his original pleadings. 31 Cyc. 422; Bank of Woodland v. Heron, 122 Cal. 107, 54 P. 537; Tognazzi v. Wilhelm, 6 Cal.2d 123, 56 P.2d 1227.

Also we have not considered defendant's contention that by pleading in their complaint that defendant had been in possession adverse to them since December 28, 1937, plaintiffs had "pleaded themselves out of court" for the reason that we have determined the case from the evidence. Of course, as evidentiary matter, that allegation may be considered as an admission against interest. This appeal is being determined upon the merits rather than upon a question of pleading.

[12-14] It is obvious that the original transactions between Dr. Friedman and the plaintiffs were in fraud of a creditor. Neither at the trial nor in the briefs on appeal, was this issue of fraud, or that the parties did not come into court with clean hands, raised. Were they to be applied here, plaintiffs could gain no comfort from them, as the court would leave the property and the parties where it finds them, which necessarily would mean denying plaintiffs any relief. As to the affirmative action of the court in quieting defendant's title, such action is based, not upon the original transactions, but upon the adverse possession of defendant for the statutory period, which created a new title. For that reason the so-called "clean hands" doctrine does not apply. As stated in Carman v. Athearn, 77 Cal.App.2d 585, at page 598, 175 P.2d 926, 934, "The misconduct which brings the 'clean hands' doctrine into operation must relate directly to the transaction concerning which complaint is made. The misconduct must infect the cause of action before the court. Relief is not denied because the plaintiff may have acted improperly in the past or because such prior misconduct may indirectly affect the problem before the court. A party may have relief in connection with a transaction itself untainted although his original title may have been tainted by improper conduct. These principles are well settled. See Germo Mfg. Co. of Missouri v. McClellan, 107 Cal. App. 532, 290 P. 534; Bradley Co. v. Bradley, 165 Cal. 237, 131 P. 750; Western Union Tel. Co. v. Commercial Pac. C. Co., 177 Cal. 577, 171 P. 317; 2 Pomeroy's Equity Jurisprudence (5th Ed.), p. 94, § 399; cases collected 30 C.J.S., Equity, § 98, subsec. c, p. 491; 4 A.L.R. 44, at p. 65." As to the conduct of defendant during the prescriptive period, it was in no way tainted with any inequitable or improper conduct.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concur.

79 Cal.App.2d 290

PEOPLE v. OWENS.

Cr. 647.

District Court of Appeal, Fourth District, California.

April 21, 1947.

Hearing Denied May 19, 1947.

1. Criminal law ⚷1036(5)

On appeal from conviction, defendant cannot complain for first time of admission of hearsay evidence.

2. Criminal law ⚷1036(1)

A fact proved by incompetent evidence, admitted without objection, is beyond attack on appeal.

3. Burglary ⚷41(1)

Evidence supported conviction of second-degree burglary. Code Civ.Proc. § 1826.

4. Criminal law ⚷829(15)

Failure to give instruction, not requested by defendant, that evidence must be wholly inconsistent with defendant's innocence and consistent with no other reasonable conclusion than that of his guilt to warrant conviction, was not prejudicial error, in view of given instructions. Const. art. 6, § 4½.

5. Criminal law ⚷1186(4)

In burglary prosecution, instruction that a person must be presumed to intend to do that which he voluntarily and willfully does and to intend all natural, probable, and usual consequences of his own acts, was not prejudicial to defendant, in view of evidence that property in burglarized buildings was stolen. Const. art. 6, § 4½.

6. Criminal law ⚷808½

An instruction submitting to jury in practically statutory language question whether evidence, by greater or lesser number of witnesses, produced conviction in jurors' minds, was not erroneous as ignoring doctrine of reasonable doubt. Code Civ. Proc. § 2061, subd. 2.

7. Criminal law ⚷823(2, 10)

A stock form instruction that mere possession of stolen property is insufficient to justify conviction of burglary, but may be considered with other circumstances, such as defendant's failure to give "logical account" of conditions under which he obtained property, was not erroneous as indicating that account need only be inconsistent with defendant's guilt, nor as assuming that defendant had possession of stolen property, in view of other instructions.

8. Criminal law ⚷761(13)

The trial court should guard against giving stock instructions, which might assume defendant's guilt or facts incriminating him, without clearly stating to jury that they are judges of whether assumed facts have been established.

9. Criminal law ⚷823(1)

In burglary prosecution, instruction in statutory language, defining word "willfully" as applied to intent with which an act is done, was not prejudicially erroneous, in view of instruction in language of statute requiring union or joint operation of act and intent to constitute crime. Pen. Code, § 7, subd. 1; § 20.

10. Criminal law ⚷824(8)

Defendant cannot complain of failure to give instruction, not requested by defendant, that evidence of his three prior burglary convictions should be considered only for impeachment purposes and not as proof of offense charged, especially where such evidence was offered as part of defendant's case in chief.

11. Criminal law ⚷824(4)

In burglary prosecution, failure to give instruction embodying statute relating to defendant's manifest intoxication was not error, in absence of showing that defendant placed defense on such ground or substantial evidence that he was in such a state of intoxication as to require trial court to recognize necessity of such instruction notwithstanding defendant's failure to request it. Pen.Code, § 22.

12. Criminal law ⚷824(5)

Failure to give instruction, not requested by defendant, that his mere possession of burglary tools was insufficient to convict him of burglary, was not error.

13. Criminal law ⚷1186(4)

In burglary prosecution, instructions in language of statutes requiring union or joint operation of act and intent to constitute crime, and providing that intent is manifested by circumstances connected with offense and accused's sound mind and discretion, were not prejudicially erroneous. Pen.Code, §§ 20, 21; Const. art. 6, § 4½.

Appeal from Superior Court, San Bernardino County; Stanley Mussell, Judge.

Carl Owens was convicted of burglary in the second degree, and he appeals.

Affirmed.

Abbott C. Bernay and Everett H. Mills, both of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Alberta Gattone, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Under an information setting forth two counts of burglary and upon a plea of not guilty entered, defendant was convicted of burglary in the second degree, after a trial before a jury. A charge of a prior felony conviction and service of a term of imprisonment thereunder, was set forth in the information and was admitted at the trial.

Count one charges that on August 22, 1946, defendant entered a drug store in Ontario. Count two charges that on the same date he entered a cafe near that place with intent to commit the crime of theft.

Defendant and appellant first claims that the evidence is insufficient to support the verdict.

Sometime during the night of August 22, 1946, the drug store was burglarized. Mr. Gimmell, the owner, testified that he had been at work about an hour or so on the morning of August 23, when he went to open the front door from within; that it appeared to have been forced open by some instrument similar to a screwdriver; that it had been bolted at the top and bottom and each bolt had been forced out of place; that the police were called and on inspection another door showed an attempt had been made to open it with the same type of instrument. These door parts were removed and brought into court for examination. He then testified, without objection, that "my partner reported" that he had made a sale in the sum of five or six dollars (the denomination of which was not known) after the registers had been cleared, and that a small shipment of named cigars, which had arrived that day, were all missing, as well as one or two sets of fountain pens and pencils that were in a case.

[1, 2] From the evidence produced, there is no question that a burglary of this store had been committed. There was some hearsay evidence received but it was admitted without objection. Defendant should not be heard to complain about the admission of this evidence for the first time on appeal. A fact proved by incompetent evidence is beyond attack on appeal where no objection was made at the trial. People v. Lorden, 62 Cal.App. 501, 503, 217 P. 117; People v. Brown, 71 Cal.App. 181, 187, 235 P. 72.

[3] The proprietor of the cafe testified that on August 22, 1946, as was the custom on Thursdays, his establishment was closed; that about 3:30 in the morning of August 23, he was called by the police to his place of business; that he first noticed a large glass in the rear window facing on Transit Street had been broken out; that when inside, he noticed a lock had been forced on a swinging door; that the back of a "Nickelodion" was broken off and the money box laid on the floor; the mirror on the cigarette machine was broken out and the money box found on the floor; the pin ball machine had been pried open with some kind of an instrument; that nickels, dimes and quarters operate the music machine; that five-cent pieces and dimes operate the cigarette machine; and five-cent pieces operate the marble machine. No money was left in any of them by the burglar, although they had been operating two or three days since last cleared. Several packages of chewing gum were missing from the candy counter; two pairs of childrens' colored cotton socks (new and fastened together) were found in the alley near the broken window. Parts of a flashlight were also found there. The evidence fully supports the conclusion that there had been a bur-

glary of this cafe. The only question is whether or not the evidence was sufficient to connect the defendant with the commission of the burglary of the cafe and the drug store.

A police officer testified that he was walking the beat that night; that about 8:30 p. m. he saw defendant "standing around" in the alley near these two store buildings; that he asked about his presence and defendant told him he was there taking care of his personal desires which were purely his own affairs; that he inquired why defendant did not go to a neighboring gas station or bar; that he replied he did not know if there was such a place open; that he again saw defendant about 11:30 p. m. one block north of the place where he first encountered him, standing in the same alley; that he asked him what he was doing there and that he said he "didn't know"; that he asked him if he lived in Ontario and he said that he did (defendant in fact lived in Pomona); that he crossed the alley and watched defendant disappear up the street; that about 1:30 a. m. he saw defendant in front of the drug store here involved; that he approached him again and asked him what he was doing there after he had told him to go home; that he asked him for identification and that defendant showed him a driver's license, a draft card, a one-dollar bill, and some pictures in his wallet; that he said the pictures were of his wife and two children; that he asked him why he kept coming around those streets in that neighborhood and he said his wife was "stepping out" on him and he was "keeping his eye on her, trying to catch her." The evidence shows that his wife and children in fact were in Okahoma at that time. He then testified that he took defendant to a taxi stand and told him to get out of town; that he checked the doors of the drug store three times up to 12:15 a. m. and at that time there was nothing wrong with them; that the doors and windows at the cafe were not disturbed prior to 11:30 p. m.

A taxi driver testified that he drove defendant about a block and a half from the cab stand; that defendant wanted him to stop; that defendant got out on Transit Street, the alley back of the stores in question, and left for a few minutes in that direction and later returned carrying a sack "like one takes money to the bank in" and a pair of extra long woollen gloves; that the money sack appeared to be full and it was "jingling like metal * * some type of coins"; that after defendant got back into the cab he took him to Pomona; that during the trip he noticed the defendant was sweating quite a bit and was chewing gum; that he talked with him en route and later delivered him to the public library, at his request, one-half block from his home, and that he went down the street and watched which home defendant later went into.

That morning, after discovery of the burglary, three officers went to the home of defendant in Pomona and searched his apartment. He and his mother lived there. Under the seat in one of the chairs they found one-half roll of dimes and quarters ($2.50), wrapped in brown paper ready for banking. Defendant later admitted that he placed them there. In a drawer in a writing table they found a lot of coins similarly wrapped. In the kitchen were found 50 or 75 coin wrapping papers. In a trunk in the closet they found a money bag. Just outside the front door of the apartment they found, under a hedge, a pair of dark brown woollen gloves. Inside of the gloves was found a screwdriver.

Defendant testified that he had never seen either the gloves or the screwdriver. The taxi driver testified that the gloves "were the same kind" he saw in defendant's possession.

Dr. Candela, after qualifying as an expert, testified that he took scrapings from under defendant's fingernails; that fibers of the woollen gloves compared favorably with the fibers found under defendant's fingernails; that in his opinion those gloves had been worn by defendant within a relatively short time. A similar examination and comparison was made as to the colored cotton socks found near the cafe with the same result and with the same conclusion.

An expert criminology technician testified that he compared, by microscope the screwdriver marks on the cigarette machine, music box, and the pieces of wood taken from the doors and windows in evidence; that the marks and the screwdriver had the same dimensions; that the marks were made by that screwdriver or one very similar to it.

Defendant took the stand and on direct examination testified that he had been, three times previously, convicted on burglary charges; that he was in Ontario on the night in question; that he did not know why he went there, it was "just one of those things"; that he took along a "one-fifth" bottle of whiskey in a brown paper sack; that he had been drinking; that he set the bottle down in the alley; that he met the officer on the occasions mentioned and the officer "told the truth about that"; that after the officer told him to take a cab and go home he ordered the cab driver to stop so he could go down the alley and pick up his bottle; that the brown bag and bottle must have been what the taxi driver saw in his hands rather than gloves and a money bag; that he put the bottle on the table at home. The officers failed to find such a bottle. He further testified that the coins found in his home belonged to his mother. He denied ever being in the drug store or cafe. Defendant's mother claimed ownership of the money and the money sack, but she did not know about the money being under the seat of the chair.

Viewing the evidence produced in its most favorable light, it clearly establishes defendant's guilt beyond any reasonable doubt. Sec. 1826, Code of Civ.Proc; People v. Miller, 171 Cal. 649, 154 P. 468; People v. Mattmueller, 30 Cal.App.2d 532, 86 P.2d 838; People v. Walsh, 50 Cal.App. 2d 164, 122 P.2d 671; People v. Willmurth, 77 Cal.App.2d 605, 176 P.2d 102; People v. Russell, 34 Cal.App.2d 665, 94 P.2d 400; People v. Davis, 1 Cal.App. 8, 81 P. 716, 88 P. 1101.

[4] Defendant next argues that the trial court erred in giving or in refusing to give certain instructions:

I. That it was prejudicial error for it to fail to give, of its own volition, and without request, an instruction that before a conviction could be had the evidence in this case must be wholly inconsistent with defendant's innocence and consistent with no other reasonable conclusion than that of his guilt, citing People v. Rayol, 65 Cal. App.2d 462, 150 P.2d 812; People v. Koenig, 29 Cal.2d 87, 173 P.2d 1; and People v. Tholke, 75 Cal.App.2d 857, 171 P. 2d 904. In each of the cases cited by defendant a request was made to give such an instruction. The trial court in this case did give instructions to the effect (1) that in case of a reasonable doubt of defendant's guilt the jury was to acquit him; (2) that defendant was presumed to be innocent until the contrary was proved beyond a reasonable doubt; (3) that if the evidence be susceptible of two constructions or interpretations, each of which appears to be reasonable, one pointing to the guilt and the other to the innocence of the defendant, the jury must adopt the one pointing to defendant's innocence; and (4) that any fact in the case may be proved by direct or circumstantial evidence, defining both.

In People v. Bender, 27 Cal.2d 164, 163 P.2d 8, the appellant, likewise, had requested no instruction on the subject matter, and an instruction was given similar in form to the one here given. There the reviewing court concluded that even though there should have been added to the instruction given a direct statement of the precise principle under discussion, the jury was not altogether uninstructed as to the law necessary to a proper consideration of circumstantial evidence. It was there said, as it must be here said, that an "examination of the record discloses that circumstances relied upon by the prosecution and left unexplained, or with an explanation which must have appeared unreasonable to the jury, point irresistibly to defendant as the perpetrator" of the crime, and that since the quoted instruction was given, the failure to give the further instruction is not, on the facts of this record, prejudicial, and accordingly, not a ground for reversal. To the same effect are People v. McClain, 115 Cal.App. 505, 1 P.2d 1085; and People v. Hatchett, 63 Cal.App.2d 144, 146 P.2d 469.

In People v. Koenig, supra, where the instruction was in fact requested but refused, the court held that the failure of the court to give the instruction suggested by the defendant was not prejudicial under the facts there related. We must reach the same conclusion here.

[5] II. The next instruction about which defendant complains is: "A person must be presumed to intend to do that which he voluntarily and wilfully does in fact do, and must also be presumed to intend all the natural, probable and usual consequences of his own acts." Defendant cites People v. Snyder, 15 Cal.2d 706, 104 P.2d 639, and contends that since a specific intent to steal is an element of the crime of burglary, the people cannot rest upon any such presumption. That was a case of an attempt to commit murder, and it was there held that the intent to kill may not be presumed from the firing of a gun at the victim, in itself. The defendant is not claiming, as the defendant was in the Snyder case, that he was acting in self defense or in good faith. He merely claims that he did not make the entry nor take the goods. The best evidence that a breaking or entering was committed with the intent to steal is evidence that property within the burglarized buildings was in fact stolen. There is no better proof that a burglar intended to commit larceny than the fact that he did in fact commit it. The instruction was not prejudicial.

[6] III. The next instruction reiterated the stock instruction in regard to the "weight of the evidence and the greater number of witnesses," and ended up with this phrase as the test: "Does the evidence produced, either by a greater or lesser number of witnesses, produce conviction in your mind?" Stress is laid on the use of the word "conviction," arguing that the instruction in that language ignores the doctrine of reasonable doubt; that it is the duty of the jury to acquit if the evidence creates a doubt of his guilt, citing People v. Ames, 61 Cal.App.2d 522, 534, 143 P.2d 92. This instruction is practically in the language of section 2061, subdivision 2 of the Code of Civil Procedure, and has been upheld in People v. Torterice, 66 Cal.App. 115, 123, 225 P. 760; and People v. Richardson, 74 Cal.App.2d 528, 535, 169 P.2d 44.

[7, 8] IV. An instruction to the effect that mere possession of stolen property is not of itself sufficient to justify a conviction of burglary, but may be considered as a circumstance and may be considered together with other circumstances such as "the failure of *the defendant* to give a *logical account* of the conditions under which he obtained the property" was given. The use of the words "logical account" is criticized as indicating a degree of proof less than that actually required, i. e., that it is only necessary that the "account" be inconsistent with defendant's guilt, and the instruction assumes that *defendant* did have possession of the property that was stolen. This was followed by a general instruction to the effect that "if the court, in stating to you any proposition of law, has assumed, or appears to you to have assumed, any fact or facts as proved, you will disregard such assumption and will deduce your own conclusions * * * from the evidence * * * you alone are the exclusive judges of the facts." The instruction complained of was but a stock form and, when considered with all other instructions, is not susceptible of the interpretation placed upon it by the defendant. People v. Reynolds, 130 Cal.App. 754, 20 P.2d 952; People v. Brown, 71 Cal.App. 181, 235 P. 72; People v. Haack, 86 Cal.App. 390, 397, 260 P. 913; People v. Stennett, 51 Cal.App. 370, 387, 197 P. 372. The trial court should guard against giving stock instructions which might assume the guilt of a defendant or facts incriminating him without clearly stating to the jury that they are the judges as to whether or not such facts assumed have been established. The word "logical" is defined as being "In accordance with the inferences reasonably to be drawn from preceding or surrounding events * * *." Webster's New International Dictionary. We do not believe that any prejudice resulted from the use of this word.

[9] V. An instruction was given in the language of section 7, subd. 1 of the Penal Code. The giving of such an instruction, even in the language of the statute, in a larceny case, was criticized in People v. Stennett, supra, but in view of the fact that an instruction was given in the lan-

guage of section 20 of the Penal Code, it was held not to be prejudicially erroneous. An instruction in the language of section 20 of the Penal Code was given in the instant case. In People v. Mason, 12 Cal. App.2d 84, 87, 55 P.2d 249, it was held, as we must hold here, that defendant suffered no prejudice by the giving of that instruction in the language of the statute.

[10] VI. Defendant next complains because the trial court, of its own motion, failed to give an instruction that the evidence of the defendant's three prior burglary convictions was to be considered only for the purpose of impeachment, and not as proof of the charge for which he was being tried, citing People v. Blanks, 67 Cal.App. 2d 132, 153 P.2d 449. In that case a request for such an instruction was refused. In the instant case, had defendant requested it, the trial court undoubtedly would have given such an instruction. Furthermore, the evidence of the prior convictions was offered by defendant as a part of his case in chief. In the absence of a request for such an instruction he should not be heard to complain. People v. Jackson, 70 Cal.App.2d 763, 767, 161 P.2d 809.

[11] VII. The next complaint is directed to the failure of the court to give some instruction of its own embodying section 22 of the Penal Code relating to defendant's "manifest intoxication", citing People v. Crowl, 28 Cal.App.2d 299, 308, 82 P.2d 507. From a reading of the record it is not disclosed that defendant placed his defense upon that ground nor is there any substantial evidence showing that defendant was in such a state of intoxication as would require the trial court, notwithstanding his failure to request such an instruction, to sua sponte recognize the necessity of giving such an instruction.

[12] IX. A similar complaint is made of the failure of the trial judge to instruct the jury that mere possession of "burglarious tools", if it deems it a fact, was not sufficient to convict him. The same conclusion must be reached as to this complaint. If counsel had been as diligent in submitting proposed instructions on these points to the trial court as he is resourceful in now pointing out claimed errors in failing to give such instructions, much time and detailed consideration could have been spared to all parties concerned.

[13] X. Objection is next made to instructions given in the language of sections 20 and 21, Penal Code, citing People v. Peterson, 29 Cal.2d 69, 173 P.2d 11; and People v. Weatherford, — Cal.App.2d —, 176 P.2d 382. The giving of an instruction in those cases, not in the language of the statute, was held erroneous. The instructions here given are in the exact language of the statute, and as thus given, it has been held not to be prejudicially erroneous. People v. Mason, supra; People v. Peterson, supra.

Defendant had a fair and impartial trial. He was convicted upon competent and substantial evidence. No prejudicial error appears in the instructions given or in the failure of the trial court to give certain other instructions not requested. No miscarriage of justice resulted. Art. VI, sec. 4½, Constitution of California.

Judgment and order affirmed.

BARNARD, P. J., and MARKS, J., concur.

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79 Cal.App.2d 94

PEOPLE v. HENDERSON et al.

Cr. 2423.

District Court of Appeal, First District,
Division 1, California.
April 14, 1947.

Rehearing Denied April 29, 1947.
Hearing Denied May 12, 1947.

1. Criminal law 🔑1144(13)

On appeal from conviction, evidence must be considered in the strongest light in favor of the verdicts.

2. False pretenses 🔑49(1)

Evidence sustained conviction of organizer of corporation engaged in building contracting business, who received down payments from customers by false representations, for grand theft under 10 counts. Pen.Code, § 484.

3. Criminal law 🔑423(1), 428

In prosecution for a conspiracy, declarations of one conspirator, made in furtherance of the conspiracy, are binding on all, but where specific offenses are also charged, the state is not excused from proving against each defendant all of the elements of each offense. Pen.Code, § 182, subd. 4.

4. False pretenses 🔑49(1)

Evidence sustained conviction of general sales manager of corporation engaged in building contracting business, to which down payments had been made by customers because of false representations, for grand theft under seven counts, but did not sustain conviction as to three counts. Pen.Code, § 484.

5. False pretenses 🔑51

Whether general sales manager of corporation engaged in building contracting business, made false representations in good faith to customers who made down payments to corporation or whether manager made them knowing that they were false, or in reckless disregard of the truth and without information justifying the belief, were questions for jury in grand theft prosecution. Pen.Code, § 484.

6. False pretenses 🔑5, 39

An intention to defraud is an essential element of grand theft, but such intention is inferable from all the facts of the case and need not be substantively proved. Pen. Code, § 484.

7. Conspiracy 🔑47, 48

A conspiracy may be proved by circumstantial evidence, the weight and sufficiency of which is for jury. Pen.Code, § 182.

8. Conspiracy 🔑47

In prosecution of organizer and general sales manager of corporation for conspiracy to obtain money by means of false promises with fraudulent intent not to perform such promises, evidence supported implied finding of fraudulent intent on part of both defendants. Pen.Code, § 182, subd. 4.

9. Conspiracy 🔑40

Whether defendant actually started to conspire with codefendant on date when conspiracy was alleged to have started, was immaterial so long as there was active cooperation by defendant with codefendant thereafter, since the period when defendant entered the conspiracy was immaterial. Pen.Code, § 182, subd. 4.

10. Criminal law 🔑369(2)

In prosecution for grand theft on 10 counts charging defendants with fraudulent representations knowingly and designedly made to defraud persons of money, and for conspiracy to obtain money by means of false promises with fraudulent intent not to perform promises, evidence as to sales and representations to others than those mentioned in the indictment was properly admitted, where the sales and representations involved similar transactions. Pen.Code, § 182, subd. 4; § 484.

11. Criminal law 🔑1166½(12), 1171(1)

Use of the phrase "similar offenses" by counsel of one defendant, court and deputy district attorney in colloquy concerning the admission of evidence of similar transactions, was not prejudicial as to the other defendant, on ground that the province of the jury was invaded where jury was fully, fairly and completely instructed on its proper functions.

12. Criminal law 🔑1169(11)

Where counsel of one of the defendants stipulated to the introduction of various checks which were offered to establish the facts alleged in the indictment, the admission of checks relating to transactions similar to those charged in the indictment, was not prejudicial error, since the checks were merely cumulative. Pen.Code, § 484.

13. Criminal law 🔑1169(2)

In prosecution for grand theft under counts charging defendants with fraudulent representations knowingly and designedly made to defraud persons of money, admission of pamphlet was not prejudicial error, where representations contained in pamphlet had been testified to by a host of witnesses. Pen.Code, § 484.

14. Criminal law 🔑1174(1)

Trial judge's statement to jury which had already deliberated five hours, and which had returned to court room and requested that a certain portion of the transcript be read, that if jury did not reach a verdict by 9:30 or 10 o'clock at night, he planned to lock the jury up, was not coercion requiring reversal.

15. Criminal law ⚷1171(1)

In prosecution for grand theft and conspiracy, reference by deputy district attorney to possibility that a debenture issued by defendant violated the Corporate Securities Act, was not reversible error, where there was no objection or request that statement be stricken, statement was made in direct response to question of defendant's counsel to the deputy district attorney, and debenture in question was part of record on consent of defendant's counsel.

16. Criminal law ⚷1170½(5)

In prosecution for grand theft and conspiracy, cross-examination of defendant, which indicated that defendant failed to pay certain federal payroll taxes, and had been in difficulties with the Internal Revenue Department, was not prejudicial error, where subject was directly inquired into by defendant's counsel on direct examination. Pen.Code, § 182, subd. 4; § 484.

17. Criminal law ⚷957(1)

Jurors cannot, by affidavit, impeach their verdict, except to show that such verdict was reached by lot.

18. Criminal law ⚷1158(1)

Where affidavit of one juror averred that she heard another juror state and argue that defendant had defrauded people in the East of much money and would defraud others if he was not convicted, and the other juror's affidavit generally denied such alleged facts, the conflict was for court on defendant's motion for new trial. Pen.Code, § 1181, subd. 2.

19. Criminal law ⚷925(1)

Alleged fact that 3 jurors at recess stated that they had favored the prosecution from the beginning, was not misconduct entitling defendant to a new trial.

20. Criminal law ⚷1158(1)

Where affidavits of two jurors averred that another juror indicated to them that he was convinced of the guilt of the defendants, and that juror's affidavit specifically denied such alleged fact, the conflict was for the court on motion by defendants for new trial.

21. Criminal law ⚷1158(1)

Where juror's affidavit stated that she favored acquittals for both defendants, that she remained adamant in that position, and that several jurors sought to intimidate her by charging her with perjury on her voir dire examination, and by accusing her of being a friend of the defendants, and affidavits of nearly all the other jurors averred that no coercion was practiced, conflict was for court on defendants' motion for new trial.

22. Criminal law ⚷1156(5)

The decision of a trial court in denying a motion for new trial after considering conflicting affidavits of jurors concerning alleged misconduct of jury, is final in absence of a showing of abuse of discretion.

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Appeal from Superior Court, Alameda County; S. Victor Wagler, Judge.

Frederick W. Henderson and Jack Moore were convicted on 10 counts of grand theft and on one count of conspiracy, and from the judgment of conviction and order denying their motions for new trial, they separately appeal.

Judgment and order denying new trial as to Henderson affirmed, and judgment and order denying new trial as to Moore reversed as to three counts, but, as to the other 8 counts, affirmed.

Vincent W. Hallinan, of San Francisco, for appellant Henderson.

Russell T. Ainsworth, of San Francisco, for appellant Moore.

Robert W. Kenny, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Ralph E. Hoyt, Dist. Atty., and Arthur H. Sherry, Asst. Dist. Atty., both of Oakland, for respondent.

PETERS, Presiding Justice.

Frederick W. Henderson and Jack Moore were jointly indicted, tried and convicted on 10 counts of grand theft (fraudulent representations knowingly and designedly made to defraud persons of money, as prohibited by § 484 of the Penal Code) and one count of conspiracy (obtaining money by means of false promises with the fraudulent intent not to perform such promises, as prohibited by § 182, subd. 4, of the Penal Code). They separately appeal from the judgment of conviction and order denying their motions for a new trial. By its various commitments the trial court provided that Henderson's terms under the first three counts should run consecutively, with the remaining terms to run concurrently, whereas Moore's terms are all to run concurrently.

These cases took over two weeks to try. The reporter's transcript totals nearly 2,000 pages. The following tabulation will serve to summarize the provisions of the indictment. Both defendants were charged as follows:

Count	Date	Nature of crime	Amount	Victim
1.	8/17/45	grand theft	$1,000	Mildred and Wm. Swift, Jr.
2.	9/28/45	grand theft	$4,500	Alta and F. Lyle Barnes
3.	9/8/45	grand theft	$1,000	Alice T. and Wm. C. Roddick
4.	9/19/45	grand theft	$1,750	Hallet and W. M. Pearl
5.	9/29/45	grand theft	$3,000	Ruth L. and Norman Hamstad
6.	9/20/45	grand theft	$ 500	Delylia Hickman
7.	9/18/45	grand theft	$ 600	Everett L. Morgan
8.	10/12/45	grand theft	$1,500	Lillian B. and Chas. C. Adams
9.	9/5/45	grand theft	$1,000	Alberta A. and Claude H. Buchanan
10.	9/17/45	grand theft	$2,000	Estella M. Barnes
11.	7/25/45 to 1/17/46	conspiracy to cheat by false promises with fraudulent intent not to perform same.	$12,300	Fifteen overt acts relating to transactions with George Sims, Albert and Everett Morgan, Norma and Robert Wilson, Richard Hilken, Ida and A. O. Bass, Adrianne and Gustav Lund.

The prosecution of these defendants grew out of the operation by them of what purported to be a general contracting business conducted by Henderson under the name, The Bay Pacific Company. Moore was associated with the enterprise, first as salesman and later as general sales manager. These two men and others from July of 1945 to January of 1946, when they were arrested, devoted their principal efforts towards the solicitation of contracts calling for the construction of new homes and business buildings. The evidence shows that the appellants sold many contracts during this period and collected from the persons desiring to build substantial sums of money. It also shows that in the course of selling these construction contracts numerous false representations were made in order to induce the prospective customers to enter into these contracts. It is these false promises and the failure to perform these contracts that form the basis of this prosecution.

Both appellants urge that the evidence is insufficient to sustain the verdicts. Such contention, so far as Henderson is concerned, totally lacks merit. So far as Moore is concerned, the contention is partly meritorious, as will later appear.

Henderson was the promoter and organizer of the entire project. He, apparently, is a man of unusual talents and imagination. At the time of trial he was but 28 years of age. His father is a building contractor, and Henderson got his first building experience with him. This appellant started on his own as a builder in Stamford, Connecticut, in 1939. He conceived the idea of building houses in groups on an assembly line basis, the workmen working in crews on a piece-work basis. He figured that he could thus build a house, complete, in twenty-four or five working days. He started to put this plan into effect in Westchester County, New York. On the first 60 houses thus constructed he made a net profit of $500 or $600 per house, but he shortly ran into difficulties with labor unions and with various contractors. His plan envisaged the dispensing with sub-contractors. There were over a hundred more houses constructed on a fixed price basis, and because of these difficulties he went broke, losing over $100,000. He then worked for a while in Washington, D. C., and in Virginia, and then was forced to stop work because of rheumatic fever. While ill he worked out a plan to eliminate the difficulties he had run into in New York. It was the plan thus conceived that he attempted to put into effect in Alameda County. The plan included cost, plus a percentage of profit, contracts, to do away with the danger of loss from fixed price contracts. It included the concept of the one construction company hiring at high wages skilled mechanics in all branches of the building industry, thus dispensing with sub-contractors. It envisaged the building company owning many of its own sources of materials, particularly lumber, and purchasing other materials in large lots. It included the building company working out all details of financing the various projects and furnishing to their clients every service ncessary to the purchasing, designing, financing and constructing a house.

With this general plan in mind Henderson came to San Francisco in December, 1944. For a short while he worked with a wrecking company and then was hired to sell paint jobs for a painting company. At this company he first met M. R. Arnold, who subsequently became associated with Henderson, and who was one of the State's witnesses. Henderson put on such a campaign selling paint jobs for his employer that he was shortly bringing in 90 percent of all paint jobs performed by his employer. In March, 1945, he quit this job, and in April started to organize The Bay Pacific Company. This company mushroomed in startling fashion.

Henderson's original plan was to organize a corporation and to turn over the assets and liabilities of his company to it. A corporation called Bay Pacific Corporation was in fact incorporated in August, 1945, and a permit to sell stock was secured which required the first $25,000 secured from the sale of stock to be escrowed. This permit was voluntarily surrendered in November of 1945. The corporation at no time operated the business in question. The business was the sole property of Henderson. Many of the contracts and receipts introduced into evidence are signed "Frederick W. Henderson, Sole Owner," and many of the checks introduced into evidence were endorsed "Bay Pacific Company * * * F. W. Henderson, Sole Owner."

At this point a few words should be said about appellant Moore. Until he became associated with Henderson, in July of 1945, he was in the re-roofing and remodeling business in Tacoma, Washington. He had responsible positions with responsible concerns in Sacramento and Los Angeles and had been in business for himself in Montana where he first met Arnold, who recommended him to Henderson.

The amazing development of The Bay Pacific Company was testified to by Henderson and by several of his employees. The company was started on $5,000 that Henderson borrowed from some friends. To trace in detail the activities of this company and the activities of Henderson and Moore, as disclosed in this lengthy record, would extend this opinion to unreasonable length. The best that can be done is to summarize, briefly, these activities, and for that purpose the following outline has been prepared:

Outline of Activities of Bay Pacific Company from 4/45 to 1/46.

(P.—People's; D.—Defendants'.)

Date	Event	Exhibit or Witness
4/45	Company started operations with a number of painters and carpenters to handle painting and remodeling and construction jobs. M. R. Arnold is induced to work for the company.	Henderson.
	Henderson represented to Bugbee, secretary of the Wholesale Credit Ass'n in Oakland, that he was worth $18,000, consisting of an equity of $5,000 in the building in which the company had an office, $8,000 worth of equipment and $5,000 cash. Henderson's version was that Bugbee agreed "to kill" a report of his labor difficulties in the East if Henderson would not ask for credit "until I deserved it from anybody, except my friends."	Kenneth Bugbee. Henderson.
4/20/45	Henderson applied for a contractor's license stating in his sworn application that he had $18,865 in assets, including $5,000 in cash free of liens or any claims. (This was the borrowed capital).	P. Ex. No. 92.
	Henderson testified that he was told by Harry Abrahams of the Contractors' License Board that this statement was to secure a contractor's license only, but Abrahams testified that he always tells people that the application is a sworn statement. The application form clearly stated: "Misrepresentation of a material fact by an applicant in obtaining a license constitutes a cause for disciplinary action * * * [and] is grounds for refusal or subsequent revocation of a license."	Henderson. P. Ex. No. 92.
5/9 or 5/10/45	Contractor's license issued to Henderson.	Henderson.
5/45	Henderson's lawyer, a relative, drew up a form contract for selling construction on a cost-plus basis.	Henderson.
6/45	One Hobson who claimed that he owned 10 million feet of fir timber near Willitts and a sawmill that needed a new top saw offered to sell to Henderson.	Henderson.
7/45	One Charles Larson was hired to take charge of Hobson's mill.	Henderson.
7/14/45	The Hobsons signed a bill of sale of "All of the sound, merchantable timber * * * within the 'Watson' Ranch in Mendocino County, California * * * in no event will there prove to be less than five (5) million board feet." Henderson gave the Hobsons $12,000 worth of notes due in a year with the privilege of renewal for another year. Interest was 6%.	P. Ex. No. 93. P. Ex. No. 94.
7/45	Henderson and Arnold met one Firestone who suggested that they look for timber at Garberville.	Henderson.
7/45	One Claude McColm, an employee of a paint company, called upon The Bay Pacific Company and got a financial statement. Henderson told him that certain property in Claremont Heights was subject to being built upon by the company.	Claude McColm.

7/17/45	Arnold wrote to Moore to come to Oakland and join the company.	D. Ex. No. P.
7/19/45	Arnold telegraphed Moore to come to Oakland not later than July 23rd.	D. Ex. No. Q.
7/23, 24/45	Moore arrived and met Henderson. He was shown two buildings constructed by the company. At Henderson's suggestion Moore accompanied one of the salesmen while he called on prospective customers. George Sims was one of the customers visited. Sims testified that Moore told him that he was going to Spokane to procure a lumber mill for the company. Moore denied this.	Moore. George Sims.
7/45	Al Young, an engineer, was employed as construction superintendent. He was interested in a ceramic tile company. He stayed in the company's employ until December, 1945.	Al Young.
7/45	Henderson met Clarence Lee Dong who intended to open an electric appliance shop in San Francisco. Dong agreed to furnish Henderson with appliances if he could get them. Henderson was to have no interest in Dong's enterprise. Henderson hired him to sell lots in Claremont Heights, stating that he owned those lots.	Clarence Lee Dong.
7/26/45	George Sims signed a cost-plus contract for a bar, restaurant and apartment unit which Henderson signed. Sims made a down payment of $5,000. (Count 11.)	P. Ex. Nos. 48, 49. Sims.
7/28/45	Arnold, on behalf of the company, signed a contract with Willis Perry of Garberville for purchase of timber on his land. Under the contract the buyer was to erect a sawmill and to pay the seller $1.00 per thousand board feet for all lumber milled.	P. Ex. No. 66.
8/45	One Douglas Miller contracted to perform architectural services for company on a flat fee per house basis. Miller bought what drafting equipment Henderson had and hired a couple of men who had been working for Henderson.	Douglass Miller. P. Ex. No. 57.
8/45	Sims discussed plans with Miller and had several conferences with Moore. Moore told him "they had their own lumber and their own sawmills * * * plumbing, water heaters * * * [that] they didn't have to sublet the electrical and plumbing * * * that they had all those fellows."	Sims.
8/1/45	Harris Whiting employed to take charge of production.	Whiting.
8/7/45	Moore had gone back to Tacoma. He now returned and apparently acted as a salesman until August 20th, when he was hired to take charge of sales.	Moore. D. Ex. No. R.
8/7/45	George and Tena Gatliff (similar offense), in presence of Moore and Henderson, signed a cost-plus contract and made a $1,000 down payment. Tena testified that Henderson said that "I have a lumber mill up in Oregon"; that he "could get all his building material, plumbing material"; that "they was [sic] having lumber kiln-dried up in Oregon." Moore told her the house would be started by October 15th.	P. Ex. No. 83. Tena Gatliff.
8/13/45	Contract between Bay Pacific Company and Briceland for purchase of timber in stumpage form near Garberville.	D. Ex. No. C.

8/45	Whiting talking with a company about the possible repair of their kilns for drying lumber.	Whiting.
8/13/45	Arnold placed in full charge of Garberville project.	P. Ex. No. 101.
8/45	Both Larson and Arnold told Henderson that the Hobson land was unsatisfactory, and the contract with the Hobsons was torn up.	Henderson.
8/17/45	Mildred and Wm. Swift, Jr. (Count one) signed a $1,000 contract and paid $1,000 down. They did not own a lot and the contract provided that if the builder could not "arrange a piece of property satisfactory to the owner, all monies [sic] paid under this contract will be returned without penalty." Henderson told the Swifts that they did not need a priority; that he had his own lumber mill, standing timber, his own painters, plasterers and plumbers.	P. Ex. No. 12. Mildred Swift.
8/27/45	August Rahlves, inspector of the State Contractors' License Board sent an interoffice memo to his deputy registrar noting he had sent Henderson an application and had requested references. He commented on the showy offices of the company and concluded: "This man is sure going to town."	D. Ex. No. W.
8/28/45	Henderson authorized Tracy Clark, a real estate broker, to purchase some lots on Masonic Ave., gave Clark a rough suggestion of a form of contract for the purchase and $500 with which to open an escrow.	Tracy Clark. P. Ex. No. 51. P. Ex. No. 52.
9/1/45	Claude and Alberta Buchanan (Count 9) signed a cost-plus contract and paid $1,000. Moore told the Buchanans that the company had two mills off of the Redwood Highway, that they were able to bring in timber, that they were contracting to buy plumbing and electrical fixtures in the East by carload lots, that they would find a lot, that they would complete the building by Christmas, 1945, that they had a lumberyard at the foot of Gilman Street, and that thev were contemplating securing another.	P. Ex. No. 28. Claude Buchanan.
Late Summer/45	Henderson arranged with Joe Stern to lease his property at Second and Gilman for a lumberyard until May, 1946, and in May, 1946, to buy it.	Joe Stern.
9/5/45	Alyce George Bell, owner of the Claremont Heights Tract, agreed to sell same to Henderson. The contract provided "that the Purchaser shall have until November the first, 1945, to do such engineering work and other work entailed in the decision to purchase said property * * *"	P. Ex. No. 63.
9/8/45	Wm. C. and Alice Roddick (Count 3) paid $1,000 and signed a cost-plus contract containing provisions for a bank loan and for refund of moneys collected. They told Henderson they desired a house built on land they owned in Castro Valley. He said he had materials, labor, Pabco paints; that his uncle was connected with the Atlas Furnace people, and that he owned a lumber mill. They said they had a priority from the O.P.A. but Henderson said that priorities would soon be off and he did not need it.	P. Ex. Nos. 15, 16. Alice Roddick.

Labor Day weekend 9/45	Moore visited Garberville to see how Arnold and Perry were getting along. He found that a tool shed or blacksmith shop had been built, as had an office which Arnold was using. Timber was being cut. A fellow was bulldozing ground to build a bunkhouse. A pipeline was in and some electric line. Work had been performed on a bridge. Arnold told Moore that the mill would probably be in by November.	Moore.
9/45	After seeing a classified ad in the Oakland Tribune, Mary Lund saw Moore who said he would guarantee to build a home for her by Christmas. He mentioned that they had their own lumber mills, tile affairs, plumbing fixtures, etc., and represented that the company was then building 100 homes. She signed a contract and paid $100.00. (Similar offense.)	Mary Lund.
9/16/45	Estella M. Barnes signed a cost-plus contract and paid $2,000. (Count 10). The contract provided that "if the builder cannot arrange a piece of property satisfactory * * * or to obtain a satisfactory bank loan, all moneys paid will be returned." Moore told her about the available lots behind their College Ave. office (Masonic Ave. lots.) He did not state where he could obtain needed materials except that "he had the lumber all seasoned."	P. Ex. No. 37. Estella M. Barnes.
9/16/45	Henderson arrived in Garberville and found that Perry let Arnold do things backward—no mill in.	Henderson. Perry.
9/18/45	Albert L. Morgan (Count 11) and Everett L. Morgan gave Henderson $1,000 to be used in the construction of a factory for manufacturing Venetian Blinds. Henderson said he would be able to build the factory next to the lumberyard so that the Morgans could get their lumber at cost and that he wanted to satisfy his demand for blinds from those the Morgans produced.	P. Ex. No. 29. Everett L. Morgan.
9/45	Sumner Iron Works man told Henderson that he should not confine himself to a 50,000 foot mill at Garberville but should get a 100 foot band mill for an average cut of 80,000 feet of lumber a day which would cost $25,000 in cash. The $25,000 from the corporation funds after $25,000 worth of stock was sold would cover this. Harris Whiting had sent for Jim French whom he had known since June, 1940, to take charge of construction for The Bay Pacific Company. He was then sent to Garberville to take over, instead of Arnold.	Henderson. Harris Whiting. Henderson.
9/18/45	Hallet and W. M. Pearl (Count 4) signed a contract with the usual cost-plus provision, bank loan provision, as well as the refund provision.	P. Ex. No. 18
9/19/45	The Pearls paid Bay Pacific Company $1,750. Moore handled the entire transaction. He said they had kiln-dried lumber, carpenters, painters, plumbers, mill in Garberville, land at Second and Gilman. They were shown the Claremont Tract.	P. Ex. No. 19. Wm. Pearl.
9/20/45	Delylia Hickman (Count 6) signed a contract to have a house built upon her lot on Solano Avenue, Albany. It contained the usual provisions for refund but was	P. Ex. Nos. 23, 24.

	a fixed price contract for $4,500. She paid $500. Moore told her they could start October 15th, as he had plenty of lumber from their mills. Henderson told her he had bought a lot, Second and Gilman, for their lumberyard. She went there to see it.	Delylia Hickman.
9/23/45	Lyle and Elsie Barnes signed a cost-plus contract which provided "if the builder is unable to arrange a piece of property satisfactory to the owner or to obtain a loan, all moneys will be returned without penalty * * *" They paid $500. Moore told them they had mills for lumber and building material was available through their contracts with different plumbing supply and hardware places in the country. He said they had just got 5 lots in Rockridge (Masonic Ave.).	P. Ex. Nos. 4, 5. F. Lyle Barnes.
Early Fall.	After Henderson got the stock permit for Bay Pacific Corporation he rented a banquet room three times at the Palace Hotel and entertained many big business men and discussed with them the future of the corporation.	Henderson.
9/29/45	Norman Hamstad (Count 5) paid $3,000 on a contract for a house and lot. Usual terms. Moore told Hamstad they had seasoned lumber, two carloads of plumbing, carpenters, plumbers, etc.	P. Ex. No. 20. Norman Hamstad.
Fall, 1945.	Employees of The Bay Pacific Company cleared George Sims' property.	George Sims.
Fall, 1945.	Through the Better Business Bureau, Mary Lund's husband got $100 back and surrendered their contract. (She phoned Moore several times first.)	Mary Lund.
Fall, 1945.	Harris Whiting completed an outline of the organization as set up under the Production Dept., including administration, architectural services, sales—wholesale and retail (material), accounting, purchasing, lumberyards, warehouses, garage, estimating, labor relations, steel construction, sash-door and planing mill, and lumber mills and procurement. A copy was given Moore by Whiting.	D. Ex. Nos. B, U. Moore. Harris Whiting.
10/1/45	F. Lyle Barnes authorized Wm. Phillips to buy a lot. the equipment—road building, engineers and survey- Walsh helped select it.	P. Ex. No. 6. Lyle Barnes. Jewett Ivey.
10/1/45	Jewett Ivey, owner of land in Alameda, saw Moore in new San Francisco office about subdividing the property. Moore told him Bay Pacific Company had all the equipment—road building, engineers and surveyors—that they could put the road through and pro-rate the costs among the lots. Bay Pacific would have the exclusive building rights and Ivey would get the purchase price of the lots.	
10/3/45	Henderson offered to get Venetian Blind materials for the Morgans. He said that if they put up $1,000 he would advance $1,000 to get $2,000 worth. They gave him a check for $1,000 signed "Albert L. Morgan." (Count 7 of the indictment alleges that Everett L. Morgan lost $600—this refers to his share in the $1,000 paid to build a house. He testified, however, that he did	Everett L. Morgan. P. Ex. No. 31.

	not give any checks, but that his brother did. R.T. 296.)	
10/4/45	Henderson contracted to buy the Murphy-Soda property on Eastshore Highway near Jacuzzi plant north of Albany for $50,000. "$10,000.00 at the time of closing title; $15,000.00 within six months of closing date; Balance payable in equal monthly installments over a period of five years."	P. Ex. No. 65.
10/6/45	Clause in Soda-Murphy contract as to payment of $15,000 changed to make date of payment 4 months.	P. Ex. No. 65.
10/8/45	Philip Murphy forwarded a legal description of property with instructions to prepare a deed and also executed a deed for Oakland Title Ins. Co. Negotiations stopped at this point as Bay Pacific did not pay.	Philip Murphy.
10/8/45	Moore received $200 (Count 11), cash payment, on R. H. Hilken's contract providing for cost-plus arrangement, bank loan. It also provided that Hilken could name his sub-contractors. $1,800 was to be paid before plans for an addition to his present business would be drawn —to consist of hotel upstairs, barroom downstairs and drugstore adjoining. Moore told him they had a lumber mill in Garberville.	P. Ex. No. 42.
10/10/45	Better Business Bureau of Oakland wrote to Bay Pacific about the complaint of Mr. and Mrs. A. L. Lund who had gone ahead and bought the lot they desired for $1,250 when Walsh told them it was $1,800. (As mentioned, supra, Mr. Lund received a refund of $100.) The letter mentioned that representations were made about owning a tile plant, manufacturing Venetian Blinds. Henderson testified that this was the first time he knew of such representations being made by his salesmen.	D. Ex. No. J. Henderson.
10/10/45	Hertel of Oakland Better Business Bureau wrote to Erb of State Contractors' License Bd. attaching a copy of the letter covering the Lund complaint. Henderson called Hertel to inquire why he forwarded the Lund complaint to Erb without waiting for an explanation. Henderson offered proof that the above-mentioned lot sold for $1,800.	D. Ex. No. Z-1. Henderson.
10/11/45	Wm. Phillips, realtor, wrote to Henderson: "Mr. Michael Walsh, employed by me as a salesman, contacted one Mr. Howard, a salesman with the Home Company, who showed him the lot, pricing the same at $1,800 * * *"	D. Ex. No. K.
10/12/45	Charles and Lillian Adams (Count 8) signed a cost-plus contract with usual provision for bank loan and refund, and paid $1,500 down.	P. Ex. Nos. 13, 14.
	Moore described ceramic tile as the "baby or invention of an architect in their employ," that the house would be finished by Christmas, and that they had high class workmen who were satisfied because of the splendid salaries they were receiving.	Lillian Adams.
10/45	Clarence Vezey, who had represented a labor organization and who had dealt with labor-employees for Henderson, was hired to take care of labor relations.	Clarence Vezey.

10/17/45	Mr. A. L. Lund cashed the check drawn by Henderson for $100 dated October 15th.	D. Ex. No. L.
10/16/45	Inspector A. F. Rahlves sent an interoffice memo to L. F. Erbs: "I had Mr. F. W. Henderson of The Bay Pacific Company in the office this A. M., in a complaint filed by Mr. George Sims * * * I took the matter up of Mrs. Marie Lund and there appears to be no grounds for a complaint."	D. Ex. No. Y.
10/45	Jewett Ivey called up an agency in Oakland and upon its recommendation called off proposed subdividing of his Alameda property by Bay Pacific Co.	Jewett Ivey.
10/16/45	Harry and Virginia Howard signed a cost-plus contract to have a house built on their lot at Lafayette and paid $500 to be applied to the $1,500 down payment. (This was offered as evidence of similar offense.)	P. Ex. Nos. 80, 81.
10/18/45	A. J. Clancy, manager, Painting & Decorating Contractors Ass'n of Alameda County, wrote to The Bay Pacific Company that the Better Business Bureau and the State Contractors' License Board had called their attention to The Bay Pacific Company's practices and requested The Bay Pacific Company's resignation from the association because of their unethical practices.	D. Ex. No. N.
10/45	Douglas Miller worked on plans for George Sims, Roddicks, and Swifts and completed same. He received a purchase order before drawing plans. He was paid for his August and September work.	Douglas Miller.
10/21/45	Tracy Clark was given a copy of "Walls of Tomorrow" describing The Bay Pacific Corporation and stating: "In addition to its various lumber mills it also controls the manufacture of innumerable major items: artistic light fixtures, modern bathroom equipment, pottery adornments * * *" Henderson testified that this was the first draft of the pamphlet to be used to sell the Corporation, starting October 15th. (Ads were already set up: D. Ex. No. G, R.T. 877.)	P. Ex. No. 56. Henderson.
10/23/45	Mr. Bass (Count 11) paid The Bay Pacific Co. $1,000. (Contract later surrendered.) Earlier in October, Bass had been told about the Ivey subdivision. Gamble told him they were able to secure lumber, had their own lumbermills, and had the ability of getting other building supplies.	P. Ex. No. 44. A. L. Bass.
10/24/45	R. H. Hilken (Count 11) paid the balance of $1,800 on his down payment of $2,000.	P. Ex. No. 43.
10/45	Henderson made out a check for $2,500 as a refund to Robert M. Wilson, postdated for October 27, 1945. It was stamped "Account closed." When Wilson received this check he gave back his contract. Moore told them that the company bought direct from manufacturers, that they had two carloads of bathroom supplies rolling, and that lumber would be forthcoming from their own mills in great volume.	P. Ex. No. 38. Robert Wilson.
10/26/45	Hertel, for Better Business Bureau, wrote the State Division of Corporations about the complaints and refunds made and stated: "We have been told that Hen-	D. Ex. No. Z–2.

	derson has used some of this money as a down payment on contracts for the purchase of certain lumber or their output, that he is anxious to sell stock under his permit to pay off dissatisfied customers who claim that they were induced to sign contracts through misrepresentation and to complete his contracts with the lumber mills."	
10/27/45	Henderson gave Norman V. Hamstad a promissory note payable seven days after date in exchange for a post-dated check previously given when he gave up his contract. He never collected the $3,000 Henderson promised to pay. Moore had told Hamstad they had seasoned lumber, two carloads of plumbing goods, their own workmen, and that they would be in their house by Christmas.	P. Ex. No. 21. Norman Hamstad.
10/27/45	Fred Linderman, part owner of a lumbermill at Weott, Humbolt County, wanted Henderson to reconstruct his mill which was burned June 1st, and signed a contract under which Henderson advanced $15,000 evidenced by a promissory note in exchange for a mortgage and lumber at current O. P. A. prices.	Fred Linderman. P. Ex. No. 60.
10/29/45	Everett L. Morgan gave a check for $400 (Count 7) and Albert L. Morgan gave a check for $600, and their father, J. O. Morgan, gave a check for $500 as a down payment of $1,500 for a family home. The contract contains the usual bank loan provision.	P. Ex. Nos. 32, 33, 34, 35.
10/31/45	Better Business Bureau of Sacramento wrote to Oakland Bureau that they had received the Oakland Bureau's Bulletin entitled "Blue Sky Construction Co.," and wanted the name of the company.	D. Ex. No. Z-6.
11/2/45	Hertel of the Oakland Bureau wrote the Sacramento Bureau that the bulletin referred to The Bay Pacific Co., giving the addresses of its three offices.	D. Ex. No. Z-7.
11/2/45	Vincent and Josephine Aiuto (similar offense) paid $1,000 and signed a cost-plus contract stating that a parcel of land will be purchased and bank loan obtained. Moore signed a receipt for $1,000. Moore told them that they were a big company with their own lumbermills, electricians and pipe men.	P. Ex. Nos. 89, 90. V. J. Aiuto.
11/3/45	Hertel of Better Business Bureau wrote Ralph E. Hoyt that Bay Pacific Co. "represents the first of what might be called 'a post-war racket.'"	D. Ex. No. Z-3.
11/5/45	Ralph E. Hoyt answered Hertel by writing "I understand from your letter and the accompanying bulletin that it is your belief that Henderson is guilty of obtaining property by false pretenses. I would appreciate your furnishing me with the names and addresses of any persons who can furnish evidence concerning this matter."	D. Ex. No. Z-4.
11/6/45	Harry Howard (similar offense) paid $1,000 balance on the down payment of his contract.	P. Ex. No. 82.
11/7/45	Hertel wrote Hoyt "with reference to The Bay Pacific * * * the Bunco Detail of the Oakland Police Department have complete information on the subject together with names of victims."	D. Ex. No. Z-5.

11/15/45	Miller completed Hilken and Hickman plans and sketches for Pearl, Barns, Adams jobs.	Douglas Miller.
11/45	The Roddicks received a check for $1,000 postdated for November 12, 1945, which was not paid.	P. Ex. No. 17.
11/45	Refund check dated November 13, 1945, for $1,000 to order of Alsedaise Ozelle Bass signed "F. W. Henderson," stamped "Refer to Maker." Bass surrendered his contract when he received this check.	P. Ex. No. 45. A. O. Bass.
11/45	Martin, who owned a half interest in the Weott mill—the subject of the agreement with Linderman—died. It was on Firestone's statement of Martin's ability that Henderson agreed to advance $15,000.	Henderson.
11/19/45	Henderson gave his promissory note for $1,000 with the balance of $1.50 per 1,000 board feet of lumber as consideration for the Weott mill.	P. Ex. No. 62.
11/45	Barnes received five postdated checks totaling $7,000 in return for the $7,000 he had paid. He was unable to cash any of the five checks.	P. Ex. Nos. 8, 9, 10, 11, 12. Barnes.
11/45	Delylia Hickman (Count 6) paid $500 on her contract.	P. Ex. No. 26.
11/21/45	Gustav Lund (Count 11) paid $1,000 to Bay Pacific after seeing a classified ad.	P. Ex. No. 46. G. J. Lund.
11/21/45	Application for a building permit for Delylia Hickman accompanied by Henderson's check for $35 which the bank stamped "Account closed."	P. Ex. Nos. 39, 40.
11/21/45	Charles Kelso (similar offense) signed a contract providing for the completion of construction by April 1, 1946. He paid $500, none of which was refunded. Moore told him the company owned Claremont lots.	P. Ex. No. 88. Charles Kelso.
11/23/45	Henderson procured two contracts for lumber, one with B. & O. Lumber Co., and the other with Jacklin & Wilson which provided "That upon the shipment of lumber * * * [Bay Pacific] shall, immediately upon receipt thereof, advance sufficient money to the second party for the further purchase of logs to replace those used in the manufacture of the lumber in said shipment."	D. Ex. Nos. H, I.
11/25/45	A classified ad appeared in the Oakland Tribune: "Building—will design, build the home of your dreams on your lot; we furnish architectural plans, designs and assistance in obtaining lot. TEmplebar 7521."	P. Ex. No. 22.
Late in 11/45	Creditors' meeting was held at which Henderson told those who wanted refunds that some people were interested in putting him out of business. (Moore contends that he was not present, but that he heard about the meeting and that this was the first time that he learned of the true financial condition of The Bay Pacific Co.)	People's witnesses.
11/28/45	Clarence Lee Dong induced John C. Tau (similar offense) to sign a contract for the purchase of a lot in the Claremont Heights property. Tau paid $2,100.	P. Ex. No. 87.
12/3/45	Joseph Kenney discussed possibility of organizing construction.	Joseph Kenney.
12/5/45	Bay Pacific's note to Linderman was canceled.	P. Ex. No. 62.
12/5/45	Moore's contract with the Bay Pacific Corporation was drawn up. It provides "that no salary shall be paid * * * for his services hereunder, the total compensa-	D. Ex. No. S.

	tion for such services being the commissions * * * provided, however, that such commissions shall be finally determined upon the actual completion of each unit."	
12/45	Postdated checks were given as refunds to A. L. Morgan and Gustav Lund. These were not honored.	P. Ex. Nos. 36, 37.
12/45	George Threlkeld drew plans for taking over construction of the houses under contract after determining that there was at least $22,725 uncollected profit in them.	D. Ex. No. O. George Threlkeld.
12/18/45	Hertel of Better Business Bureau wrote Deputy D. A. Arthur Sherry about another complaint against The Bay Pacific.	D. Ex. No. Z–8.
1/3/46	Joseph Kenney's crew stopped work when the D. A. took over The Bay Pacific.	Joseph Kenney.
1/9/46	Hertel received a letter from Contractors' License Board stating that a thorough investigation was being made in connection with Bay Pacific Corporation's application for a license.	D. Ex. No. Z–9.

There was considerable evidence introduced as to the hopeless financial condition of the company. It is quite apparent that from the very first the company had insufficient capital, and that its financial condition grew steadily worse until the inevitable collapse.

Sufficiency of the Evidence on Ten Grand Theft Counts as to Henderson.

A reading of the record demonstrates that Henderson directly and indirectly made numerous false statements to prospective customers to induce them to make contracts with The Bay Pacific Company. Some 20 prospective persons, including those named as the victims in the first 10 counts of the indictment, testified as to these representations by which nearly $80,000 was secured from customers. Thus it was represented that The Bay Pacific Company had mills in the northern part of the state, and that all kinds of building materials were available through contracts and agencies that the defendants had with different plumbing, hardware and electrical dealers; that the company had an electrical agency; that the company made loans from banks in groups for its customers and thus got more favorable interest rates; that a particular type of tile had been invented by one of the employees, and the company had the right to its use; that the company had its own tile yard; that it had supplies of pre-war plumbing materials; that the company owned land in Berkeley and Albany for its lumber yard and warehouse site; that the company had on hand enough lumber to start construction at once and that they had plenty of kiln-dried lumber at Garberville; that the company owned the Claremont Heights property and the Masonic Avenue property; that the company had carloads of plumbing material available; that the company was constructing 100 houses. Various representations, all false, were made to various persons and organizations to the effect that the company was a responsible firm with substantial assets. The evidence shows that neither the company nor Henderson ever owned any property, and that it had no substantial financial resources. Henderson argues that the various representations were true. It is a fact that as to most of them some deal was pending by which Henderson hoped that the representation would come true. Thus the representation about owning lumber mills was based on the fact that deals were entered into with the Hobsons, Weott, Perry, Briceland and others in reference to the purchase of lumber and mills, but all these deals fell through. According to the evidence Henderson represented he had presently available all the lumber he needed and his own mills, when he knew that no mills were in fact in operation and that his interests therein were contingent. The representation that he had facilities available to dry kiln the lumber was false. While some discussion had been had with Tidewater

Company about securing their kilns, nothing was ever done about it. The representation that he had seasoned lumber to carry out the contracts was clearly an overstatement. The representations that he had his own lumber yards in Oakland and Albany were false. While he started to negotiate with the owners to buy, he never got title because of inability to make the down payments. Most of his representations about having plumbing materials presently available were false. The most that the evidence shows is that Henderson tried to negotiate the purchase of two carloads, but the deal never materialized. His representations that he had presently available all necessary electrical equipment was false. At most he had a deal with Dong to buy from Dong if and when Dong could get such appliances. The representation that he had lots on which to build was an overstatement. The most he had was an option to purchase. His representations that he maintained specialized crews of flooring men, electricians, plumbers and other craftsmen were overstatements. While he had some carpenters, painters and laborers in his employ he did not have any plumbing, electrical or flooring crews.

[1, 2] It is quite clear that if the evidence is considered, as we must consider it, in the strongest light in favor of the verdicts (People v. Matthew, 68 Cal.App. 95, 228 P. 417; People v. Rankin, 10 Cal. 2d 198, 74 P.2d 71; People v. Newland, 15 Cal.2d 678, 104 P.2d 778; People v. Kessler, 62 Cal.App.2d 817, 145 P.2d 656; People v. Buenaflore, 40 Cal.App.2d 713, 105 P.2d 621) it is ample to prove every element necessary to sustain the convictions on all 10 counts of grand theft. The court fully instructed on the elements of the offenses charged. The jury was amply justified in its findings.

Sufficiency of the Evidence on Ten Grand Theft Counts as to Moore.

[3, 4] There is merit in Moore's contention that as to his conviction under Counts 1, 3 and 7 of the indictment—the Swift, Roddick and Morgan counts—the evidence shows that he did not participate therein, the three transactions being handled entirely by Henderson. The State does not contend that the evidence shows that Moore participated in these three deals, but contents itself with the assertion that the case was tried on a conspiracy theory, and that the declarations of one conspirator made in furtherance of the conspiracy are binding on all conspirators, citing People v. Cook, 10 Cal.App.2d 54, 51 P.2d 169 and People v. Suter, 43 Cal.App.2d 444, 111 P.2d 23. It is true, of course, that in a prosecution for conspiracy the declarations of one conspirator made in furtherance of the conspiracy are binding on all, but that does not mean that where specific offenses are also charged, that the State does not have to prove against each defendant all of the elements of each offense. Here, in the challenged counts, Moore was charged with the grand theft of specific amounts of money secured from Swift, Roddick and Everett Morgan on specific days. If Henderson had testified that Moore assisted him in these deals the cited cases might be in point, but the evidence fails to show directly or inferentially that Moore participated in the slightest degree in these offenses. The conspiracy charged in Count 11 is of no importance here because it charged as overt acts entirely different transactions. The convictions under the three counts must be reversed.

As to the other seven counts of grand theft, Moore vigorously contends that, although he made the various representations appearing in the record to the persons named in the various counts, and even if the representations were false, the evidence shows that he made them in good faith in reliance on information given him by Henderson and others in his employ and upon whom he had a right to rely. In other words, it is urged that there is no evidence as to the basic element of intent to defraud.

[5, 6] There can be no doubt that the record demonstrates that Moore was not nearly as morally reprehensible as was Henderson. On the other hand, Moore did make many false representations. In reliance on them the persons named in the seven counts under discussion parted with their money. Whether Moore made these representations in good faith or whether he made them knowing they were false,

or in reckless disregard of the truth and without information justifying the belief, were questions for the jury. Intent cannot always be proved by direct evidence. Many times it has to be determined from a consideration of all the circumstances surrounding the doing of an act. Certainly the jury was justified in finding that one who was so closely connected with the company must have known that many of his representations were false. This being so, this court cannot disturb the verdicts. (People v. Newland, 15 Cal.2d 678, 104 P.2d 778; People v. Kessler, 62 Cal.App. 2d 817, 145 P.2d 656; People v. Jones, 61 Cal.App.2d 608, 143 P.2d 726.) An intention to defraud is an essential element of the charged offenses, but such intention is inferable from all the facts of the case and need not be substantively proved. (2 Wharton's Criminal Law, § 1450, p. 1739; Miller on Criminal Law, pp. 382–389; May's Criminal Law (3d Ed.), pp. 299–312.)

Sufficiency of the Evidence as to Both Appellants on the Conspiracy Count.

[7] The essence of this charge is that Henderson and Moore conspired to defraud by making false promises with the fraudulent intent not to perform them. Once it is determined, as it already has been determined in connection with the grand theft counts, that both appellants in connection with the business of the company made the false representations charged, the fact that they acted in concert is proved by both direct and inferential evidence. What was said in People v. Yant, 26 Cal.App.2d 725, 737, 80 P.2d 506, 511, is applicable to the present record: "It is not often that the direct fact of an unlawful agreement which is the essence of a conspiracy can be proved otherwise than by the establishment of independent facts bearing upon the common design; and the question as to the existence of the conspiracy being one of fact, it is sufficient if the circumstances proved satisfy the jury, leaving the weight and sufficiency of the evidence to the triers of the questions of fact." See, also, People v. Sampsell, 104 Cal.App. 431, 286 P. 434; Johnstone v. Morris, 210 Cal. 580, 292 P. 970; Revert v. Hesse, 184 Cal. 295, 193 P. 943; Campbell v. Birch, 19 Cal.2d 778, 122 P.2d 902; People v. Kauffman, 152 Cal. 331, 92 P. 861.

[8] The real question presented is whether the false promises were made with the fraudulent intent not to perform them. Henderson urges that had he not been interfered with he would have fulfilled his basic promises. His argument amounts to the contention that the proof of his intent not to perform rests on circumstantial evidence, and he invokes the rule that such evidence will sustain a conviction only where the circumstances not only are consistent with guilt but are inconsistent with every reasonable hypothesis of innocence. The jury was so instructed. So far as an appellate court is concerned, we think the evidence supports the implied finding of fraudulent intent, and, that being so, the contention now under consideration is without merit.

[9] Moore vigorously contends that he was not even in the employ of the company on July 25, 1945, the date the conspiracy is alleged to have started. The evidence does show that he was in Oakland conferring with Henderson on July 23 and 24, 1945; that he then returned to Tacoma; that he came back to Oakland on August 7, 1945, and became salesmanager on August 26, 1945. Whether he actually started to conspire with Henderson on the 25th is immaterial. (State of California v. Day, 76 Cal.App.2d 536, 173 P.2d 399.) As long as there is active cooperation, the period when each defendant enters the conspiracy is immaterial. (2 Wharton's Criminal Law, § 1608, p. 1865.)

Moore, like Henderson, urges that there was no intent to defraud. What was said as to Henderson's like contention is equally applicable here. All of the problems presented as to the conspiracy count were jury questions. Its findings are supported and cannot be disturbed.

Alleged Errors of Law.

1. Evidence of other offenses.

[10] During the trial the court admitted evidence of sales and representations to others than those mentioned in the indictment. Both appellants recognize the rule that evidence of other acts of a similar

nature may be admitted, when not too remote, to prove a material fact or where they tend to show motive, scheme, plan or system. (People v. Nakis, 184 Cal. 105, 193 P. 92; People v. Kynette, 15 Cal.2d 731, 104 P.2d 794; People v. Hatch, 163 Cal. 368, 125 P. 907; People v. Hennessey, 201 Cal. 568, 258 P. 49.) An examination of the record as to the sales made to Harry and Virginia Howard, George and Tena Gatliff, John Tau, Mary Lund, Charles Kelso, and Vincent Aiuto shows that they fall well within the realm of admissibility.

[11] The facts in reference to these sales were introduced seriatim. Counsel for Henderson wanted to know if he had to object separately as to each one. The trial judge stated: "Maybe counsel will stipulate you will have these objections to similar offenses." There then followed a colloquy between Henderson's counsel, the Court and the deputy district attorney over the question, during which all of them used the expression "similar offenses," or described the transactions in question as "offenses" several times. Moore complains of this use of the word "offenses" and urges that declaring the testimony is a "similar offense" invades the province of the jury, that is, that it was for the jury to decide whether the transactions were offenses and whether they were similar offenses. This may be true, and the use of the term "offenses" was perhaps unfortunate, but it could not possibly have been prejudicial. The jury was fully, fairly and completely instructed on its proper functions and could not possibly have been misled by this challenged colloquy.

[12] Henderson complains of the introduction of many checks which were postdated and which were not paid by the banks on which they were drawn. The record shows that Henderson's counsel stipulated to the introduction of the various checks which were offered to establish the facts alleged in the indictment. The checks in the "similar offense" category were merely cumulative. The objection is without merit.

2. Introduction of pamphlet, "Walls of Tomorrow."

[13] Appellant Moore contends that error was committed in admitting into evidence this exhibit, a pamphlet describing the activities of the corporation. This pamphlet was introduced while Tracy Clark, who had been employed to sell real estate for the company, was on the stand. He testified that Henderson gave him the pamphlet in October, 1945, and told him that it "was the text of, or copy to be used in getting out some advertising * * * [for the] Bay Pacific Company's program." Moore urges that the document referred only to the activities of the corporation which never actively engaged in business, that it was never exhibited to prospective customers, and that it was a mere communication between employer and employee. It will be noted that Clark testified that the pamphlet was to be used as a text for advertising for the company as distinguished from the corporation. Moreover, it is a reasonable inference that Henderson expected Clark to read the document and to use its representations in his selling campaign. At any rate, the admission of this document could not possibly have been prejudicial. The representations contained therein, although couched in quite flowery language, had been testified to by a host of witnesses. At most it was merely cumulative.

Alleged Coercion by the Court.

[14] The jury consisted of 10 women and 2 men. The case had taken almost three weeks to try. The jury commenced its deliberations at 11:45 a.m. At 4:47 p.m. of the same day the jury returned to the courtroom and requested that a certain portion of the transcript be read. After this was done the trial judge told the jury that: "This case has taken a long time to try, and if you don't reach a verdict, say, by 9:30 or 10:00 o'clock tonight, I plan to lock you up. So, as soon as it becomes apparent that you are not going to reach a verdict on all counts tonight, by that time, say, will you let us know so we can dispatch some deputies around to your various homes to get the things you will need." The jury returned with its verdict at 5:58 p.m. Appellant Moore urges that the necessary effect of this statement by the court was to coerce the jury into reaching a verdict. In this connection he relies on the

affidavits of two jurors, one who was by stipulation excused after this statement was made because she stated she was ill, and counsel stipulated the alternate could be substituted, and one by one of the jurors, who avers that she heard one of the women jurors state that she did not want to stay overnight and wanted to go home. The sick juror averred, in effect, that she declared she was ill because she wanted to go home. Aside from the elementary rule of law that a juror is not permitted in this fashion to impeach his verdict it is quite obvious that what the trial judge said was not said for the purpose of coercion, but was said for the purpose of serving the convenience of the jury. Here was a case where about 2,000 pages of evidence were introduced. There were 11 counts against each defendant. Obviously, had the jury not agreed prior to 9:00 or 10:00 p.m. it would have been most proper to hold them overnight to see if agreement could not be reached. But with 12 jurors and several alternates this would mean sending a bailiff or deputy sheriff to quite a number of homes to notify relatives and to secure articles for the convenience of the jurors. The trial judge is to be commended rather than reproved for his consideration.

Alleged Misconduct of District Attorney.

[15] Henderson charges that the district attorney was guilty of misconduct in several respects. He first complains of a reference by the deputy district attorney to the possibility as to whether a debenture issued by Henderson as consideration for the Hobson contract violated the corporate securities act. The record shows not only that Henderson's counsel failed to object or request that the statement be stricken, but that the statement was made in direct response to a question of Henderson's counsel directed to the prosecutor. While it would have been improper to have charged Henderson on this trial with a violation of the corporate securities act, here the error of which he complains was not only invited but specifically requested by Henderson's counsel. Moreover, the debenture in question was made part of the record upon the consent of Henderson's counsel. Under such circumstances Henderson is in no legal position to complain. People v. Page, 28 Cal.App.2d 642, 83 P.2d 77; People v. Ralls, 21 Cal.App.2d 674, 70 P.2d 265.

[16] Henderson also objects to certain questions asked him on cross-examination which indicated he had failed to pay certain federal payroll taxes, and had been in difficulties with the Internal Revenue Department. An examination of the record discloses that this subject was directly inquired into by Henderson's counsel on direct examination. Where the defendant opens a subject on direct examination, it may be examined into on cross-examination, and defendant has no legal ground for complaint, particularly where, as here, he has failed to object to the questions asked on cross-examination. People v. Brown, 71 Cal.App. 181, 235 P. 72; People v. Medalgi, 94 Cal.App. 543, 271 P. 552.

Alleged Misconduct of the Jury.

[17] On the motion for new trial affidavits and counter-affidavits were filed by several of the juror, the alternates, and one by the attorney for appellants. Of the affidavits relied upon by appellants only one is of a juror who participated in the final determination of the case—that of Anita George. The affidavits of Lee B. Kidwell and of Mrs. Minnie Taylor show that although they were originally selected as jurors they were later excused and alternates selected in their places. As to these affidavits, at least as to matters not occurring while they were regular jurors, and as to the affidavit of the attorney, they do not fall within the rule that jurors cannot, by affidavit, impeach their verdict, except to show that such verdict was reached by lot. People v. Galloway, 202 Cal. 81, 259 P. 332.

[18-21] The appellants assert that the affidavits show misconduct on the part of the jury in four respects:

1. It is alleged that the jury received evidence out of court. The affidavit of Mrs. Taylor avers that she heard juror Sheinberg state and argue that Henderson had "defrauded people in the East of a

lot of money and would defraud other people if they weren't convicted." There is no evidence in the record of this asserted fact. Penal Code, § 1181, subd. 2, provides that a new trial may be granted when the jury has received evidence out of court. The affidavit of the juror Sheinberg generally denies the facts averred by Mrs. Taylor. This conflict was for the trier of the facts.

2. It is urged the jury failed to follow the Court's instructions. Again the Taylor affidavit is relied upon. It is there averred that during the discussions in the jury room no effort was made to discuss the guilt or innocence of Moore and Henderson separately as the court had instructed. It is also averred that during the trial the affiant and jurors George, James and Kelly rode together and were heard by Taylor to state that they favored the prosecution from the beginning. The Court had, of course, instructed the jurors not to discuss the case during recess. These charges are generally denied by the juror Kelly. Inasmuch as Mrs. Taylor was excused before the verdicts were reached, she could not know what happened after she left. As to the alleged prejudice it is specifically denied by the juror Kelly. General discussion of the jurors during recess, while not to be approved, could not, as a matter of law, be prejudicial.

3. The jurors prejudged the case before the evidence was in. The affidavits of Kidwell and Taylor are particularly aimed, in this respect, at the juror Jurs. They aver that while these two affiants were still members of the jury, the juror Jurs opened a discussion with each of the affiants and indicated that he was convinced of the guilt of the appellants. This charge is specifically denied by the juror Jurs, and is generally denied in the affidavits of several of the other jurors. This conflict was for the trier of the fact.

4. That one of the jurors was coerced and intimidated. This is perhaps the most serious charge made. Its charge relates to the circumstances under which the juror Taylor was excused as a juror. The facts relied upon appear in the affidavit of Taylor and are corroborated by the juror George. It appears in these affidavits that Mrs. Taylor was regularly selected as a juror and participated as such all through the trial, and retired with the jurors to deliberate on the verdicts; that she alone of the jurors was in favor of acquittals for both appellants; that she remained adamant in this position, whereupon several of the jurors became very excited and sought to coerce and intimidate her by charging her with perjury on her voir dire examination; by accusing her of being friends of the appellants, etc. The record shows that the jury came into court and it was reported to the judge that Mrs. Taylor was too ill to continue the deliberations, whereupon the judge carefully interrogated her. He told her that if she just did not feel like assuming the responsibilities of a juror she could not be excused, but that she could if she were really ill. Mrs. Taylor replied that she was sick and might "pass out" at any time. She was excused. The affidavits of nearly all of the jurors, with the exception of the George affidavit, aver that no coercion or intimidation was practiced on Mrs. Taylor, and aver that she represented she was too ill to continue. This conflict was for the trier of the facts.

[22] In connection with all of these charges appellants urge that their affidavits were properly filed, and sustain the charges of misconduct, citing People v. Galloway, 202 Cal. 81, 259 P. 332. In that case certain affidavits alleging misconduct on the part of the jury were offered in support of the motion for a new trial, but, on objection of the district attorney, the trial court struck from the affidavits certain statements alleged to have been made by a juror prior to being sworn and other statements alleged to have been made subsequent to the rendition of the verdict. As one of several grounds of reversal the Supreme Court held that this was error, and that the trial court should have considered all affidavits of jurors as to statements made before and after the trial. But the court did not hold that because such affidavits should have been considered that the trial court was compelled to believe them, even if controverted. Here the affidavits were all filed and considered by

the trial court, and, after argument, the trial court denied the motions for new trials. It is elementary law that the decision of the trial court in denying a motion for a new trial after considering conflicting affidavits is final in the absence of a showing of abuse of discretion—in fact, one of the cases cited by appellants so holds—People v. Von Badenthal, 8 Cal.App.2d 404, 48 P.2d 82. (See, also, People v. Negra, 208 Cal. 64, 280 P. 354; People v. Ross, 89 Cal.App. 132, 264 P. 314; People v. Maggio, 90 Cal.App. 683, 266 P. 813; People v. Sotelo, 102 Cal.App. 688, 283 P. 388.) Thus, even if the affidavits of Taylor and Kidwell were properly considered as to facts occurring while they were jurors (a point we do not decide) since they were filed and considered and controverted, the finding of the trial court cannot be disturbed.

The judgment and order denying the new trial as to Henderson are affirmed; the judgment and order denying the new trial as to appellant Moore are reversed as to Counts 1, 3 and 7, but as to the other eight counts are affirmed.

WARD and BRAY, JJ., concur.

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79 Cal.App.2d 284

PEOPLE v. CAPE.

Cr. 580.

District Court of Appeal, Fourth District, California.

April 21, 1947.

Arson 🔑37(1)

Evidence sustained conviction of arson.

Appeal from Superior Court, Fresno County; Dan F. Conway, Judge.

J. C. Cape was convicted of arson, and he appeals.

Affirmed.

Tom Okawara, of Fresno, for appellant.

James M. Thuesen, Dist. Atty., and N. Wendell Hansen, Deputy Dist. Atty., both of Fresno, for respondent.

BARNARD, Presiding Justice.

On the evening of May 10, 1946, a fire occurred in the plant of the Roeding Fig & Olive Company in Fresno, causing a considerable amount of damage. The defendant was charged with the crime of arson on the theory that he started this fire. Having been found guilty by a jury and sentenced to imprisonment, he has appealed from the judgment and from an order denying his motion for a new trial.

There is little dispute as to the main facts although the appellant has denied at all times that he started this fire. His sole contention on this appeal is that the evidence is not sufficient to sustain the verdict and judgment. While it is admitted that he was found at the scene of the fire, it is argued that there is no evidence to show his participation therein and, further, that the evidence discloses that he was so drunk at the time that he could not have had the necessary intent.

The Roeding plant, where the fire occurred, consists of a number of buildings, all within an enclosure surrounded by a fence. The California Packing Corporation's plant adjoins it on the north. About twenty minutes before the fire alarm was turned in two witnesses observed the appellant walking along the platform at the California Packing Corporation's plant. They saw him get up on a machine standing on this platform, climb from there over a fence topped by strands of barbed wire, and jump down into the yard of the Roeding plant. A few minutes later he was seen by the night watchman inside one of the buildings of this plant. The doors of this building were all locked. Among other things, there was a row of fumigating rooms in this building, which were about twelve feet high and built against the outside wall of the building. There was an open space between the ceilings of these rooms and the roof of the building, in which a quantity of paper, old lumber and cartons were stored. There was a ladder reaching from the floor of the building to the top of these rooms, giving access to this space. At the time in question, because of certain repairs being made, a section of the outside wall had been removed near the top and slightly to one side of these fumigating rooms, leaving a hole which was about twelve feet from the ground on the outside. There was a scaffolding which made it possible to enter the building through this hole and thus reach the top of these fumigating rooms. The only reasonable inference from the evidence is that the appellant entered the building in this manner.

The fire alarm was turned in at 6:53 P. M. on this evening by people on the outside who saw the smoke. Shortly before that, at ten minutes to seven, the watchman in this building saw the appellant come down the ladder from the top of these fumigating rooms. When he first saw him, the appellant was just starting down this ladder. To his questions as to what he was doing there, the appellant replied: "I took little sleep up there." The watchman took the appellant into the office and called the police. Shortly thereafter, the watchman saw smoke and then observed the fire. The first fire was "right on top of the fumigating room—the place where he was coming down from."

The fire marshal arrived three minutes after the alarm was turned in, and saw the appellant at once. He testified that he asked the appellant why he had set fire to the plant and "he didn't make any answer at all, merely shrugged his shoulders." Half an hour later, at a fire department office, this witness asked the appellant what he was doing there and he denied that he had been there at all. When asked why his shirt was so dirty he said that while coming to town with his brother-in-law they had had car trouble and he got his shirt dirty while fixing the motor. This brother-in-law stated that they had no car trouble while coming to town. For several hours that evening the appellant was questioned by the fire marshal, an inspector for the Board of Fire Underwriters, the district attorney, and others. To these officers the appellant told a number of varying and fantastic stories. He first said he met a couple of men who took him to a hotel room where they offered to pay him $300 to go over and set fire to the Roeding plant; that when he refused to do this they beat him up; and that, when he came to, he found the hotel on fire and he barely escaped with his life by stumbling downstairs. He then told of meeting a man in a bar who offered him $200 if he would burn this packing house and when he refused the man struck him and gave him a black eye. Incidentally, he had a black eye when arrested. He then told a number of stories as to where he had been on that day. He then said that he had become sleepy and gone to a hotel; that he climbed the fence in order to go in the back way and get into the lobby of the hotel; that the clerk took him upstairs to see if the room was satisfactory; that while he was there another man came in and offered to give him $300 to burn the hotel; that when he refused he was struck in the eye and knocked down; and that when he awoke the place was afire. Later he said he remembered climbing over the fence to go to sleep but that he was not sure whether it was a hotel or a packing house, and that when he woke up the place was afire.

A few months before this fire the appellant pleaded guilty to manslaughter, having killed a man while driving an automobile while under the influence of liquor. He was given probation, one of the conditions being that he let liquor alone, and not frequent places where it is sold. While being questioned on the evening of the fire he said he would tell the truth to the probation officer if he was called. The probation officer was called and was allowed to talk to him privately. To the probation officer he told several different stories about being offered $300 to start fires in rooming houses and seeing other men start such fires. Later that night, a statement was taken down by a shorthand reporter, the questions being asked of the appellant by the district attorney. This statement covers twelve pages of the transcript. It is mainly significant in that the appellant freely answered a large number of questions which could have no important bearing on this case and refused to answer practically all questions with respect to his acts or conduct having any relation to this fire. He even refused to answer the question as to whether or not he had started this fire. Although he was clearly relying more upon his own ability and cleverness than upon the truth and his innocence, he handled himself throughout the taking of this statement with an unusually high degree of ability. As one witness who was present on that occasion said: "His attitude was that of a sea lawyer; he knew more about the law than the district attorney."

On the next day, after the fire, the officers took the appellant to the Roeding plant. He admitted climbing a fence into the grounds and when shown the ladder to the top of the fumigators admitted that that was the ladder he climbed down, and that that was where the watchman "grabbed him." He then told the officers "that he was just drunk and didn't know what happened." In several conversations over the next two or three days he repeated some of the stories above set forth.

The appellant took the stand at the trial. He testified that on the afternoon preceding the fire he was drinking, that he drank from 20 to 24 "beers," and that each time he drank beer he also took a drink of whiskey. He then said he remembered walking along the California Packing platform and climbing over this fence into the grounds of the Roeding plant, that he went in there for a purpose private to himself, and that he remembered being over by one of the buildings. When asked if he went inside a building he replied: "When I was around in this yard I just kind of blacked out. I got there. Next that I remember I was inside the packing shed." He then testified that when he found himself inside the building he walked down a hallway trying to get out of the place; that he heard some men talking and went back in the hallway; that he was standing by this ladder when the night watchman "come up and got me"; that he did not recall climbing up any scaffolding and crawling through an opening into the space above the fumigating room; that he did not recall climbing down a ladder just before the watchman found him; and that he was just standing at the foot of the ladder when the watchman came. When asked whether he had been up over the fumigating room, he replied: "Not that I know of." He then said that the next thing he knew he was in a room at the city hall; that he did not remember having any conversation with the district attorney or other officers that night; and that he did not remember being taken to jail. The story told by the appellant on the stand was quite different from any of the stories he had previously told to the officers. On cross examination, he was asked whether he had ever told any of the officers, either that night or afterwards, the story he told on the stand. He replied that he had not. When he was asked "Why didn't you?" he replied: "Well, just the very thing I told you there, you wanted me to plead guilty. And in order to get these sentences to run concurrently I refused to do it."

The appellant's main contention is that he was so drunk that night that he could not know whether or not he started this fire; that it follows that he could not have had the necessary criminal intent; and that the fantastic stories told by him that night were the ramblings of a drunken mind and, therefore, not of a character to show a consciousness of guilt. However, in attempting to support this theory on the witness stand the appellant overdid the matter. If it could be assumed that a man could consume the amount of liquor the appellant said he did within the time stated, it would be obviously impossible for such a man immediately thereafter to climb this fence, to climb the scaffold, to get safely down the ladder, and then to be in such possession of his faculties as is disclosed by this record. While there is evidence that after his apprehension and while he was being questioned the appellant had a smell of liquor about him, with some evidence from which drunkenness could be inferred, the great preponderance of the evidence is that he did not appear so drunk as to stagger or to be incoherent of speech, that he was able to talk intelligently before and immediately after the fire was discovered, and that he did so thereafter when it suited his purpose. The wild tales that he told that night indicate an imaginative mind and a design to conceal the truth, rather than the drunken stupor of one who does not know what he is doing or saying. It is not without significance that even while fabricating these stories, with the apparent purpose of covering up or avoiding the necessity of other explanation for his activities and for his presence at the spot where the fire started, his mind was so taken up with the matter of the intentional starting of fires that he made arson the central theme of all of his stories. A wide distinction is clearly observable between these stories and his conversation shortly after he was arrested, at times while he was being questioned, and especially at the time his statement was taken down by a shorthand reporter. According to his contention he remained so drunk all of that evening that he did not know what he was doing and he testified that he could not even remember that he was asked questions by the district attorney in the presence of a reporter, and could not remember being later taken to the jail. On the other hand, that statement discloses that the appellant then had a very keen mind and that he knew exactly what he was saying and why he was saying it. It very clearly appears that while that statement was being taken the appellant was not drunk enough to interfere with the very active and skillful use of his mental faculties. Moreover, he was not drunk the next few days while he was in jail, nor while he testified as a witness in the trial of this action.

It was rather clearly shown that this fire was of incendiary origin. It clearly appears that it did not start from electric wires, which were in metal conduits. Spontaneous combustion was eliminated as a cause. The only reasonable inference from the evidence is that it was started by the appellant. While the question of his criminal intent in doing so rests entirely upon circumstantial evidence that evidence is quite strong. The appellant had not only affected entrance into this locked building at night but he was seen coming from within a few feet of where the fire started, just three minutes before the fire was observed. This spot is one which could hardly have been approached by mistake. The attempted explanations for his presence at the place the fire started at about the time it must have started, both that night and later, were far from satisfactory. It was clearly established that some of appellant's statements on material matters were false. Some things he at first denied were later admitted. His testimony at the trial was such that it was obviously impossible for the jury to believe it. His statements and attitude on the witness stand, and when he was being questioned on the night of the fire before a court reporter, are not those which would naturally be expected from an innocent man. It rather clearly appears that he was greatly concerned on the night of the fire with the effect this matter might have on his previous release on probation. In view of this fact his statement on the witness stand, in reply to a question as to why he had not told the same story before, that he had refused to plead guilty "in order to get these sentences to run concurrently," is not only close to an admission of guilt, but it furnishes a more probable explanation of the reason for his fantastic stories than the one that he finally gave, that as a result of drink he "blacked out" during the critical few minutes in which the fire was started, and that he neither knew how he entered the building nor what he did there. The implied findings of the essential facts, including the criminal intent, are sufficiently supported by the evidence and by the inferences which may reasonably be drawn therefrom.

The judgment and order are affirmed.

MARKS and GRIFFIN, JJ., concur.

29 Cal.2d 847

HATFIELD v. SUPERIOR COURT OF LOS ANGELES COUNTY.

L. A. 19895.

Supreme Court of California, in Bank.
March 28, 1947.

Mandamus ⟹22

Where will contestants voluntarily dismissed their contest before probate after proponent had filed an answer praying for admission of will to probate, and will was admitted to probate, proponent was not aggrieved by dismissal of the contest before probate, so as to be entitled to mandamus to compel the court to proceed with the trial of the contest before probate upon contestants thereafter filing a contest after probate to revoke probate of the will. Code Civ.Proc. § 581, subd. 1.

◆

Proceeding in mandamus by Clarence Milton Hatfield to compel the Superior Court of Los Angeles County to proceed with a trial.

Writ denied.

George I. Devor, of Los Angeles, for petitioner.

Entenza & Gramer, John J. Craig, Harold W. Kennedy, County Counsel, and Douglas DeCoster, Deputy County Counsel, all of Los Angeles, for respondent.

CARTER, Justice.

Petitioner, the executor named in the will of Charlotte Gustava Sundberg, deceased, and a devisee thereunder, renounced his right to act as executor and the will was offered for probate by the California Trust Company, proponent. In a contest before probate, opposition to the probate on the grounds of incompetency, undue influence, and revocation by a subsequent will, was filed by certain heirs. The due execution of the will was not questioned. In his answer to the contest, petitioner did nothing more than deny the allegations of contestants in their opposition to the probate of the will. In his prayer he requested the dismissal of the contest and the admission of the will to probate. Four days before the date on which the contest had been set for trial, and again on the date of the trial, contestants filed with the clerk a voluntary dismissal of the contest. On February 11, 1946, the date set for trial, by reason of the dismissal, the trial court refused to proceed with the trial of the action. Following a hearing on February 11, 1946, and on March 14, 1946, the petition of California Trust Company to have the will admitted to probate was granted. On August 5, 1946, contestants filed a contest *after* probate to revoke the probate of the will, and petitioner answered that contest, making no reference to the previous contest and dismissal and alleging that the will was admitted to probate.

Petitioner now seeks by mandamus to compel the court to proceed with the trial of the contest before probate, asserting that contestants' voluntary dismissal was unavailing inasmuch as he had prayed for the admission of the will to probate in his answer in that contest, a procedure which he claims constituted a demand for affirmative relief within the meaning of subdivision 1 of section 581 of the Code of Civil Procedure.

No relief should be afforded under the foregoing circumstances. The "affirmative relief" sought by petitioner (the admission of the will to probate), if it be such, a question we do not decide, has been obtained. Petitioner is not in a position to claim that he is aggrieved and no justification appears for the issuance of a writ of mandamus.

The alternative writ of mandate is discharged and the petition for a peremptory writ is dismissed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

29 Cal.2d 863

JOHN P. MILLS ORGANIZATION, Inc., v. SHAWMUT CORPORATION et al.

L. A. 19933.

Supreme Court of California, in Bank.
April 22, 1947.

1. Execution 🔑73

A judgment creditor seeking to enforce his judgment more than five years after its entry must show, by affidavit, that he exercised reasonable diligence to enforce his judgment during statutory period in which he might have obtained a writ of execution as a matter of right. Code Civ.Proc. § 685.

2. Execution 🔑73

Whether judgment creditor seeking to enforce his judgment more than five years after its entry exercised reasonable diligence to enforce his judgment during statutory period in which he might have obtained a writ of execution as matter of right was for trial court to determine in its discretion, and its decision upon conflicting affidavits would not be disturbed. Code Civ.Proc. § 685.

3. Execution 🔑73

Refusal of judgment creditor's motion for execution more than five years after entry of the judgment was not an abuse of discretion, where judgment debtor's affidavit contradicted or cast doubt upon every material fact asserted by judgment creditor for purpose of showing that he had exercised reasonable diligence to enforce judgment during the statutory period. Code Civ.Proc. § 685.

4. Execution 🔑73

Even though judgment creditor may have satisfied court that he had proceeded with due diligence in his attempt to enforce his judgment during the statutory period, the court may still deny him its process if judgment debtor shows circumstances occurring subsequent to the five-year period upon which, in exercise of a sound discretion, it should conclude that creditor is not now entitled to collect his judgment. Code Civ.Proc. §§ 681, 685.

5. Execution 🔑73

Judgment debtor's reliance on assurance that judgment would not be enforced against him, failure to make any demand on him for payment of judgment, lapse of time and change in his position in relation to his principals, and prejudice resulting therefrom, showed circumstances occurring subsequent to statutory period for enforcing judgment which would authorize trial court, in its discretion, to deny creditor its process, even though creditor might have satisfied court that he had proceeded with due diligence to enforce his judgment during the statutory period. Code Civ.Proc. §§ 681, 685.

◆

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action on promissory notes by John P. Mills Organization, Inc., against Shawmut Corporation and others, wherein final judgment was entered against defendant corporation and a number of its stockholders. From an order denying plaintiff's motion for a writ of execution against George Cunningham, one of defendants' stockholders, more than five years after entry of the judgment, John P. Mills appeals.

Affirmed.

Prior opinion 171 P.2d 937.

A. G. Reily and W. R. Law, both of Los Angeles, for appellant.

I. Henry Harris, Jr., and Marvin Wellins, both of Los Angeles, for respondent.

GIBSON, Chief Justice.

Eighteen years after the entry of judgment, plaintiff moved for issuance of execution against defendant Cunningham under section 685 of the Code of Civil Procedure. The motion was supported by affidavits stating that since entry of the judgment the creditor and its agents, including skilled private investigators, had been persistent, extremely diligent, regular and unceasing in their efforts to locate assets subject to levy, but that none had been discovered until shortly before the motion. It was asserted that the debtors were "clever and learned in the art of covering assets," and that proceedings in aid of execution were not resorted to because of fear that such action would serve to notify the debtors that their acts of evasion should be more guarded.

In opposition to the motion, defendant filed an affidavit stating that the judgment was rendered against him and others as stockholders of a corporation in which he owned one share of stock and held title to 45,000 other shares solely as trustee. It is asserted by defendant that plaintiff's officer assured him that no effort would be made to collect the judgment against him, and he states that had he not received such assurance, he would have undertaken to collect the amount of his liability from his principals. Defendant is 80 years of age, and he claims that he will be seriously prejudiced if plaintiff is allowed to enforce the judgment against him at this late date, because he can no longer recall the identity of his principals, their whereabouts are unknown to him, and any action against them would be barred by the statute of limitations. Defendant further states that he never made any attempt to conceal his assets, that he has maintained a bank account since 1912, and has rented a safe deposit box since 1901, and ever since entry of the judgment he has had amounts on deposit in the account and cash and bonds in the safe deposit box which, if applied, would have substantially reduced the amount of the judgment against him.

Plaintiff has appealed from an order denying issuance of execution.

[1, 2] A judgment creditor seeking to enforce his judgment more than five years after its entry must show, by affidavit, that he exercised reasonable diligence to enforce his judgment during the statutory period in which he might have obtained a writ of execution as a matter of right. Butcher v. Brouwer, 21 Cal.2d 354, 132 P.2d 205; Beccuti v. Colombo Baking Co., 21 Cal.2d 360, 132 P.2d 207; Hatch v. Calkins, 21 Cal.2d 364, 132 P.2d 210. Whether he exercised such diligence is for the trial court to determine in its discretion, and its decision upon conflicting affidavits will not be disturbed. Beccuti v. Colombo Baking Co., supra; cf. Kraner v. Snow Mountain W. & P. Co., 203 Cal. 126, 127, 262 P. 1094.

[3] In the present case defendant's affidavit contradicted or cast doubt upon every material fact asserted by the judgment creditor. It disclosed that at all times defendant possessed assets, consisting of money in a bank account and money and bonds in a safe deposit box, which he made no attempt to conceal and which would have at least partially satisfied the judgment. No demand was ever made upon defendant for payment of the judgment and no effort was ever made by examination in supplementary proceedings to discover his assets. Under these circumstances it does not appear that the trial court abused its discretion in denying the motion.

[4, 5] There is a further reason why the order should be affirmed. We have held that "even though the creditor may have satisfied the court that he has proceeded with due diligence to enforce his judgment under section 681, the court may still deny him its process if the debtor shows circumstances occurring subsequent to the five-year period upon which, in the exercise of a sound discretion, it should conclude that he is not now entitled to collect his judgment." Butcher v. Brouwer, 21 Cal.2d 354, 358, 132 P.2d 205. Defendant's reliance on the assurance that the judgment would not be enforced against him, the failure to make any demand on him for payment of the judgment, the lapse of time and change in his position in relation to his principals, and the prejudice resulting therefrom, were sufficient to bring the case within this rule.

The order is affirmed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

79 Cal.App.2d 221

In re BERTH.

ROMAN et al. v. DORADO et al.

Civs. 15441, 15466.

District Court of Appeal, Second District, Division 1, California.

April 18, 1947.

1. Adoption ⟹13

The matter of adoption rests in sound discretion of trial court in the exercise of which information from all proper sources should be sought, and hence a formal contest of petition is not a prerequisite to the taking of testimony.

2. Adoption ⟹13

Court must make order for adoption only if satisfied that the interests of child will be promoted by the adoption. Civ. Code, § 227.

3. Adoption ⟹13, 15

Where two petitions for adoption of minor child were pending at the same time, trial court properly proceeded to decide each petition upon its merits in the order of their presentation to court and was not bound to hold in abeyance a decision on second petition until appeal from denial of first petition had been decided.

4. Adoption ⟹15

A clear case of abuse of discretion is required to authorize an appellate court to set aside an order of adoption.

5. Adoption ⟹15

Appellate court may not set aside order of adoption where record shows nothing reflecting upon persons to whom letters were awarded, even though all persons opposing granting of letters may likewise be fit and proper persons to whom adoption letters might be granted.

6. Adoption ⟹13

Granting petition of paternal aunt and godmother and her husband, 22 and 29 years of age, for adoption of 10 year old orphan girl and denying petition for adoption by couple in their middle 50's, who could not speak English with whom child had lived for several years, was not abuse of discretion, though all petitioners were qualified to adopt child and adoption by older couple whom child preferred was recommended by State Department of Social Welfare.

◆

Appeals from Superior Court, Los Angeles County; A. A. Scott, Judge.

Proceeding in the matter of the adoption of Jo Ann Berth, a minor. From an order denying the petition of Trinidad Roman and Rita Del Rio Roman for adoption of the minor and an order granting the petition of Romulo Dorado and Ida Alelaide Dorado, Trinidad Roman and Rita Del Rio Roman appeal.

Orders affirmed.

David C. Marcus, of Los Angeles, for appellants Trinidad Roman and Rita Del Rio Roman.

Derthick, Cusack & Ganahl, of Los Angeles, for respondents Romulo Dorado and Ida Adelaide Dorado.

DORAN Justice.

The record discloses that Jo Ann Berth, whose adoption is the subject of this appeal, was born in Los Angeles on January 2, 1936; that both mother and father of the minor are dead, and that on December 7, 1939 the father placed the child to live with the appellants Roman (no relation,) since which date Jo Ann has spent practically the entire time as a member of the Roman household. On July 6, 1940 the Romans filed a petition for adoption; on May 7, 1941 letters of guardianship were awarded to the Romans; on June 3, 1943 another petition for adoption was filed by the respondents Dorado, the child's aunt and uncle who had recently moved here from the East.

In reference to the original Roman petition for adoption, the State Department of Social Welfare reported favorably, recommending the adoption and stating that the "minor is a happy well-adjusted child, well cared for by petitioners who meet her every need". At the date of this report, May 1, 1944, Trinidad Roman was aged 53 years, and Rita Del Rio Roman, aged 55. The report further showed that the Romans were in good health, that Trinidad

Roman operated a small grocery store, that neither the husband nor the wife spoke English; that both parties were of good moral character, and maintained a suitable home.

Reports filed after investigation of the Dorado adoption petition disclose that these petitioners were of the age of 29 and 22 years respectively on January 17, 1946; that the Dorados owned their own home, that Romulo Dorado was gainfully employed; that the child had lived at the Dorado home for approximately two and one-half months only; that "petitioners' home appears to be adequate for their needs at this time. It is neat and clean and petitioners' own children appear to be receiving good care". No recommendation for or against adoption by the Dorados was made by the State Department of Social Welfare. At the hearing of the Dorado petition it appeared that Ida Dorado was the paternal aunt as well as the godmother of the child; that Mrs. Dorado and a sister has come from Massachusetts "for the specific purpose of looking after these children", (Jo Ann and a sister). According to the testimony of the parish priest, Jo Ann attended a Catholic school where "Her conduct has been perfect. * * * I have noticed that she was treated (by the Romans) as one of their own".

Both petitions asking for the adoption of Jo Ann Berth came on for hearing in the same department of Superior Court on January 21, 1946 but were heard separately. The Roman petition was first on the calendar, and after hearing the evidence the trial court denied such petition, saying: "I want it distinctly understood, however, it is no reflection whatsoever upon these very good people who have taken excellent care of the child". The court thereupon immediately proceeded to hear the Dorado petition, and upon conclusion of the proof ordered that the child be adopted by the Dorados. The reasons for making this order are stated by the trial court as follows: "I have this child's welfare at heart, and I want to see her grow up to be a good, decent American citizen. I think if these aunts were not here, I think the Romans could equally look after her, but here these younger people coming along, related to the girl by blood, and going a step farther, the petitioner here being the godmother of the child, it seems to me there is only one thing the court can do and that is to give custody of the child to Mr. and Mrs. Dorado". The Romans have filed appeals from the order granting the Dorado petition as well as from the court's order refusing to permit Mr. and Mrs. Roman to adopt Jo Ann.

The records indicate that the various parties and their respective attorneys, as well as the child, were all present at the separate hearings of the two petitions; that although no formal contest or objections were filed, each attorney participated to some extent in both hearings, without, however, cross-examining witnesses, or introducing evidence except that offered to support each separate petition. At the hearing of the Roman petition, the attorney for Mr. and Mrs. Dorado was, in fact, refused the right of cross-examination. At the conclusion of the Dorado hearing, the then counsel for the Romans seems to have contended that the trial court should not decide the Dorado matter until a proposed appeal from the Roman order had been decided, and that during that period Mr. and Mrs. Roman should retain custody of the child. This the court refused to sanction.

The question on appeal is stated in appellants' brief as follows: "In the event two petitions be pending at the same time to adopt the same child, are they to be considered adverse to each other and thereby be consolidated, or joined together and tried together, or must the court hear the petition filed first, separate and apart from the petition filed later, and make judgment in the first proceeding, and allow the time to appeal therefrom to elapse or if appeal be taken, to be finally determined before hearing and adjudging another petition for adoption of the same child?" The respondents' brief assets that appellants have presented two points: "First: that the court below had no jurisdiction to make its decree of adoption in case No. 15466 (the Dorado petition) because they (the Romans) still have the right of appeal in case No. 15441. (The Roman petition which was denied) * * * Second: * * * an abuse of discretion"

[1, 2] The appellants' brief states that "The only case petitioner has found in any jurisdiction in the United States with statutes similar to California's is—In re Bewley, 1916, 167 Cal. 8, 138 P. 689, 690, where appellant raises the question of a contest between two adoption petitioners, but the Court did not decide the question". In the Bewley case the court held that "There was no necessity for a formal contest of the petition * * * as a prerequisite to the taking of the testimony. The matter of adoption rests in the sound discretion of the court, and in the exercise of that discretion information from all proper sources should be sought * * *. No higher discretion than this is vested in a court. After all of the formalities prescribed by the statutes have been complied with, the court must make the order that the child shall thenceforth be treated as the child of the adopting petitioners only 'if satisfied that the interests of the child will be promoted by the adoption.' Civ.Code, § 227." This decision is obviously against and not for the appellants' contentions. That the law therein stated is correct, there can be no doubt.

[3] Nor is there any statutory provision concerning adoption which would justify the trial court in doing other than what was done in the instant case,—i. e., deciding each petition upon its merits in the order that such matters were presented to the court. Appellants' argument that the trial court should have held in abeyance a decision of the Dorado petition until an appeal from the adverse decision in the Roman case had been decided, is not fortified by anything in either statutory or case law. The suggestion, therefore, would be more appropriately presented to the legislative than to the judicial branch of the government.

All of the formalities prescribed by the statutes in reference to adoption of children appear to have been complied with; the trial court took the testimony of all parties and apparently made a searching examination of the facts as presented by the reports of the State Department of Social Welfare in each case. It is also apparent that the difficulty of choosing between two suitable and proper homes for the child was duly appreciated; as said by the trial judge, "these adoption cases are always bitter, particularly when we have people such as these people who, in good faith, have raised this child". Nor does the record disclose any indication that the child was, as suggested by appellants, "permitted to be bartered around as a chattel", but quite the contrary.

It is insisted by appellants that "There was indeed a great abuse of discretion * * * in taking this child away from the only persons who had afforded her a home, the loving care and attention of devoted foster-parents * * * The security afforded her by the protection of these people, the Romans, certainly outweighed any advantage that could be gleaned from the record * * * in behalf of the Dorados". The alleged abuse of discretion is further predicated upon the fact that the trial court did not follow the recommendation of the State Department of Social Welfare that adoption be granted to the Romans; and that the court disregarded the wishes of the child who stated, "I do not want to go with you folks", (the Dorados). The record would indicate that the trial court considered these matters which, however, were not necessarily controlling. And, as commented on in respondents' brief, "the court in rendering its decision took into account the age of this child and the age of the petitioners (Dorado) * * * more naturally suited * * * than the Romans who were in their middle fifties; that the Romans could not speak English and that they were of course no relation by blood", and that Mrs. Dorado was the child's aunt and godmother.

[4, 5] As has been said in Re Fahlman, 84 Cal.App. 248, 251, 257 P. 893, 894, and elsewhere, "it would require a very clear case of the abuse of the judicial discretion vested in the trial court to authorize an appellate court to set aside an order of adoption * * *. An appellate court is confined to the record, and when the record shows nothing reflecting upon the persons to whom the letters have been awarded, an appellate court cannot declare the determination of the trial court erroneous,

even though all the persons opposing the granting of letters may likewise be fit and proper persons to whom adoption letters might be granted". The Fahlman case was cited with approval in Re Hickson's Adoption, 40 Cal.App.2d 89, 93, 104 P.2d 411.

[6] Neither in appellants' brief nor in the record does anything appear to indicate an abuse of discretion in respect to the order of adoption granted on the Dorado petition, nor in reference to the denial of the Roman petition. Not only was the matter discretionary in nature, but as said in Re Bewley, 167 Cal. 8, 10, 138 P. 689, 690, "No higher discretion than this is vested in a court". Finding no abuse of this discretion, and no irregularity of procedure, the orders appealed from are and each of them is, affirmed.

YORK, P. J., and WHITE, J., concur.

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79 Cal.App.2d 332

KROPLIN v. HUSTON.

Civ. 7315.

District Court of Appeal, Third District, California.

April 24, 1947.

1. Appeal and error 🔑1060(1)

Where there was no evidence of bad faith in plaintiff's counsel and the questions were not objected to at the trial, asking prospective jurors on voir dire whether they owned stock or were financially interested in named insurance company or any other insurance company was not prejudicial error.

2. Trial 🔑108½

A party to an action is entitled to ask prospective jurors in good faith whether they are stockholders or financially interested in any casualty insurance company for the purpose of discovering the presence of bias or prejudice, if any exists in the minds of the jurors, which would disqualify them as fair and impartial jurors.

3. Appeal and error 🔑1060(1)

Where the defendant was called by plaintiff for examination and denied that immediately after the accident he admitted he was at fault or that he stated that he was insured and would take care of plaintiff's expenses, asking a witness, in good faith, for the purpose of impeaching the defendant, whether he had made such statements, was not prejudicial misconduct. Code Civ.Proc. § 2055.

4. Appeal and error 🔑1060(1)

Questions by plaintiff's counsel concerning insurance carried by defendant were immaterial and improper, but putting the questions did not constitute reversible error where the evidence called for was merely cumulative and the court had repeatedly instructed the jury to disregard the matter of insurance.

5. Pleading 🔑237(3, 6)

Where original complaint by plaintiff against defendant alleged that injuries were the result of willful misconduct of the defendant in the operation of automobile, permitting trial amendment in conformity with proof that the defendant was intoxicated was not an abuse of discretion. Vehicle Code, § 403.

6. Pleadings 🔑236(3)

The trial court has a sound discretion to allow amendments of pleadings during trial in furtherance of justice and to dispose of the case on its merits when the adverse party is not prejudiced thereby.

7. Pleadings 🔑238(1)

That new matter may have been known to applicant at the time of filing his original pleading is not sufficient ground for denying the right to amend.

8. Appeal and error 🔑1001(1)

Whether an operator of an automobile was intoxicated at time of accident, whether his intoxication was the cause of the injuries received by the guest, and whether guest had knowledge or by exercise of reasonable care should have known that the driver was intoxicated, are for the jury, with whose conclusion a reviewing court may not interfere where there is substantial evidence to support the findings. Vehicle Code, § 403.

9. Automobiles 🔑244(31, 36, 56), 245(24, 50, 87)

In action by guest against host for injuries resulting from automobile collision, whether host was intoxicated at time, whether his intoxication was proximate cause of the injuries received by guest, and whether guest knew or by the exercise of reasonable care should have known that host was intoxicated, were for jury whose verdict for guest was sustained by substantial evidence. Vehicle Code, § 403.

10. Trial 🔑252(8)

In action by guest against host for injuries resulting from automobile collision, where there was no evidence that guest knew that host was intoxicated, request for instruction that, even though jury determined that intoxication was proximate cause of injuries sustained by guest, if guest observed, or in exercise of ordinary care should have observed, that host was intoxicated but voluntarily continued to ride with him, she was guilty of contributory negligence, was properly refused. Vehicle Code, § 403.

11. Trial 🔑252(8)

Where the undisputed proof was that plaintiff had not been drinking and that plaintiff had never drunk, an instruction which charged jury that if they believed that plaintiff, through her drinking, had her faculties so dulled that she was unable to recognize intoxication in the defendant and that she would have recognized such intoxication had she been sober, she would be guilty of contributory negligence, etc., was properly refused. Vehicle Code, § 403.

12. Trial 🔑252(1)

It is not error to refuse to give a proposed instruction when there is no evidence to support theory upon which it is drawn.

13. Witnesses 🔑379(4), 397

Where witness on cross-examination testified that neither she nor the plaintiff had been drinking on the day of the accident, a statement signed by the witness that she and plaintiff had been drinking was admissible only to impeach the witness and not as proof of drinking by witness and plaintiff.

14. Evidence 🔑202
Witnesses 🔑379(1), 397

Evidence of extrajudicial statements by witness not a party to the action is not binding as admissions of the fact in controversy and is competent and admissible only as against the witness for impeachment purpose to discredit his testimony at the trial.

15. Appeal and error 🔑216(2), 1067

Where the instructions given were correct and only one instruction requested by defendant was refused and that instruction was patently erroneous and no further instructions were asked, and instructions given included question of contributory negligence, failure to instruct the jury more fully on the subject of contributory negligence was not reversible error, particularly where no proper instruction on that subject was offered by defendant.

Appeal from Superior Court, Napa County; Mervin C. Lernhart, Judge.

Action by Louella Kroplin against John R. Huston for damages sustained in automobile collision while riding with defendant as a guest. From a judgment for plaintiff for $12,500, the defendant appeals.

Judgment affirmed.

Coombs and Dumlap, of Napa, for appellant.

Francis H. Frisch and Daniel K. York, both of Napa, for respondent.

THOMPSON, Justice.

The defendant has appealed from a judgment of $12,500, which was rendered against him pursuant to the verdict of a jury, in a suit for personal injuries sustained by plaintiff, as the result of an automobile, in which she was riding as a guest, colliding with a tree by the side of the highway, when the defendant lost control of the vehicle on account of alleged intoxication and wilful misconduct. A motion for new trial was denied.

Neither the amount of the award nor the sufficiency of the evidence to support the judgment is challenged. The defendant, however, seeks a reversal of the judgment on the grounds that plaintiff's attorney was guilty of prejudicial misconduct in adducing evidence that the defendant was insured against automobile casualties, that the court erred in giving and refusing to give instructions to the jury, and that plaintiff was permitted to amend her complaint during the trial to conform to the evidence, so as to charge the defendant with intoxication as the proximate cause of the accident.

The plaintiff was fifty-six years of age. She is the mother of three adult children. She lived in Napa with her son William Kroplin. She spent the afternoon and evening of August 13, 1944, at the home of her friend, Mrs. Cox, in Napa. About 10:30 P. M. of that day Mrs. Kroplin prepared to return home. For that purpose she was about to telephone for a cab, when Mrs. Cox suggested that her neighbor, John Huston, would drive her home in his automobile. Mrs. Kroplin was not well acquainted with Mr. Huston, although he had once previously driven her home. He had just returned from a visit to the home of a friend in Napa County. Mrs. Cox called to him and asked him to take Mrs. Kroplin home. He soon appeared and consented to do so. Plaintiff accompanied him as a guest passenger. As they drove from the Cox premises in his Ford sedan, they met Olin Scott, a friend of Mr. Huston, but a stranger to Mrs. Kroplin. The defendant told him to get in and ride with them; that he was just taking Mrs. Kroplin home and would return in a few minutes. All three persons sat on the front seat. Mrs. Kroplin sat between the men. Huston drove the car.

There is evidence that Mr. Huston had been drinking and that he was then intoxicated. Mr. Scott testified that he, also, was then pretty drunk. Mrs. Kroplin testified that she had not observed and did not know that either of the men was under the influence of liquor. Mr. Huston was evidently in a great hurry and drove very rapidly. Both Mrs. Kroplin and Mr. Scott repeatedly warned the defendant not to drive so fast. As their automobile approached the intersection of Pueblo and Solano Avenues, it sideswiped the rear fender of an approaching machine. The defendant lost control of his vehicle and after the car traveled fifty or seventy-five feet further, it crashed into a eucalyptus tree by the side of the highway with such force as to imbed a front lamp in the tree. Huston was slightly injured, and Mrs. Kroplin sustained a fractured pelvis and other serious injuries. Donald Boerger, who drove the car which had been previously hit by Huston's machine, immediately returned to the scene of the accident. He testified that, from the appearance and conduct of Mr. Huston, "I knew he was under the influence of liquor." A traffic officer, who soon arrived at the scene of the accident, testified that he smelled alcohol on Huston's breath, and that he appeared to be intoxicated. An ambulance conveyed the plaintiff to a hospital where she was treated. She remained in a hospital for about eight months. Two other witnesses, who saw Huston at the hospital immediately after the accident, also testified that he then appeared to be intoxicated.

The complaint originally alleged that plaintiff's injuries were sustained as the result of wilful misconduct of the defendant in the operation of his machine. During the trial, after evidence of defendant's intoxication developed, on motion of plaintiff, over the objection of the defendant, she was permitted to file an amendment to her complaint charging the defendant with intoxication as the proximate cause of the accident, in conformity with the provisions of Section 403 of the Vehicle Code. That amendment was duly filed and its allegations were deemed to have been denied by the defendant. The trial was completed, and the jury returned a verdict of $12,500 in favor of the plaintiff. A motion for new trial was denied. From the judgment the defendant has appealed.

[1, 2] It was not prejudicial error for plaintiff's attorney to ask prospective jurors on the voir dire, whether they owned stock or were interested financially in the Pacific Indemnity Insurance Company, or any other insurance company. There is no evidence of bad faith in propounding those questions. There was no objection to the

questions at the time of trial. A party to an action is entitled to ask prospective jurors, in good faith, whether they are stockholders or financially interested in any casualty insurance company for the purpose of discovering the presence of bias or prejudice, if any exists, in the minds of the jurors, which would disqualify them as fair and impartial jurors. Dermer v. Pistoresi, 109 Cal.App. 310, 293 P. 78; Levens v. Stocco, 5 Cal.App.2d 693, 43 P.2d 357; Girard v. Irvine, 97 Cal.App. 377, 382, 275 P. 840; Bennett v. Chandler, 52 Cal.App.2d 255, 264, 126 P.2d 173; 11 So. Cal. Law Rev. p. 419; 15 Cal. Jur. 421, sec. 92. There is nothing in the general questions propounded to the jurors on the voir dire to indicate bad faith on the part of plaintiff's counsel. That assignment of error is without merit.

[3] Likewise, we are of the opinion it was not prejudicial misconduct for plaintiff's attorney to ask a witness in good faith, for the purpose of impeaching the defendant, who had previously denied the admission, whether the defendant had not told him immediately after the accident occured that "he was at fault"; that he was insured and would "take care of" plaintiff's expenses incurred as a result of the accident. When the defendant was called and examined as a witness under Section 2055 of the Code of Civil Procedure, he was asked if he had not previously admitted that the casualty was his fault; that he was fully insured and that he would pay the expenses, to which he replied, without objection, "I told her I had insurance," but the witness denied that he admitted the accident was his fault or that he told her he would pay the expenses. Regarding that conversation with the defendant, which Dora Webster, a daughter of plaintiff, testified occurred soon after the accident, this colloquy appears in the record:

"Q. At that time you had a conversation with Mr. Huston with reference to the accident? A. Yes, I did.

"Q. Would you please tell us what you said and what Mr. Huston said at that time? A. Yes. * * * I looked him up to find out about the accident, and he asked me to come in, and I went in and he said * * * he felt sorry about the whole thing, but it was his fault and that he would take care of everything."

It appears that the witness, Dora Webster, later went with her brother Elmer to the defendant's home to inquire about the payment of expenses, regarding which conversation the following testimony appears:

"Q. And what was the conversation at that time; what did you say to him and what did he say to you? A. Well, he said the same thing over again, and then he said that he had insurance that would take care of everything, that we didn't have to worry."

To that statement the attorney for the defendant said: "Just a moment. * * * I will ask the Court to instruct the jury on any insurance." There was no motion to strike out the answer, or any portion of it. But the court very clearly and definitely instructed the jury it could not consider the circumstance of insurance for any purpose at all.

It appears that two days after the last mentioned conversation took place, Elmer Kroplin and his brother William again visited the defendant's home and had another talk with him about paying expenses of their mother's injuries. Regarding that conference the following occurred:

"Q. What was said at that time by you or what was said by Mr. Huston or * * * by your brother Bill with regard to this accident? A. Well, we were interested in finding out about expenses at that time."

Defendant's attorney objected on the ground that it was not material. The court replied, "No; not what you were interested in, but what was said," to which the witness replied, "So Mr. Huston said that he had a certain piece of paper which would take care of certain things. * * * What was said by Mr. Huston was—(Interruption)." Defendant's counsel then said "Go ahead." The witness proceeded to say, "So we asked to see it; and he fumbled around looking for it, and then he told us that there was a certain Mr. Davis who was— Mr. Frisch (Interrupting): Q. Did he identify the kind of paper he was looking for? A. Yes, he did. Q. What kind of a piece of paper did he say it was? A. Insurance policy." Defendant's attorney assigned the foregoing as misconduct and asked the court to instruct the jury to disregard it. The court again clearly and definitely instructed the jury to disregard the evidence of insurance. Moreover, in the final instructions which were read by the judge to the jury, it was again charged to disregard the evidence of insurance, in the following language:

"* * * In the course of the trial, the Court struck testimony relative to insurance from the record and cautioned you to disregard it. Whether or not any party is insured has nothing at all to do with any of the questions in this case which you are to decide. You are reminded that no insurance company is a party to this action. * * * Under your oath as jurors, you are required to refrain from any speculation, consideration or discussion about insurance."

[4] We do not approve the preceding quoted inquiry by plaintiff's attorney regarding the nature of the "paper" which the witness said the defendant was hunting for, nor the answer which it elicited that it was an "insurance policy." Counsel appeared to be too eager to identify the exact character of that document. It was immaterial and improper, as the court properly said. But, under the circumstances of this case, it was not reversible error, for the reasons that it was merely cumulative and the court repeatedly instructed the jury to disregard that evidence. The Appellate Court said in Girard v. Irvine, supra, 97 Cal.App. at page 382, 275 P. at page 842, regarding the same issue under similar circumstances, in which a judgment for plaintiffs was affirmed:

"* * * In the present case the negligence of the defendant was not in our opinion a close question, and we cannot say that the questions asked were necessarily prejudicial; nor is it clear from the record that they were not asked in good faith.

"In denying defendant's motion for a new trial, based upon the grounds, among others, of the misconduct of plaintiff's counsel, the trial court impliedly determined that no prejudice was suffered by the defendant, and its conclusion cannot be disturbed, unless, under all the circumstances, it was plainly wrong. La Fargue v United Railroads, 183 Cal. 720, 192 P. 538. This cannot be said here."

We think the objectionable evidence ot insurance, last mentioned, was not prejudicial because the fact of the existence of defendant's insurance was already properly before the jury, without objection, and the jury was repeatedly warned to disregard that evidence. Also the challenged evidence was a part of a declaration against interest, repeatedly made by the defendant, in which he admitted that the accident was due to his fault, and that he was insured and would pay the expenses of the injuries sustained by the plaintiff. It has been frequently held that the declaration against interest of a defendant in an automobile casualty case is competent and admissible, even though it may incidentally reveal the fact that he is insured. (McPhee v. Lavin, 183 Cal. 264, 269, 191 P. 23; Dullanty v. Smith, 203 Cal. 621, 624, 265 P. 814; North v. Vinton, 17 Cal.App. 2d 214, 219, 61 P.2d 950; Walter v. England, 133 Cal.App. 676, 688, 24 P.2d 930; Noble v. Bacon, 129 Cal.App. 177, 183, 18 P.2d 699; Handley v. Lombardi, 122 Cal. App. 22, 33, 9 P.2d 867; 11 So.Cal. Law Rev. p. 421.)

[5] The court did not abuse its discretion in granting plaintiff's motion to amend the complaint, in conformity with the proof adduced, so as to allege that the injuries sustained by plaintiff were the result of defendant's intoxication, in accordance with the provisions of Section 403 of the Vehicle Code. The original complaint merely charged the defendant with wilful misconduct. Evidence of defendant's intoxication developed on the first day of the trial upon his examination as a witness under Section 2055 of the Code of Civil Procedure. That evidence was adduced without objection. It was followed by other and more definite evidence of intoxication. On the second day of trial plaintiff moved to amend her complaint on that ground, having previously given notice in open court that she would do so. The motion was granted and the cause was continued to the following Monday to enable the defendant

to rebut that issue. The court stated that the allegation of intoxication would be deemed to be denied by defendant's answer. There was adequate evidence to support the issue of intoxication of the defendant. It does not appear that the defendant was prejudiced by that amendment.

[6, 7] The rule is well established that the trial court has a sound discretion to allow amendments of pleadings during the trial, in furtherance of justice and to dispose of the case on its merits, when the adverse party is not prejudiced thereby. It has been held the court should be liberal in allowing such amendments. The fact that the new matter may have been known to the applicant at the time of filing his original pleading is not sufficient ground for denying the right to amend. (Tolbard v. Cline, 180 Cal. 240, 245, 180 P. 610; McDougald v. Hulet, 132 Cal. 154, 64 P. 278; Isaacson v. Union Trust Co., 95 Cal.App. 633, 638, 273 P. 119; 21 Cal.Jur. 191, sec. 133.)

[8, 9] The questions as to whether the operator of an automobile was intoxicated at the time of an accident, whether his intoxication was the proximate cause of the injuries received by the guest, and whether she had knowledge, or by the exercise of reasonable care should have known that the driver was intoxicated, are problems for the determination of the jury with which conclusion a reviewing court may not interfere when there is substantial evidence to support the findings, as there is in the present case. (Lindemann v. San Joaquin Cotton Oil Co., 5 Cal.2d 480, 507, 55 P.2d 870; McMahon v. Schindler, 38 Cal.App. 2d 642, 102 P.2d 378; Tomlinson v. Kiramidjian, 133 Cal.App. 418, 24 P.2d 559; Ogilvie's California Vehicle Code, p. 183, sec. 403.)

In the McMahon case, supra, judgment for plaintiff, who was injured while riding as a guest in an automobile driven by an intoxicated driver, was affirmed, and a hearing was denied by the Supreme Court. In that case plaintiff was employed as hostess in a night club. She accepted an invitation by the owner of the machine to drive her home. Bernard Schindler accompanied them and drove the car. Both plaintiff and Schindler drank intoxicating liquor that evening. Plaintiff saw Schindler drink four or five whiskey toddies at a night club where they stopped for half an hour on their way home. After resuming their journey Schindler drove the car at a speed of 50 or 55 miles an hour and in such a manner that it swerved in its course. The plaintiff protested against the excessive speed and warned him "not to drive so fast." Finally she realized that he must be drunk and told him to stop the car. But almost immediately the machine crashed into a telephone pole and she was injured. She brought suit charging wilful misconduct and intoxication of the driver as the cause of the accident. Defendants pleaded contributory negligence of plaintiff as a bar to her right of recovery. A jury rendered judgment in plaintiff's favor. The court held that in spite of the fact that plaintiff knew Schindler had been drinking liquor, that he drove the car at an excessive rate of speed, and that she also had taken three drinks of intoxicating liquor that evening, she was not deprived of the right to recover damages under Section 403 of the Vehicle Code. It was held that the questions of intoxication of the driver, plaintiff's knowledge, actual or imputed, of his condition of sobriety, whether his intoxication was the proximate cause of the accident, and plaintiff's alleged contributory negligence, were all problems for the determination of the jury, with which conclusions the reviewing court was not permitted to interfere.

[10] In the present case we are of the opinion the trial court properly refused defendant's proposed instruction which stated that even though the jury determined that defendant's intoxication was the proximate cause of the injuries sustained by plaintiff, if it also found that plaintiff "observed or should, in the exercise of ordinary care have observed, that Defendant was intoxicated, and, nevertheless, voluntarily continued to ride with him," she was guilty of contributory negligence which would bar her recovery of judgment.

There is no evidence that plaintiff knew the defendant was intoxicated. Nor is there any evidence that would show that, as a reasonable person, she should have known that he was intoxicated. The evidence is just the contrary. On her examination in chief as a witness, she was not asked whether she observed his condition as to sobriety. She did testify that he drove so fast that she was frightened, and that she warned him three or four times against driving so fast. But it was not even intimated that she thought his reckless driving was the result of intoxication. All of the evidence of his intoxication came from other witnesses who saw him after the accident occurred. She was not well acquainted with Mr. Huston. There is no evidence that she had any information that he was addicted to the use of intoxicating liquor. She had not seen him on the day of the accident until immediately before they entered his car to go to her home. Both Mrs. Cox and plaintiff testified positively that neither of the ladies had drunk liquor that day. Mrs. Kroplin said that she never drank liquor. As a part of defendant's case, plaintiff was recalled and examined under Section 2055 of the Code of Civil Procedure upon a deposition which she had formerly made, in which it appears she was asked if Mr. Huston had been drinking. She replied, "I couldn't say, because he came in, he wasn't with us, * * * he just came in and I had not seen Mr. Huston" until he came to drive her home. Upon direct inquiry she said, in effect, that he did not appear to be intoxicated. She testified that "He appeared— * * * because he seemed all right. He opened the door for me to get in the car. *He appeared all right to me.*"

We think there was no substantial evidence in the case upon which to base the challenged instruction which is founded on the supposition that plaintiff knew the defendant was intoxicated, or that, as a reasonable person, she should have known that he was under the influence of liquor. The court, therefore, did not err in refusing to give that instruction to the jury.

[11, 12] Moreover, that same proposed instruction was otherwise objectionable because it charged the jury that if they believed that plaintiff "through her drinking, had her faculties so dulled that she was unable to recognize intoxication in the Defendant and that she would have recognized such intoxication had she been sober," she would be guilty of contributory negligence which would preclude her from recovering damages for her injuries. There is no evidence in the record that the plaintiff had been drinking liquor. The uncontradicted evidence is that she had not been drinking. Both she and Mrs. Cox testified they had not been drinking. Plaintiff said that she never drank intoxicating liquor. There is no evidence to the contrary. The rule is firmly established that it is not error to refuse to give a proposed instruction when there is no evidence to support the theory upon which it is drawn. Davenport v. Stratton, 24 Cal.2d 232, 254, 149 P.2d 4; Shepherd v. Jones, 71 Cal. 223, 16 P. 711; Chapman v. Pacific Electric Ry. Co., 85 Cal.App. 69, 74, 258 P. 1006; 24 Cal. Jur. 804, sec. 78. In the Davenport case, supra [24 Cal.2d 232, 149 P.2d 15], it is said:

> "Even though an instruction is couched in proper language it is improper, if it finds no support in the evidence, and the giving of it constitutes prejudicial error if it is calculated to mislead the jury."

[13] It is true that upon cross-examination of Mrs. Cox, she testified positively that neither she nor Mrs. Kroplin had been drinking liquor on the day of the accident. For the purpose of impeaching her in that regard the defendant offered a previous statement signed by Mrs. Cox, which was written by a representative of an insurance company in her home, not in the presence of the plaintiff, which he induced Mrs. Cox to sign, in which a statement appears that the ladies had taken several drinks of liquor that afternoon and that they were feeling "pretty high." Mrs. Cox emphatically declared at the trial that she made no such statement; that it was not true, and that she signed the written statement without reading it, at the request of the stranger who came to her home a day or two after the accident occurred. The statement was competent only for the purpose of impeaching the witness on the theory that she had previously made an extrajudicial admission in conflict with her testimony at the

trial. It was not competent as evidence of the fact as to whether Mrs. Cox had actually been drinking liquor. It certainly was not binding on the plaintiff as an admission of her previous drinking of liquor.

[14] The rule is almost universally recognized in all jurisdictions, including that of California, that evidence of extrajudicial statements made by a witness who is not a party to the action, are not binding as admissions of the fact in controversy, and are competent and admissible only as against the witness for impeachment purpose to discredit his testimony given at the trial. Albert v. McKay & Co., 174 Cal. 451, 163 P. 666; Lopez v. Wisler, 58 Cal.App. 2d 455, 462, 136 P.2d 816; Overton v. Harband, 6 Cal.App.2d 455, 462, 44 P.2d 484; 70 C.J. p. 1153, sec. 1339; 20 Am.Jur. p. 404, sec. 458; 133 A.L.R. 1454, note. In the Albert case, supra, it is said, 174 Cal. at page 456, 163 P. at page 668, that:

> "When a witness is impeached by proof of prior inconsistent statements, the effect is merely to discredit him as a witness. The former statements made by him are incompetent for any other purpose. They do not constitute evidence of the truth of the facts so stated by him."

There is therefore no evidence in this case that the plaintiff had been previously drinking intoxicating liquor, and the proffered instruction was misleading and properly refused.

[15] The foregoing instruction was the only one offered by the defendant which was refused. The defendant does not contend that the instructions which were given to the jury are erroneous, but he does assert that the court, on its own initiative, should have given other instructions more fully defining or explaining the law with respect to the defense of contributory negligence. We think not. The jury appears to have been sufficiently and fairly instructed upon the essential issues of the case. The defendant offered no other instructions on the subject of contributory negligence. The jury was instructed that the burden was on plaintiff to prove by a preponderance of the evidence that she was injured as a result of the wilful misconduct or intoxication of the defendant, and that, even if that was shown to the satisfaction of the jury, plaintiff could not recover if she was also guilty of negligence which contributed to the accident. With respect to negligence which would bar the plaintiff from recovering damages, the jury was told that it must be such as would have "actively contributed to the happening of the accident and the injuries" received. We think the failure to more fully instruct the jury on that subject is not reversible error, since no proper instruction on that subject was offered by the defendant. The jury could not have been misled by the instructions which were given. There was no miscarriage of justice.

The judgment is affirmed.

PEEK, J., and SCHOTTKY, Justice pro tem., concur.

79 Cal.App.2d 431

PEOPLE v. YANKEE.

Cr. 1979.

District Court of Appeal, Third District, California.

April 30, 1947.

1. Criminal law 🔑1159(3)

Where there is a conflict of evidence on an essential issue, appellate court is bound by determination of jury.

2. Robbery 🔑24(5)

Evidence sustained conviction for attempt to commit robbery by means of force and fear.

3. Criminal law 🔑939(1)

Where newly discovered evidence was merely for purpose of attempting to impeach witness by showing his positive testimony at trial was in conflict with previous statements made to police officers, if defendant believed in good faith that police report contained contradictory statements of witness, defendant should have demanded report in open court or should have issued subpoena duces tecum, and failure to do so was a lack of due diligence which justified denial of new trial.

4. Criminal law ⚿938(1)

Motions for new trial on ground of newly discovered evidence are addressed to trial court's discretion.

5. Criminal law ⚿1156(3)

Determination of motion for new trial on ground of newly discovered evidence will not be disturbed on appeal except for a clear abuse of discretion.

6. Criminal law ⚿942(1)

On a motion for new trial on ground of newly discovered evidence, when it appears that it is sought solely for impeachment purposes, motion should be denied.

7. Criminal law ⚿939(1)

The question of exercise of due diligence as basis for motion for new trial is subject to sound discretion of trial court, and, when there is a failure to show due diligence, motion should not be granted.

◆

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Elgin S. Yankee was convicted of an attempt to commit robbery by means of force and fear, and he appeals.

Affirmed.

Arthur DeBeau Carr, of Sacramento, for appellant.

Fred N. Howser, Atty. Gen., and Charles W. Johnson, of San Francisco, for respondent.

THOMPSON, Acting Presiding Justice.

The defendant was convicted by a jury of an attempt to commit robbery by means of force and fear. He was found guilty on the theory that he aided and abetted John Eugene Sankey in a futile attempt to rob the cashier in the box office of the Alhambra Theatre in Sacramento on February 19, 1946, by means of threats, and the use of an imitation revolver. The robber was prevented by interference of the bystanders from accomplishing his purpose, and he fled in the automobile of the defendant. The evidence indicates that the defendant drove his car at the time of the attempted theft. A motion for new trial, on the ground of newly discovered evidence, was denied. From the judgment and order denying a new trial the defendant has appealed.

It is contended that the judgment is not supported by the evidence, and that the court erred in denying the motion for new trial.

The defendant and John Eugene Sankey were friends and associates. Each of them had been previously convicted of felonies. They served sentences together in San Quentin. The defendant, who was a married man, lived in Sacramento. He owned the black Chrysler automobile which was used in the attempt to rob the Alhambra Theatre office. The license number of that machine was 3–K–427. Sankey was in Sacramento on the day of the attempted robbery. The defendant admitted that he met him that morning. The defendant was often called by his friends, "Yank," which was an abbreviation of his surname.

Mr. and Mrs. Harold Christensen drove their automobile to the Alhambra Theatre on the evening of February 19th for the purpose of attending a picture play. They arrived about 9:30 P. M. As they approached the entrance to the parking lot on the north side of the building, their course was obstructed by a "black shiny car," from which a man stepped and walked ahead of them to the box office. The black machine then proceeded north and thence around the block. After parking their car, the Christensens went to the box office to purchase their tickets. When they arrived they found the man who had just emerged from the black car standing in front of them at the office window. They saw his features and recognized him. The Christensens testified that there was an unusual commotion going on at the office window, but they did not realize just what was happening. With some impatient expression, Mr. Christensen pushed the man aside so that he could purchase his tickets. The man turned about and faced Christensen and said, "O.K., O.K." Miss Betty Krause, who was then in charge of the ticket office, was very much excited. She was hysterical and cried. She testified that the man appeared at the window and demanded of her the cash on hand, saying, "O. K. Sister, let me have it. * * * I am not kidding, Sister." At the same time he flourished what appeared to be a revolver. He reached into the window and "knocked over the top of the ticket machine." Williams Glackin the manager of the theater, hearing the disturbance at the office, rushed from the building and asked what was going on there. Miss Krause replied that "she was being robbed." In the meantime the man suddenly fled. He ran into the garden at the south side of the building. Mr. Glackin was informed of the direction in which he ran, and immediately pursued him. Miss Krause at once phoned for the police officers, who soon arrived.

Mr. Glackin followed the thief through the adjoining garden to the street between the theater and the firehouse. He saw the man leaning against a pillar at the corner of the firehouse. Glackin approached him cautiously for fear he was armed with a revolver. He motioned to a fireman, who stood some distance away, to help him. But he failed to do so because he did not realize the nature of the appeal. Glackin, however, questioned the man who evaded his inquiries. Suddenly the thief saw his "black car" approaching on that side of the street and holloed at the driver, "Hey, Yank, Yank." He started to run toward the machine, but Glackin seized him by the shoulder. The thief stumbled, but he turned around and shoved Glackin backward and ran to the car. Mr. Glackin testified in that regard, "He [the thief] whirled around, which broke me loose,—as he did he came all the way round with both hands and knocked me back, and he went forward and made a run for the car, and this car started to move a little bit,—he grabbed for the right hand side of the car, the front door opened, and he got in and went on." As the machine drove away, Mr. Glackin saw that its license number was 3–K–427, which is the same as the defendant's license number. When the police officers arrived, they were told the number of the machine in which the robber escaped, and promptly ascertained that the car belonged to the defendant. They also located his residence, and went directly to his home, where they found the machine parked, and observed that the engine was still warm. The defendant was at home.

The officers critically questioned the defendant, and learned of his association with Sankey. But he denied having seen Sankey since that morning, and denied that he had accompanied Sankey or any person to the Alhambra Theatre that evening. He asserted that his car had not been out of his personal possession that night, and explained that he had just returned from visiting a woman friend in Sacramento. Sankey disappeared. He has not been apprehended. In a later interview the defendant changed his story regarding the use of his car that night. He then told the officers that he met a carpenter by the name of Joe Evans about eight o'clock that evening and loaned him the machine to take his woman friend home; that he was gone only one-half or three-quarters of an hour when the man returned the vehicle to him at the Clunie Hotel. The defendant said he had just returned home when the officers arrived. He admitted that Evans was a mere casual acquaintance, and that he did not know where he lived. They were unable to locate any man by the name of Joe Evans. The explanation which the defendant made, to account for his change of stories regarding the use of his machine that night, was that he first declared it had not been out of his possession because he feared his friend Evans might get into trouble if his association with his woman friend became known. The jurors were entitled to conclude, as they evidently did, that Evans was just a fictitious character created by the fertile mind of the defendant to account for the fact that the thief was actually seen to enter his automobile when he fled from the scene of the attempted theft. The contradictory stories which were related by the defendant, together with evidence of his prior conviction of other felonies, warranted the jury in assuming that he had been successfully impeached, and in discrediting his testimony at the trial.

After the escape of the thief from the theater, a plastic imitation revolver was found in those grounds. Assuming that he did not use a genuine revolver in his attempt to rob the box office, that fact is immaterial. The toy revolver was intended to serve the purpose of a real revolver, and it evidently had that effect. The thief nevertheless used force and fear in an effort to commit the crime.

The identity of the thief, an ex-convict, John Eugene Sankey, was fully established by several witnesses who saw him at the theater, and subsequently recognized him from photographs which were exhibited to them. The "black shiny car" from which the thief emerged at the theater and into which he sprang when he fled from the scene, was definitely recognized and identified by witnesses as the machine, with license number 3–K–427, which belonged to the defendant. There is no doubt it was the same machine which was used in the attempt to rob the Alhambra Theatre box office on that occasion.

[1] The important question to be determined in this case is whether there is satisfactory evidence showing that the defendant's machine was actually driven by him, instead of by Evans or someone else, when the crime was attempted. In passing upon that question on appeal this court has not the same discretion of weighing the evidence and determining the sufficiency thereof or the credibility of witnesses that the jury possesses. When there is a conflict of evidence on an essential issue, this court is bound by the determination of the jury. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778; People v. Smith, 35 Cal.App.2d 73, 76, 94 P.2d 633; 8 Cal.Jur. 587, sec. 581.

[2] In this case it appears that the defendant and John Eugene Sankey were associates and friends. Sankey was in communication with the defendant the morning of the attempted robbery. Sankey rode in the defendant's automobile to and from the theater the night of the attempted crime; the defendant was commonly called "Yank," which was an abbreviation of his real name; when the thief fled from the theater he recognized the machine and hailed the defendant by name, saying, "Hey, Yank, Yank." The defendant deliberately told the officers conflicting stories regarding the very material question as to who actually drove the car when the thief fled from the scene of the crime. Those facts and other circumstances of the case furnish adequate evidence to support the verdict and judgment in this case. We have no doubt the defendant actually drove his car to and from the theater in aid of Sankey's attempt to rob the Alhambra Theatre box office.

[3] We may not interfere with the trial court's discretion in denying the motion for new trial on the ground of newly discovered evidence. The alleged newly discovered evidence was merely for the purpose of attempting to impeach a witness who testified positively at the trial that he heard the thief call to the driver of the passing automobile in which he escaped, "Hey, Yank, Yank." The defendant's attorney merely averred in his affidavit for new trial that he *"believed* that the original police report showed that the testimony of said witness Glackin was not in accord with previous statements made to the police officers." Mr. Glackin, the manager of the theater, testified positively at the trial that the thief holloed at the driver of the car, "Hey, Yank, Yank." On cross-examination he was asked if he had not told the police officers that the thief said "'Hank' or 'Yank,' or something else"? to which the witness replied "No, sir." Then he was asked "Are you sure about that?" to which he replied "Absolutely." Three police officers were afterward called as witnesses. Mr. Ed Gapen, one of the officers, was shown at the trial police "report C—67599". Apparently the police report was in court at the trial, and evidently referred to by the witness. None of those officers was asked if the police reports contained a statement made by Mr. Glackin contrary to his testimony on the trial. Nor does it appear that the defendant's attorney demanded the right to inspect the police report. There is now no evidence that the report contained a statement in conflict with what Glackin testified to at the trial. We have no reason to believe that it did. If the defendant believed in good faith that the report contained contradictory statements of the witness, he should have demanded the report in open court, or he should have issued a subpoena duces tecum to procure that evidence. The defendant therefore failed to exercise due diligence.

[4-6] Motions for new trial on the ground of newly discovered evidence are addressed to the discretion of the trial court, and the determination of that motion will not be disturbed on appeal except for a clear abuse of discretion. Such applications are not regarded with favor. People v. Tallmadge, 114 Cal. 427, 46 P. 282. On a motion for new trial on the ground of newly discovered evidence, when it appears that it is sought solely for impeachment purpose, the motion should be denied. People v. Pianezzi, 42 Cal.App.2d 270, 280, 108 P.2d 685; People v. Goldenson, 76 Cal. 328, 352, 19 P. 161; People v. Valencia, 30 Cal.App.2d 126, 129, 86 P.2d 122; People v. Haines, 64 Cal.App. 628, 631, 222 P. 183; 23 C.J.S., Criminal Law, 1460, p. 1248. In the Pianezzi case, supra [42 Cal.App.2d 270, 108 P.2d 690], it is said:

"Defendant on his motion for a new trial alleged that the witness Farris' wife would upon a retrial testify that said witness had stated to her that he could not identify 'those fellows', referring to the men who murdered the decedents. This alleged newly-discovered evidence is purely of an impeaching nature and, therefore, is not ground for granting a motion for a new trial. People v. Snyder, 36 Cal.App.2d 528, 535, 97 P.2d 976."

[7] There is an absence of any showing of due diligence on the part of the defendant to secure the alleged newly discovered evidence in this case. In fact it appears that it would have been easy to secure the police records in question. The defendant failed to do so. The question of the exercise of due diligence as a basis for a motion for new trial is subject to the sound discretion of the trial court. When there is a failure to show due diligence, the motion for new trial should not be granted. People v. Gidney, 10 Cal.2d 138, 142, 73 P.2d 1186; People v. Thompson, 123 Cal.App. 726, 732, 12 P.2d 81; 23 C.J.S., Criminal Law, § 1455, p. 1235.

The motion for new trial was therefore properly denied.

The judgment and the order are affirmed.

PEEK, J., and SCHOTTKY, Justice pro tem., concur.

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79 Cal.App.2d 237

VIGLI et al. v. DAVIS et al.

No. 13277.

District Court of Appeal, First District,
Division 1, California.
April 21, 1947.

1. Appeal and error 🔑979(2)

An order granting a new trial on ground of insufficiency of the evidence to sustain the judgment will not be disturbed on appeal, unless there be a clear showing of abuse of discretion.

2. Appeal and error 🔑979(2)
New trial 🔑71

A trial court, in considering a motion for new trial, is not bound by a conflict in the evidence, and has not abused its discretion when there is any evidence that would support a judgment for the moving party and only when there is no substantial evidence to support a contrary judgment may an appellate court reverse an order granting a new trial.

3. New trial 🔑70

Where broker who dealt with plaintiffs in procuring a buyer for their realty had desk in office of operator of real estate company, for which he paid a rental of half of his commissions, and he used cards and contracts bearing company's name, and plaintiffs thought that they were dealing with company, granting plaintiffs a new trial in action to recover alleged secret profits made by broker, operator of company, and others, in resale of realty, was not an abuse of discretion on ground that broker alone was the plaintiffs' agent. Civ. Code, § 2300.

4. Brokers 🔑31

A real estate broker, when pursuing his own interests, cannot ignore the interests of his principal, and will not be permitted to enjoy the fruits of an advantage taken of a fiduciary relation, whose dominant characteristic is the confidence reposed by one in another.

5. Principal and agent 🔑14(1)

Where peculiar physical make-up of an agreement to sell, signed by owners of realty when they put their realty in hands of brokers for sale, justified an ordinarily reasonable person in inferring that real estate company, the name of which appeared numerous times in the agreement, was the broker's principal, and that in signing the agreement, the owners were entering into an agreement with company, the rule that if a person signs a writing without reading it, he is nevertheless bound by its terms, was not applicable, though there was a notation on agreement that wherever company's name appeared in the agreement, broker's name should be substituted.

6. Principal and agent ⚷23(1)

In action by vendors to recover alleged secret profit made by defendants while serving in alleged capacity of agents for vendors, evidence established that defendant operating real estate company, either intentionally, or by want of ordinary care, held out real estate broker with whom vendors dealt, as his agent, or at least justified such an inference to be drawn. Civ. Code, § 2300.

7. Principal and agent ⚷23(2)

Agency between real estate broker and operator of real estate company could not be established entirely by the representations of the broker as agents.

8. Conversion ⚷12

When a binding agreement of sale of realty is entered into by the parties, an "equitable conversion" is worked and the purchaser becomes the equitable owner of the realty and the seller the owner of the purchase price.

See Words and Phrases, Permanent Edition, for all other definitions of "Equitable Conversion".

9. Conversion ⚷1

In action by vendors against agents to recover alleged secret profits made by agents in resale of realty in alleged violation of their fiduciary relationship, agents could not invoke as a defense the doctrine of equitable conversion, since the doctrine cannot be invoked to sustain a fraud or do a wrong.

10. Escrows ⚷3

The holder of an escrow is generally the agent for all parties up to the time that the escrow is closed.

11. Escrows ⚷3

The rule that the holder of an escrow is holder for all parties up to time that the escrow is closed could not be invoked as a defense by real estate agents in suit against them by vendors of realty to recover secret profits made by agents, since the rule could not be invoked to enable the agents to commit a fraud.

◆

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Joseph Vigli and Tina Vigli against William J. Davis, doing business as Davis Realty Company, Jay Brandell, Joseph H. Abrams, and D. C. Letsinger, to recover an alleged secret profit made by defendants while serving in the alleged capacity of real estate agents for the plaintiffs. From an order granting plaintiffs' motion for new trial after verdict for defendants, the defendants appeal.

Order affirmed.

Phil F. Garvey, of San Francisco (Julia M. Easley, of San Jose, of counsel), for appellants.

Charles A. Christin and Thomas J. Keegan, both of San Francisco, for respondents.

BRAY, Justice.

Appeal by all defendants from an order granting plaintiffs' motion for a new trial, after a jury verdict in favor of defendants, in an action to recover an alleged secret profit while serving in the alleged capacity of real estate agents for plaintiffs.

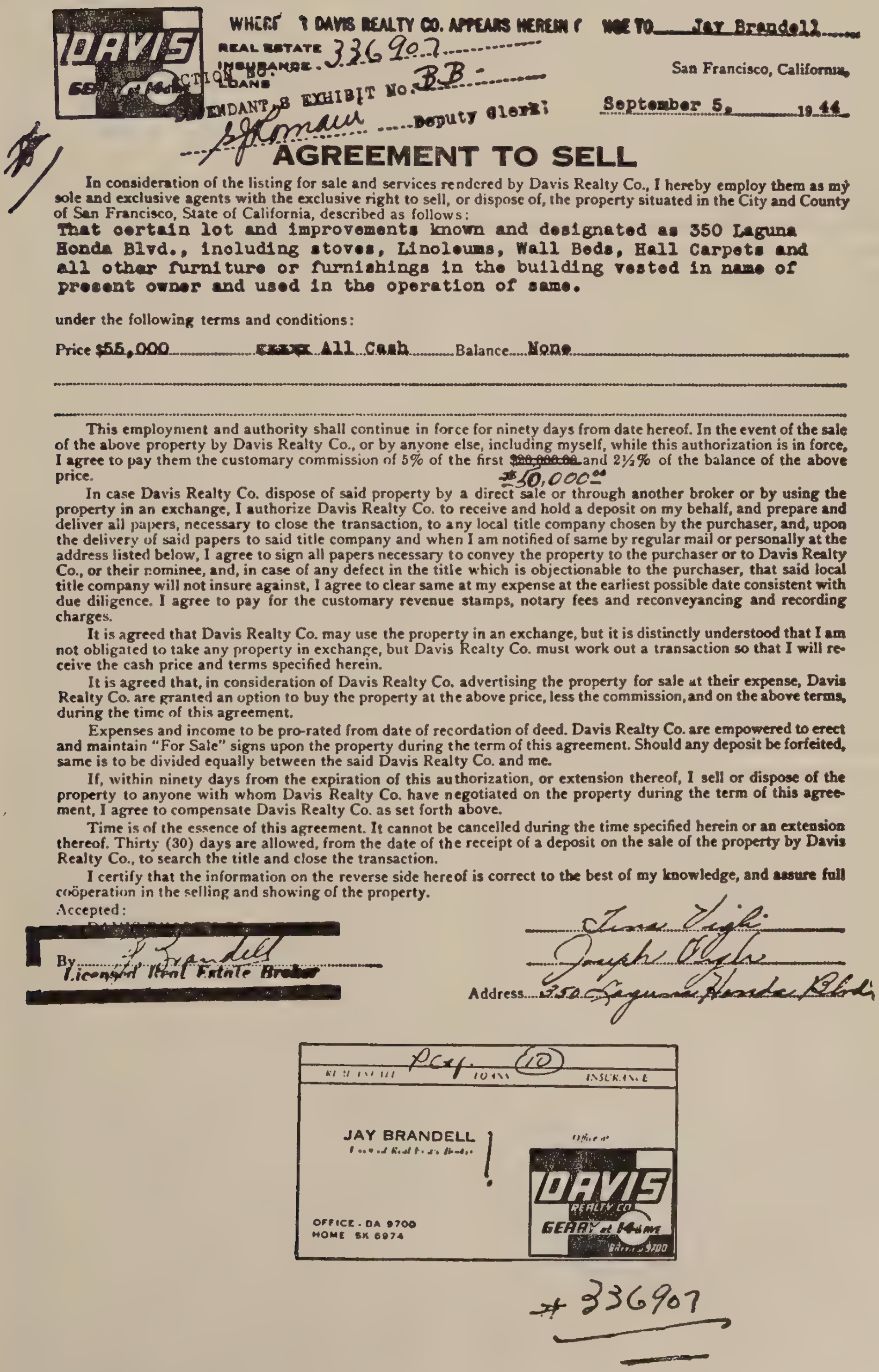
The complaint alleged that William J. Davis, doing business as the Davis Realty Company, through his own employee, defendant Jay Brandell, acted as plaintiffs' agent in the sale of their property to one Galant; that they were induced to sell their property at a lower price than that which Davis could have obtained; that Davis, without their knowledge, purchased the property from their grantees, resold it to the ultimate purchaser for a much larger price than they had obtained, thereby realizing a secret profit, for which profit the plaintiffs asked judgment.

Defendants' answer denied that any of the defendants other than defendant Brandell was the agent of plaintiffs in the sale transaction, and that any of the other defendants were employees of Davis, but alleged that these other defendants were independent real estate brokers; alleged that Brandell was plaintiff's sole agent in the transaction, and that the property was sold in the ordinary course of business to Galant as a bona fide purchaser for value; and denied that any defendant was guilty of fraud or concealment. The jury found in favor of all defendants. The court granted plaintiffs' motion for a new trial, upon the ground of the insufficiency of the evidence to sustain the verdict.

Defendants' primary contention on appeal is that as matter of law there was insufficient evidence to justify a verdict in favor of plaintiffs had one been returned by the jury, for the reason that the evidence shows without contradiction that Brandell alone, and not Davis, was the agent of plaintiffs, and therefore the granting of a new trial constituted a clear abuse of discretion. Secondly, they contend that the sale by plaintiffs to Galant effected an equitable conversion of title to plaintiffs' property, and that by reason of such conversion, plaintiffs can legally have no interest in its subsequent disposition. Finally, they contend that plaintiffs had constructive knowledge of the subsequent transactions.

[1, 2] The test to be applied to the evidence on this appeal is as set forth in Williams v. Field Transportation Co., 28 Cal. 2d 696, 171 P.2d 722, 723. "An order granting a new trial upon the ground of the insufficiency of the evidence to sustain the judgment will not be disturbed upon appeal, unless there be a clear showing of abuse of discretion. 'All presumptions are in favor of the order and it will be affirmed if it is sustainable on any ground. Mazzotta v. Los Angeles Ry. Corporation, 25 Cal.2d 165, 169, 153 P.2d 338, and cases cited. The trial court in considering a motion for new trial is not bound by a conflict in the evidence, and has not abused its discretion when there is any evidence which would support a judgment in favor of the moving party.' Ballard v. Pacific Greyhound Lines, 28 Cal.2d 357, 170 P.2d 465, 467. Even if the evidence is uncontradicted, the trial judge may draw inferences from it contrary to those made by the jury, and it is his duty to resolve such conflicts in determining whether the issues should be retried. Only when, as a matter of law, there is no substantial evidence to support a contrary judgment, may an appellate court reverse an order granting a new trial. Brooks v. Metropolitan Life Ins. Co., 27 Cal.2d 305, 163 P.2d 689; Mazzotta v. Los Angeles Ry. Corp., supra." See also Estate of Sexton, 199 Cal. 759, 251 P. 778.

[3] Defendants admit that the foregoing is the rule, but contend that the evidence here is uncontradicted, basing this contention primarily on certain exhibits admitted in evidence. Unless we give to these exhibits the construction contended for by defendants, there was a decided conflict in the evidence. Disregarding, for the moment, defendants' contention as to these documents, and all conflicts in the evidence, and giving to plaintiffs' evidence the weight to which it is entitled in an appellate court, the evidence shows: Plaintiffs were the owners of an apartment house in San Francisco. About a year prior to the transactions here, defendant Brandell visited them and inquired if they were interested in selling their property. He told them that he was from the Davis Realty Company and presented them a card. (Plaintiffs' exhibit 10) (Inasmuch as both sides place emphasis upon this card, and it is very difficult to describe realistically its appearance, a photostat of it is attached to this opinion.) The plaintiffs informed Brandell that they did not wish to sell. In September, 1944, plaintiffs decided to sell. Plaintiff Joseph Vigli phoned the Davis Realty Company and told the girl who answered that plaintiffs wanted to list their property with the company to sell it for them, and that they had already talked to Mr. Brandell and would like Brandell to come out and talk it over. The following Sunday Brandell came out and gave them another card (a duplicate of



DAVIS

WHERE DAVIS REALTY CO. APPEARS HEREIN CHANGE TO Jay Brendell

REAL ESTATE 336907
INSURANCE
LOANS

SECTION NO.
DEFENDANT'S EXHIBIT No. BB
J J Roman Deputy Clerk

San Francisco, California,

September 5, 1944

AGREEMENT TO SELL

In consideration of the listing for sale and services rendered by Davis Realty Co., I hereby employ them as my sole and exclusive agents with the exclusive right to sell, or dispose of, the property situated in the City and County of San Francisco, State of California, described as follows:

That certain lot and improvements known and designated as 350 Laguna Honda Blvd., including stoves, Linoleums, Wall Beds, Hall Carpets and all other furniture or furnishings in the building vested in name of present owner and used in the operation of same.

under the following terms and conditions:

Price $55,000 ~~xxxxx~~ All Cash Balance None

This employment and authority shall continue in force for ninety days from date hereof. In the event of the sale of the above property by Davis Realty Co., or by anyone else, including myself, while this authorization is in force, I agree to pay them the customary commission of 5% of the first ~~$20,000.00~~ $10,000.00 and 2½% of the balance of the above price.

In case Davis Realty Co. dispose of said property by a direct sale or through another broker or by using the property in an exchange, I authorize Davis Realty Co. to receive and hold a deposit on my behalf, and prepare and deliver all papers, necessary to close the transaction, to any local title company chosen by the purchaser, and, upon the delivery of said papers to said title company and when I am notified of same by regular mail or personally at the address listed below, I agree to sign all papers necessary to convey the property to the purchaser or to Davis Realty Co., or their nominee, and, in case of any defect in the title which is objectionable to the purchaser, that said local title company will not insure against, I agree to clear same at my expense at the earliest possible date consistent with due diligence. I agree to pay for the customary revenue stamps, notary fees and reconveyancing and recording charges.

It is agreed that Davis Realty Co. may use the property in an exchange, but it is distinctly understood that I am not obligated to take any property in exchange, but Davis Realty Co. must work out a transaction so that I will receive the cash price and terms specified herein.

It is agreed that, in consideration of Davis Realty Co. advertising the property for sale at their expense, Davis Realty Co. are granted an option to buy the property at the above price, less the commission, and on the above terms, during the time of this agreement.

Expenses and income to be pro-rated from date of recordation of deed. Davis Realty Co. are empowered to erect and maintain "For Sale" signs upon the property during the term of this agreement. Should any deposit be forfeited, same is to be divided equally between the said Davis Realty Co. and me.

If, within ninety days from the expiration of this authorization, or extension thereof, I sell or dispose of the property to anyone with whom Davis Realty Co. have negotiated on the property during the term of this agreement, I agree to compensate Davis Realty Co. as set forth above.

Time is of the essence of this agreement. It cannot be cancelled during the time specified herein or an extension thereof. Thirty (30) days are allowed, from the date of the receipt of a deposit on the sale of the property by Davis Realty Co., to search the title and close the transaction.

I certify that the information on the reverse side hereof is correct to the best of my knowledge, and assure full coöperation in the selling and showing of the property.

Accepted:

[redacted]

By J. Brandell
Licensed Real Estate Broker

Tina Vigli
Joseph Vigli
Address 350 Laguna Honda Blvd.

LOANS INSURANCE
Pcy. (10)

JAY BRANDELL

OFFICE - DA 9700
HOME SK 6974

DAVIS
REALTY CO
GEARY at 14th Ave

336907

plaintiffs' Exhibit 10). Brandell told plaintiffs that the Davis Co. had quite a staff, all of whom would work on the matter of selling the property. Brandell suggested that the building was depreciated and that $50,000 would be the best price obtainable. Plaintiffs would not agree to that sum. The next night, Brandell returned, and plaintiffs signed the listing agreement headed "Agreement To Sell" with a sale price of $55,000. (Again, because of its importance and the difficulty of properly describing its appearance, it is reproduced and attached to this opinion and will be referred to as the "listing agreement.") Neither plaintiff noticed the words which were stamped at the head of the agreement "Where Davis Realty Co. appears herein change to Jay Brandell," nor the blacking out at the end of the agreement of the words "Davis Realty Co." Plaintiffs at all times believed that they were doing business with Davis Co. and that Brandell was an agent or employee of Davis Co.

The Sunday following the execution of the listing agreement, plaintiffs saw an ad in the San Francisco Chronicle advertising the property for sale for $58,500. The ad ended "Jay Brandell D-A-V-I-S Realty 500 Geary (at 14th) BA 9700." Immediately plaintiffs contacted Brandell asking why the sale price was advertised as $58,500 when Brandell had theretofore told them that $50,000 was all that could be obtained and they had signed up to sell at $55,000. Brandell's answer was that they could advertise it at any price they wanted and would try to get the best price possible. Brandell brought plaintiffs an offer of $50,000 which they refused, telling him that if anything were to be cut it would have to be the commission. Brandell then told them that the commission had to be split three ways, one-third to Davis, one-third to defendant Abrams, and one-third to Brandell. Brandell then brought plaintiffs a contract to sell the property for a flat $50,000, which the plaintiffs also refused.

On September 21st, Brandell brought to plaintiffs a "Uniform Agreement of Sale and Deposit Receipt," in which defendant Abrams acknowledged receipt from one Galant of $1000, on account of a purchase price of $51,500 for the property, which Galant agreed to pay, subject to the approval of the seller. The document is quite lengthy and contains the usual provisions of such an agreement. It had already been signed by Galant as purchaser. Opposite his signature appears a blank line and below it the printed words "Agent for Seller By" and thence follows the signature of the defendant Abrams. Up to this time the plaintiffs had no knowledge of Abrams and never did meet him. Following the portion of the document signed as above, appears the following: "Approval. San Francisco, California 9/21, 1944. The seller hereby approves the sale of the property described herein, upon the terms and conditions hereinabove set forth and agrees to pay on demand to Jay Brandell the sum of Two Thousand dollars ($2000.00) Dollars for services rendered," and then a provision as to the disposition of the deposit in case of a forfeit. As Brandell agreed to reduce the commission provided in the listing agreement to $2,000, plaintiffs signed immediately below the clause above set forth. Brandell told plaintiffs that Galant had put up at Davis Co. the $2,500 increased deposit which the agreement required upon approval by the seller. No part of this money was received by plaintiffs. Brandell later notified plaintiffs that the deed was ready and on October 18th they went to the title company office to sign it. Plaintiffs then asked Brandell "if anybody else was in this deal, and he said absolutely not." Plaintiffs signed the deed and escrow instructions. The title company clerk wrote on the instructions in the presence of Brandell and plaintiffs the amounts to be paid, "allow taxes, $231.15, allow rent, per statement of Davis Realty Company, and pay Davis on account of commission $2000." A statement dated October 20th and headed "Davis Realty Co." with its address and telephone number was received shortly thereafter by plaintiffs through the mail. It stated: "Sale price $51,500," then listed taxes, breakdown of rents, federal revenue stamps, notary fees, recording fees, "Commission $2000." While these transactions between plaintiffs and Brandell were being had, a most interesting situation was developing, in which the defendants Abrams, Letsinger and Davis appear. Abrams and Letsinger bore to Davis, as will hereinafter appear, the same relationship that Brandell did.

It was on September 5th that plaintiffs signed the listing agreement. Between that time and September 9th Abrams went to Galant, who had formerly done business with him and visited the Davis Co. on an average of once a month and had some of his letters typed there, and told him about plaintiffs' property. Abrams signed, as seller's agent, a receipt to Galant for a deposit of $1,000, on a purchase price for the property of $50,000. The check for this, although Abrams, like Brandell, claims he was acting individually and not for the Davis Co., was made payable to the Davis Co. It is this offer which Brandell had in mind when he told Vigli he had a $50,000 offer for the property. As Vigli refused it, the check was returned to Galant on September 14th. On September 16th, Galant raised his offer to Abrams to $51,500, gave Abrams a $1,000 check payable to the Davis Co., and signed the "Uniform Agreement of Sale and Deposit Receipt" which Viglis accepted on September 21st. The next day, Galant gave Abrams the additional deposit check of $1,500 likewise made out to the Davis Co. (and later with the other check cashed by the Davis Co.). It was on September 16th or "even * * * earlier" that Davis claims he first heard of the Vigli matter. A day or two after September 21st Galant claims that he decided that he wanted to sell the property so he authorized Abrams (who up to this point at least had not been Galant's agent) to obtain a buyer for the property. Immediately, between September 21st and 25th, one Stotts was shown the property by defendant Letsinger and on the 25th Stotts signed the usual uniform agreement of sale agreeing to pay $58,000 for the property, $20,000 of which was to be a second lien on the property in question and a first lien on some country property owned by Stotts. The receipt portion of the document, receipting for a deposit of $2,500, is signed "Davis Realty Company, agent for seller, by D. C. Letsinger." Although Abrams was supposed to be the agent for Galant, the seller, this writing shows Davis Co., by Letsinger, as the agent for the seller. Abrams took this to Galant, but Galant refused to accept the offer because of the second lien feature, but said in effect that he would accept any offer that would net him a profit of $1,500. Davis knew of these transactions as they occurred, so accordng to his own testimony, on September 26th or 27th "the deal was put up" to him by Abrams and Letsinger as a result of which Davis was to buy the property from Galant for $53,000 (giving Galant his $1,500 profit) and resell it to Stotts for $58,000. Shortly after that Abrams brought Galant a writing to the effect that Davis was buying the property and Galant was to receive $1,500 profit plus his $2,500 deposit, a total of $4,000. Thereupon Galant wrote the title company, enclosing deed from himself and wife to Stotts and wife, to be delivered upon receipt for him of $4,000, and stating: "Any further instructions necessary to close the transaction you will please accept from the Davis Realty Company, as we are selling the property to them as principals, and they, in turn, are reselling the property to Garver B. Stotts and wife." Although this was a sale to Davis and a resale by him to Stotts, it will be noticed that the deed ran directly from Galant to Stotts.

On October 2nd Galant wrote a letter to Davis Co.—"Attention: Mr. Wm. J. Davis," stating that the Stotts offer of September 25th was not satisfactory because of the second lien feature, "but I will sell the before described property to you as a principal" for $1,500 profit plus the return of the $2,500 deposit. In case Davis met those terms "you have my permission and approval to proceed with the sale of the property to said Garver B. Stotts and wife, dealing with them as the principal, and make such profit in connection with said sale as you are able to make and retain said profit for your own account." The same day Letsinger wrote Stotts to the effect that "we" had approved his offer of September 25th, the purchase price to be $58,000. $37,000 was to be secured by a first deed of trust to Western Service Corporation in the sum of $37,000, and $20,000 secured by a second deed of trust to William J. Davis, or his nominee, plus a first lien on some Tulare county property. On October 18th the Viglis were taken by Brandell to the title company to sign the deed to Galant. The deed from Galant to Stotts was signed the same day.

Of the $2,000 commission paid by Viglis, Brandell received one-third, Abrams one-third, and Davis one-third. Galant made $1,500 on the deal; Letsinger received no commission from Stotts but did receive $1,500 "and some odd" from Davis. He claimed that this was a commission paid him by Davis for selling the property from Davis to Stotts and not for representing Davis in buying from Galant. Davis received in addition to the $666 (one third of the $2,000) a profit of approximately $4,000.

The Viglis at no time met or talked with Davis, Abrams or Letsinger, all their transactions being with Brandell.

There is very little, if any, conflict in the testimony concerning the facts so far set forth, except that Brandell denied ever stating or intimating that he was an agent or employee of Davis Co. or that he was acting for any one other than himself and the Viglis. The main conflict comes in connection with the relationship between the parties to this action, and even there, there is very little difference in the evidence on that subject, the real difference being in the inferences which might be drawn, and which the court drew, from that evidence. Defendants contend that the only inference possible is the one supporting their position, but they are wrong in this contention.

The defendants Brandell, Abrams and Letsinger all are licensed real estate brokers, as is defendant Davis; all three of them have desk space in the Davis Realty Company office, 5000 Geary Boulevard (at 14th Avenue), where there are about 20 real estate brokers having desk space. All three of them use a card identical with Exhibit 10 except, of course, that their names appear instead of Brandell's. Davis himself uses an identical card with the exception that the words "Office at" do not appear. All three use defendants' Exhibit BB form of "Agreement to Sell" inserting their respective names at the top where appears the name "Jay Brandell." All three have written contracts with Davis such as the one signed by Brandell reading: "For and in consideration of Desk Space at 5000 Geary Boulevard, San Francisco, California, and for telephone, stenographic and bookkeeping services, in connection with the conduct of my real estate brokerage business, I, the undersigned tenant broker, agree to pay Wm. J. Davis, dba Davis Realty Co., fifty percent of my profits made from my real estate or insurance activities. It being understood that I am not to pay Wm. J. Davis anything on account of renewals of my existing insurance business or pay anything from the profits of any other venture or other line of business in which I am engaged or may become engaged during my tenancy or thereafter. It is understood that my tenancy is on a month to month basis. It being distinctly understood and agreed in connection with my tenancy that I am not an employee of Wm. J. Davis and that said Wm. J. Davis does not control or does not have the right to control my time or acts and I can come and go as I see fit." They all receive the services outlined in the agreement and use the phone listed under the Davis Co. name. Davis supplies them with cards, stationery, forms, etc., without charge.

Defendants claim that the desk space contract, the type of card used by the defendants (Exhibit 10), the listing agreement which they contend shows was only made with Brandell and not with Davis Co., and the uniform agreement of sale and deposit receipt signed by Viglis in which they agree to pay the commission to Jay Brandell (and no mention of Davis Co.), conclusively establish without conflict the fact that no fiduciary relationship existed between plaintiffs and any defendant other than Brandell.

But defendants have overlooked the inferences that reasonably may be drawn from those documents coupled with the other facts in the case. Practically the same contention was made in Cauhape v. Security Savings Bank, 118 Cal. 82 at page 84, 50 P. 310, wherein the court said: "It is assumed as a premise by appellant, upon which he bases his argument for a reversal, that 'there is no serious question of fact in the case; and the order granting a new trial was the result, apparently, of a change of the view first taken by the trial court of the law bearing upon the facts.' The record fails to sustain this assumption. While the evidence tending to prove the circumstances relied on by plaintiff to sustain his right to recover was uncontradicted, the ultimate facts to be deduced therefrom depended largely and essentially upon inferences not in themselves obvious or certain. When the facts necessary to sustain the judgment do not naturally follow as a necessary sequence from the probative facts, but must depend upon inferences to be deduced therefrom, it is as exclusively the province of the trial court to make those deductions, and find the facts, as where the evidence itself is conflicting. In fact the evidence may, in such an instance, be said in one sense to be conflicting, since the facts which it tends to prove are uncertain until found.

"In such a case, the trial court having in its discretion set aside its findings, for this court to reverse its order would be in effect coercing it to a particular conclusion upon a controverted question of fact, and that it is not within our power to do."

The lower court drew the inference that Brandell was either the actual or ostensible agent of Davis. The question is not whether such an inference is the only one, or the one most likely, to be drawn, but is it one that reasonably can be drawn? It is not unreasonable to infer that there was an actual agency from the following facts, among others in the case: Brandell's close association with Davis; the fact that almost immediately after Brandell signed up the Viglis, Abrams and Letsinger, bearing the same relationship to Davis as did Brandell, started working on "the deal"; the advertisement in the Chronicle ending "Jay Brandell, D-A-V-I-S Realty Co."; the fact that the receipts of deposit on the Galant offers to purchase from Vigli were signed by Abrams as "Agent for Seller" (how could that be if Brandell alone was the agent for the Viglis, the sellers?); the fact that the deposit checks were made to and cashed by Davis Co.; the instructions to the title company to withhold a $2000 commission for, and pay to, Davis Co.; the fact that although Galant testified that he employed Abrams as his agent, "Davis Co. by Letsinger" suddenly appeared as his agent; the fact that the commission check was payable to, endorsed and cashed by Davis Co.; the fact that of the commission on the Vigli-Galant sale, Davis and Abrams each received one-third (The desk space contract, which is so strongly stressed by defendants provides for the payment to Davis of 50 per cent of "my profits made from my real estate" activities. One of the inferences that can be drawn from this circumstance is that the desk space contract was a device to be used when necessary to make it appear as if there were no agency relationship between Davis and the other defendants); the fact that when Vigli phoned the Davis Co. and told the girl that he wanted to list his property with the Davis Co. and would like to discuss the matter with Mr. Brandell, no information was given him to the effect that Mr. Brandell was not authorized to act for Davis Co.; the statement from the Davis Co. to Viglis showing the details of the application of the purchase price.

On the question of ostensible agency—the holding out by Davis of Brandell, Abrams and Letsinger as his agents—the foregoing facts and the inferences to be drawn are also strong. That plaintiffs relied and acted upon such a holding out is shown, among other things, by their instructions to the title company when they deposited in escrow their deed to Galant, "allow account of rent (per statement of Davis Realty Company. Pay Davis account commission $2,000."

Defendants contend that the Viglis should have known on receiving the Brandell card that he was simply a broker with his office at Davis Realty Co. Had a studied effort been made to design a card calculated to deceive the average person as to Brandell's true relationship to Davis Co., no card better for the purpose could be evolved than the one used here. The thing that strikes the eye most forcibly in looking at it is the blue and yellow Davis Co. emblem that takes up about one-fifth of the card, but visually appears to take up more. The words "Office at" are in small, light type. A person looking at the card, even if he noticed "Office at," would reasonably get the impression that Brandell was connected with Davis Realty Co. in a relationship other than just a tenant. The same is true of the listing agreement. The Davis Co. emblem sticks out like a sore thumb. The sentence "Wherever Davis Realty Co. appears herein change to Jay Brandell" stamped at the head of the instrument, and not too clearly, as the words "wherever" and "change" did not make a full impression on the paper, might not be noticed by the average person, but if noticed, its significance would not necessarily be understood. Particularly is this so in view of the emblem at the top; the fact that Davis Realty Co. appears 14 times; the fact that the sentence in question is not part of the agreement itself. Even the blacking out of "Davis Realty Co." at the end would not appear too significant, as the "by" remains in. After signing, it reads "By J. Brandell." The average person might very well conclude that the substitution of Brandell was an arrangement or policy of Davis Co. to place the particular listing solely in the care of that individual employee.

It is true that the evidence is susceptible of the interpretation claimed for it by defendants, namely, that Brandell was acting for himself alone; that although the property was advertised for seven or eight days, Galant was the only purchaser who appeared; that Abrams and Letsinger were also acting as independent brokers for themselves respectively; that no agency or employee relationship existed between Davis and any of the other defendants; that after Stotts offered to buy, offering a second mortgage which Galant was unwilling to take, at Galant's suggestion Davis was interested in the transaction; that the arrangement between Davis and the other defendants was as set forth in the desk space contracts; that Brandell, Abrams and Letsinger were neither the actual nor ostensible agents for Davis. But this is only one of the interpretations to be made of the evidence. The interpretation that the court made is actually more reasonable and proper under all of the facts of the case.

It is not claimed that the so-called "tenancy agreement" between Davis and Brandell was ever called to the attention of plaintiffs, and therefore the plaintiffs are in no wise bound by its terms, nor, so far as they are concerned, does it offset the effect of the acts of Davis justifying the inference of agency. If, actually, Brandell had no agency affiliation with Davis Co. it would have been a simple matter to make that clear and certain, on the cards and forms. The conclusion is almost inescapable that should the arrangement contended for by defendants be sustained by the court, it would supply a neat subterfuge for allowing Davis to reap a harvest from irregular dealings with properties listed with any of the "tenant brokers" without the shackles of the fiduciary doctrine of agency law. Davis was perfectly free to make use of all the connections made by his "tenant brokers" both selling and buying. The fact that all of the three defendant "tenant brokers" were bound to pay him one-half of all their commissions to enjoy the privileges of his office is a rather suspicious circumstance.

[4] The evidence justifies the conclusion that defendant Brandell was acting as the agent of Davis; that both knew that the property would bring a sum substantially more than the $50,000 Brandell tried to get plaintiffs to accept; that at the time Brandell obtained plaintiffs' acceptance of the $51,500 Galant offer, either one of two situations was the fact—either Galant was obtained merely for the purpose of holding the property until a higher price could be obtained, or Galant was a bona fide purchaser, but defendants knew that they could get a higher price and violated their confidential relationship with plaintiffs in not disclosing that fact. Naturally plaintiffs would not have sold for $51,500 had they known that the property would bring within a few days $58,000 (a sum within $500 of the amount the defendants set forth in their Chronicle ad). Having in mind that Davis purchased the property from Galant the following language from Rattray v. Scudder, 28 Cal.2d 214, 224, 169 P.2d 371, 377, 164 A.L.R. 1356, is appropriate: "* * * the broker, when pursuing his own interests, cannot ignore those of his principal and will not 'be permitted to enjoy the fruits of an advantage taken of a fiduciary relation, whose dominant characteristic is the confidence reposed by one in another.' Curry v. King, supra, 6 Cal.App. 568, 575, 92 P. 662, 665. It has therefore been stated that, 'The law does not allow the agent who has also a right to purchase to wait until someone makes an offer of an amount in excess of

the agreed purchase price and then elect to purchase the property at the lesser price without informing the owner of the higher offer, and, after the agent has obtained the consent from the owner to buy the property, then immediately sell it for the higher price as his own property.' Neighbor v. Pacific Realty Association, supra, 40 Utah 610, 124 P. 523, 526, Ann.Cas. 1914D, 1200. * * * One who acts as an agent and also deals with his principal as to the subject matter of the agency cannot take advantage of his principal by withholding from him information secured by means of the agency. In the language of the Restatement of Agency: 'Before dealing with the principal on his own account * * * an agent has a duty, not only to make no misstatements of fact, but also to disclose to the principal all material facts fully and completely. A fact is material * * * if it is one which the agent should realize would be likely to affect the judgment of the principal in giving his consent to the agent to enter into the particular transaction on the specified terms. Hence, the disclosure must include not only the fact that the agent is acting on his own account * * *, but also all other facts which he should realize have or are likely to have a bearing upon the desirability of the transaction from the viewpoint of the principal.' § 390, Comment a." See also Bell v. Scudder, 78 Cal. App.2d 448, 177 P.2d 796.

[5] Stress is laid by defendants upon the fact that the plaintiffs both testified that they did not notice the "Office at" on the card of Brandell's, and the alterations in the listing agreement, and quote Zibbell v. Southern Pacific Co., 160 Cal. 237, 241, 116 P. 513, to the effect that the physical facts must overcome a witness' testimony that he did not see or hear. That was an accident case and is not in point for the reason that here, the peculiar physical makeup of the documents in question, coupled with the other facts of the case, or even standing alone, would justify an ordinarily reasonable person in inferring that Davis Co. was Brandell's principal, and that in signing the listing agreement the signer was entering into an agreement with the Davis Co. This is not the only inference to be drawn, of course, but it is a natural one. For the same reason, the rule set forth in 6 Cal.Jur., sec. 50, page 84, to the effect that if a person signs a writing without reading it, he nevertheless is bound by its terms, does not apply. It is not a question of plaintiffs not reading the writing, but not noticing under the circumstances matters which other persons reasonably might not have noticed.

The inferences which reasonably can be drawn from an examination of the writings and the directly contradictory testimony of Brandell as against that of the plaintiffs causes the conflict of evidence rule to apply to this appeal. Cases like De La Falaise v. Gaumont-British Picture Corporation, 39 Cal.App.2d 461, 103 P.2d 447, Moss v. Stubbs, 111 Cal.App. 359, 295 P. 572, 296 P. 86, and others cited by defendants and holding that where there is no substantial conflict in the evidence, the rule does not apply, are not applicable here as the conflict is real and substantial.

[6] Section 2300 of the Civil Code defines ostensible agency as one "when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." Having in mind the rule cited by defendants from Walsh v. American Trust Co., 7 Cal.App.2d 654, 47 P.2d 323, that there is no presumption that an agency exists but on the contrary that a person is acting for himself solely, and applying the test set forth in the code to the facts of this case—the type of cards and instrument forms provided by Davis Co., the instructions to the title company, and the statements to plaintiffs on Davis Co. letterheads, the general situation and facts of this case certainly show that Davis, either intentionally, or by want of ordinary care, held Brandell out to be his agent, or at the very least, justified such an inference to be drawn. Pacific Ready-Cut Homes, Inc., v. Seeber, 205 Cal. 690, 272 P. 579; Stanhope v. Los Angeles College of Chiropractic, 54 Cal. App.2d 141, 128 P.2d 705.

[7] In determining this question, as also the question of an inference of actual agency, it is not necessary to resort to the

statements of Brandell. Eliminating the testimony as to his representations to plaintiffs entirely (as we have to do under the rule set forth in Christian v. Rice Growers Ass'n, 50 Cal.App.2d 617, 123 P.2d 534), there is still plenty of evidence in the case to support the lower court's conclusions. Defendants point out that the test of ostensible agency is set forth in Hill v. Citizens Nat. Trust & Savings Bk., 9 Cal.2d 172, 176, 69 P.2d 853, as, first, that the person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one; second, such belief must be generated by some act or neglect of the principal sought to be charged; and third, the third person in relying on the agent's apparent authority must not be guilty of negligence. The evidence in this case meets all these requirements.

The facts in the case of Traders' Credit Corporation, Ltd. v. Radin & Kamp, Inc., 131 Cal.App. 479, 21 P.2d 461, 462, are readily distinguishable from those in our case. There Clifford, who rented space in the department store of Radin & Kamp in Fresno, signed orders for goods in his own name, although the seller's agent marked the orders "Charge to Radin & Kamp." Clifford wrote one letter on Radin & Kamp stationery and three telegrams which he signed "Radin & Kamp." The merchandise was shipped to Radin & Kamp and delivered to Clifford through their receiving room. "No one connected with respondent [Radin & Kamp] had any knowledge of these deliveries except the receiving clerk and Clifford. Invoices and statements of account were mailed to Radin & Kamp at Fresno. They were apparently taken from the mail by Clifford * * *. No responsible officer, agent, or employee of respondent knew of the letter or telegrams and no direct or implied authority to Clifford to sign 'Radin & Kamp' to the telegrams was shown." The court very properly found that the evidence fell far short of establishing an ostensible agency. In our case, however, Davis Co. not only knew of the type of cards and forms Brandell was using, but actually issued them to him. Letters and statements on Davis Co. letterheads not only were sent out, but were sent out by Davis Co. and the commission was taken by Davis Co. and thereafter split up by it.

Defendants place great reliance upon the fact that neither plaintiff had met Abrams or Davis at all, and had not seen Letsinger for about four years, nor had either one talked to any of these three men in any way in connection with the transaction involved here. Defendants argue that from that fact, plus the fact that the deposit receipt "agrees to pay on demand to Jay Brandell the sum of Two Thousand dollars ($2000.00) for services rendered," plus the alteration in the listing agreement which we have already discussed, that the Viglis must have known that they were dealing with Jay Brandell solely. Any one of these facts standing alone might support defendants' position, but when taken in connection with the other facts of the case, place a different aspect upon the situation. Being justified in believing that Brandell was the agent of Davis from the other circumstances of the case, the fact that the commission agreement referred to Brandell and not to Davis Co. would not be sufficient to cause plaintiffs to suspect that Davis Co. was not the principal, and, of course, there can be a holding out of agency by a person without such person actually talking to the person who acts upon such holding out. That was the case here.

Defendants cite Allen v. San Francisco Wholesale Dairy Produce Exch., 59 Cal. App. 93, 96, 210 P. 41, as support of their contention that because plaintiffs did not actually see the Davis Co. office or see or talk to Davis, Letsinger, and Abrams, there can be no ostensible authority. In that case a clerk whose only duty was to open the office mail and bring it to the attention of the proper officers, wrote an order on an office letterhead and stamped the name of one of the officers to it. The court held there was no evidence that the plaintiff knew these facts or was misled by them. In our case, the evidence shows that the plaintiffs knew the facts of the holding out of the agency heretofore discussed and were misled into believing they were dealing with Davis Co.

Defendants claim that the evidence does not show that Brandell participated further in the transaction after he had signed up the plaintiffs. But he did participate later to the extent that he permitted the $2,000 commission paid by the Viglis out of the Galant purchase price, which under defendants' theory of the case belonged to Brandell alone, to be used by Davis Co. as a credit in the Stotts transaction, and finally permitted Davis Co. to split it, one third to Davis Co., one-third to Abrams, and only one-third to Brandell. But even if he did not participate in any further profits from the transaction, the legal situation is not changed. His part of the deal had been performed. Acting for Davis Co. he had tied up the plaintiffs until such time as Davis with the assistance of his other agents, Letsinger and Abrams, could work out the matter of getting a higher price for the property.

[8, 9] Defendants' second point on appeal is that when plaintiffs accepted Galant's offer to purchase by signing the agreement of sale and deposit receipt (plaintiffs' Exhibit 13) the title passed by equitable conversion from plaintiffs to Galant; therefore plaintiffs legally could not have sold the property again, either to Stotts or any one else; and hence cannot complain about what was done with the property thereafter. This, of course, is assuming that Galant was a bona fide purchaser and not buying for the defendants, to tie up the property until a purchaser at a higher price could be obtained, an inference which could reasonably be drawn from the evidence. But assuming that Galant was a bona fide purchaser, is the doctrine of equitable estoppel a defense against the claim that the defendants Brandell and Davis, as plaintiffs' agents, received secret profits? Undoubtedly the true rule of equitable estoppel is, as set forth in Estate of Dwyer, 159 Cal. 664, 115 P. 235, cited by defendants, to the effect that when a binding agreement of sale is entered into by the parties, an equitable conversion is worked; the purchaser becomes the equitable owner of the land and the seller the owner of the purchase price. But that doctrine has no application here. This is not an action between plaintiffs and Galant, or over the title to the property. This is an action against real estate agents who violated their fiduciary relationship to get more money for themselves. Equitable conversion is an equitable doctrine and equity can never be invoked to sustain a fraud or do a wrong. (10 Cal.Jur. 519.)

In State v. O'Connell, 121 Wash. 542, 209 P. 865, at page 868, the court refused to apply the doctrine as against an alien land law violator, saying that equitable conversion "is a fiction which will be enforced only when necessary to accomplish manifest justice, and never to circumvent the public policy * * * ".

In Re Walkerly, 108 Cal. 627, 41 P. 772, 49 Am.St.Rep. 97, to try to get away from the rule against perpetuities, an attempt to invoke the doctrine of equitable conversion was made. The court said (108 Cal. at page 652, 41 P. at page 777, 49 Am.St.Rep. 97): "This would not only be a surprising application of the doctrine, but would be a novel and startling method of evading the law against perpetuities by invoking an equitable fiction. The rule of equitable conversion merely amounts to this: that where there is a mandate to sell at a future time, equity, upon the principle of regarding that done which ought to be done, will for certain purposes, and in aid of justice, consider the conversion as effected at the time when the sale ought to take place, whether the land be then really sold or not."

"* * * the doctrine of equitable conversion * * * [is] resorted to only where it is necessary to determine ownership." In re Van Zandt's Estate, 142 Misc. 663, 255 N.Y.S. 359, 364. "The law does not favor conversions * * *." In re Loew's Estate, 291 Pa. 22, 139 A. 582, 583.

The last point raised by defendants is that plaintiffs, between the signing of the agreement to sell and the signing of their deed to Galant, had knowledge of the transactions now complained about. They contend this knowledge was (a) constructive, and (b) actual.

[10] The claim of constructive knowledge is based upon the fact that all parties, Vigli, Galant, Davis and Stotts, placed their instructions and documents in escrow

with the same title company and as part of the same escrow. Defendants contend that the title company was therefore the agent for Viglis, and that the title company's knowledge of the various deals as shown in the escrow instructions is imputed to Viglis; in other words, that the knowledge of the agent is the knowledge of the principal. Defendants rely on Early v. Owens, 109 Cal.App. 489, at page 494, 293 P. 136, at page 138, where the court held: "It is well-settled law in California that the holder of an escrow is agent for all parties up to the time that the escrow is closed. * * * It is also well-settled law in this state that notice given to or possessed by an agent within the scope of his employment and in connection with, and during his agency, is notice to the principal."

While that it the general rule, there are exceptions to it. In Thompson v. Stoakes, 46 Cal.App.2d 285, 115 P.2d 830, an action similar to the one here was brought against the plaintiffs' agents to recover secret profits in a real estate transaction. This court (46 Cal.App.2d at page 292, 115 P.2d at page 834) "pointed out that in Early v. Owens, supra, the appellate court expressly held that the finding that the principal had *actual* knowledge was supported by the evidence." (Emphasis added.) It stated that the general rule would not be applied where there were two escrows, "to documents deposited in the escrow to which the party sought to be charged with notice was not a participant." It further held: "As a matter of substantive law, where a positive fraud has been perpetrated by one agent, appellants herein, such fraud does not become non-actionable because of the knowledge of another agent, the escrow holder, of facts not communicated to the common principal. As between two innocent parties, notice to the agent of one is notice to the principal, but, as between the principal and the fraudulent agent, notice of another agent should not be imputed to the principal." While our case is probably not one of two escrows (the title company agent testified that it was all under one escrow number but also designated it as "a double transaction") the principle that notice to another agent should not be imputed to the principal in protection of the fraud of another agent of the principal, would apply.

Kroeker v. Hurlbert, 38 Cal.App.2d 261, 101 P.2d 101, expressly overrules Early v. Owens, supra, insofar as it might apply to the situation in this case. After referring to the general rule as set forth in the Early case, the court says (38 Cal.App.2d at page 269, 101 P.2d at page 104): "A further consideration is that a real estate broker should not be relieved from the consequences of a plain fraud and violation of his duty to his employer, such as was found by the court here, on a technical constructive notice unless this is necessary in order to conserve established rules which, in some cases, are most salutary. The rule here in question, as laid down in cited cases and others, has been invoked in order to do equity and to prevent fraud, and it is not necessary that this rule be so extended, under the circumstances of this case, as to permit it to be used in perpetuating a fraud and in protecting an agent in the violation of his duty to his employer." The court also points out that the escrow holder's agency is a limited one, where "Although the papers were included in the same escrow, in a very real sense the transfer of this deed to the appellants was a separate matter from the other part of the escrow which involved a conveyance of the land from the former owner to the respondent. * * * Assuming that the escrow holder was the agent of the respondents in the passing of the deed conveying a one-fourth interest in the oil rights to the appellants the authority and scope of its agency for that purpose was limited, the entire matter of the consideration for that deed being excluded from the escrow agent's duty and from the sphere of its agency in that regard. That consideration was the services of the appellant E. C. Hurlbert in buying the land as cheaply as possible. Not only did the escrow holder have no knowledge of that consideration or the obligation of the appellants to perform that service, but if it had had such knowledge the same would not have been within the scope of its agency. If the escrow agent had knowledge of facts which would otherwise affect this consideration, that knowledge related to a matter which was not within the scope of its agency. It follows that the respondents would not be bound by any such knowledge, and the evidence amply supports the court's finding that nothing concerning that matter was communicated to the respondents and that they had no actual knowledge of any such fact."

[11] So here, the knowledge of the escrow holder concerning the matters other than the deed and instructions in the Vigli-Galant matter was without the scope of the title company's agency for plaintiffs. It was plaintiffs' agent merely to deliver their deed and obtain for them the consideration set forth in their instructions, paying out of that consideration the specific amounts plaintiffs instructed them to pay out. The agency was limited and the agent's knowledge, imputable to his principal, likewise limited to matters within that agency. It is significant that in this respect the title company escrow clerk who handled the transaction testified: "Q. All right. In other words, the seller in a case like this puts in his deed, and calls for his money, and that is all, so far as your records are concerned, that he sees in this deal? A. Yes, each party would see his own end of it." In any event, the constructive notice rule must not be permitted to enable a real estate agent to commit a fraud on his principal.

The claim that plaintiffs had actual knowledge of the subsequent transactions is based primarily upon the testimony of Mrs. Houston, who was plaintiffs' manager of the apartments. In September Letsinger had brought Stotts out to go through the building. On October 3rd Stotts came to the building and rented from her a vacant apartment. The next day she told plaintiff Joseph Vigli that Mr. Letsinger had told her that Stotts had just contracted to buy the building. Stotts paid the rental and occupied the apartment just across the hall from Viglis. Letsinger told her not to tell plaintiffs that Stotts was buying, but she did. Brandell testified that he told Viglis that Stotts was buying from Galant. The Viglis denied this, hence creating a conflict. However, it must be remembered that thereafter, when plaintiffs, their lawyer, and Brandell were at the title company, plaintiffs' lawyer asked Brandell if there were anyone than Galant interested in the deal and Brandell told them "absolutely not." While Brandell denies making this statement, for the purposes of this appeal we must consider that he did. Then, any intimation which the Viglis may have had that Stotts was also buying would be offset by the positive statement of their own agent that no one else was interested in the deal. They had a right to rely on his statement as against the information given them by Mrs. Houston as to what Mr. Letsinger had said. The plaintiffs having relied upon their own agent's statement, that agent cannot now question its effect. Defendants complain that when the attorney asked Brandell if any one else was interested in the transaction, he did not also ask the escrow clerk the same question. Nothing had occurred which would cause either plaintiffs or their attorney to question the reliability of their own agent, and hence, there was no occasion for asking the clerk.

The order granting a new trial is affirmed.

PETERS, P. J., and WARD, J., concur.

79 Cal.App.2d 425

BERGER v. SUPERIOR COURT IN AND FOR YUBA COUNTY.

Civ. No. 7370.

District Court of Appeal, Third District, California.

April 30, 1947.

1. Prohibition ⚷10(1)

A writ of prohibition is the proper method of restraining a court which is exceeding its jurisdiction by improperly assuming jurisdiction over persons not served with process as required by law.

2. Automobiles ⚷235

Where member of armed forces from Missouri was stationed in California for more than three years prior to date of automobile collision, and he stated that he became a resident of California several months before collision and continued to be such until after collision, and there was no evidence that he was a nonresident, he was not a "nonresident" within meaning of Vehicle Code section authorizing service on a nonresident motorist by leaving copy of summons and complaint with director of motor vehicles. Vehicle Code, § 404; Government Code, §§ 243, 244.

See Words and Phrases, Permanent Edition, for all other definitions of "Nonresident".

◆

Prohibition proceeding by Marcus Berger, commissioner, against the Superior Court of the State of California, in and for the County of Yuba, to restrain the respondent from any further proceedings in an action filed in that court by one Rita Fern Notestine against the petitioner.

Writ of prohibition ordered issued.

Van Dyke & Harris by Jack Montgomery, all of Sacramento, for petitioner.

Manwell & Manwell, of Marysville, for respondent.

SCHOTTKY, Justice pro tem.

Petitioner seeks a writ of prohibition to restrain the Superior Court of Yuba County from any further proceedings in an action filed in said court by one Rita Fern Notestine against petitioner. Petitioner previously appeared specially and made a motion in said Superior Court to vacate and quash service of complaint and summons upon him upon the ground that at the time of the attempted service under Section 404 of the Vehicle Code he was a nonresident of the State of California.

[1] That a writ of prohibition is the proper method of restraining a court which is exceeding its jurisdiction by improperly assuming jurisdiction over persons not served with process as required by law is settled by the case of Jardine v. Superior Court, 213 Cal. 301, 2 P.2d 756, 79 A.L.R. 291. That case expressly overruled some earlier decisions which held that the remedy of a defendant who attacks jurisdiction over his person is by appeal only, the court stating, 213 Cal. at page 305, 2 P.2d at page 758, 79 A.L.R. 291:

"We conclude that the jurisdictional question was properly raised by this petition; and since this conclusion is in direct conflict with the group of cases to which reference has been made (Bullard v. Superior Court, supra, [106 Cal.App. 513, 288 P. 629,] and others cited supra), we are compelled to overrule them in so far as they purport to hold that an objection to jurisdiction over the person of a defendant cannot be raised by an application for a writ of prohibition." See also Hammons v. Superior Court, 63 Cal.App. 700, 219 P. 1037.

It appears from the petition, the allegations of which are not controverted, that petitioner came to California in November, 1942, as a member of the armed forces of the United States and was stationed at Camp Beale in Yuba County until March 9, 1946, when he departed for the State of Missouri; that on the 7th day of February, 1946, in the County of Yuba, petitioner, while driving an automobile, was involved in a collision with an automobile driven by one Rita Fern Notestine; that thereafter on March 21, 1946, an action was filed against petitioner to recover for injuries and damages resulting from said collision; that an order for publication of summons was made and petitioner was handed a copy of summons and complaint in St.

Louis, Missouri, on May 22, 1946; that after the order for publication of summons was made, a copy of the summons and complaint was left with the Director of Motor Vehicles at Sacramento in accordance with Section 404 of the Vehicle Code; that no property of petitioner within the State of California has been brought within the jurisdiction of the court in said proceeding by attachment or otherwise; that on June 6, 1946, petitioner appeared specially in the said Superior Court by motion to quash the said service of summons, which said motion was argued on June 21, 1946, and denied by the said Superior Court on December 9, 1946. The petition alleged further that petitioner at all times from November, 1942, until March 9, 1946, was "domiciled in and a resident of the State of California" and the affidavit of petitioner in support of his motion to quash service of summons, which affidavit was attached as an exhibit to the petition, reads as follows:

"That during the latter part of the Month of November, 1942, he became a resident of the State of California and continued to be a resident of said State until on or about the 9th day of March, 1946, at which time he departed from the State of California; That at the time he left the said State of California on said date he intended to relinquish all claim to California residence and to acquire a Missouri residence; That said Missouri residence was acquired by him on or about the 26th day of March, 1946, that being the date upon which he arrived within the State of Missouri;

"That on the 7th day of February, 1946, being the date referred to in plaintiff's complaint on file herein, and being the date on which he was involved in an accident with plaintiff, named in said Complaint, he was a resident of the State of California, and that he continued to be a resident of said State until on or about the 9th day of March, 1946."

Section 404 of the Vehicle Code provides for service of process upon a nonresident in an action growing out of any accident or collision resulting from the operation of any motor vehicle upon the highways of this State by himself or agent, but subdivision (h) of said section provides that "nonresident" means a person who is not a resident of this State at the time the accident or collision occurs. Such service may be made by leaving a copy of summons and complaint with the Director of Motor Vehicles, and mailing a copy of summons and complaint to said nonresident by registered mail or by serving such nonresident personally. The Supreme Court of the United States has approved constructive or substituted service of process upon nonresident motorists coming into a particular jurisdiction and availing themselves of the highways of the State. A similar statute of the State of Massachusetts was before the court in Hess v. Pawloski, 274 U.S. 352, 47 S.Ct. 632, 633, 71 L.Ed. 1091, and in discussing the validity of this method of service, the Supreme Court used the following language:

"* * * Under the statute the implied consent is limited to proceedings growing out of accidents or collisions on a highway in which the nonresident may be involved. * * * And, in advance of the operation of a motor vehicle on its highway by a nonresident, the state may require him to appoint one of its officials as his agent on whom process may be served in proceedings growing out of such use. Kane v. [State of] New Jersey, 242 U.S. 160, 167, 37 S.Ct. 30, 61 L.Ed. 222, [226]. That case recognizes power of the state to exclude a nonresident until the formal appointment is made. And, having the power so to exclude, the state may declare that the use of the highway by the nonresident is the equivalent of the appointment of the registrar as agent on whom process may be served. * * *"

The learned trial judge evidently reached the conclusion that petitioner was a nonresident of the State of California on February 7, 1946, the date of the collision, and for that reason denied petitioner's motion to quash service of summons. The question that we must decide is whether or not such conclusion is sustained by the record. It is conceded by respondent that if petitioner was a resident of the State of California at the time of the collision, petitioner is entitled to the relief sought by him.

Respondent points out that Section 404 does not contain any definition of the term "nonresident" and argues that the general laws of California must be consulted for the purpose of determining whether a person is a resident or nonresident within the meaning of said section. Sections 243 and 244 of the Government Code provide as follows:

"Every person has, in law, a residence."

"In determining the place of residence the following rules are to be observed:

"(a) It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose.

"(b) There can only be one residence.

"(c) A residence can not be lost until another is gained.

* * * * * *

"(g) The residence can be changed only by the union of act and intent."

Counsel for respondent argues that a change of residence is obtained by act and intent and that the mere fact that a soldier in the armed forces was stationed at a place and lived there did not establish such place as his residence. He argues further that a soldier has no choice as to his dwelling place and that the fact that he remains in any one place for a considerable length of time is merely a fortuitous circumstance. He cites the case of Johnston v. Benton, 73 Cal.App. 565, at page 569, 239 P. 60, at page 62, where the court said:

"It is well settled that the domicile of a person is in no way affected by his enlistment in the civil, military, or naval service of his country; and he does not thereby abandon or lose his domicile which he had when he entered the service, nor does he acquire one at the place where he serves. 9 R.C.L. 551; Stewart v. Kyser, 105 Cal. 459, 39 P. 19; People ex rel. Budd v. Holden, 28 Cal. [123,] 124; Estate of Gordon, 142 Cal. 125, 75 P. 672; Percy v. Percy, 188 Cal. [765,] 768, 207 P. 369. True, the fact of his being on military duty does not preclude him, if he so desires, from establishing residence where he is stationed (Percy v. Percy, supra); but the uncontradicted evidence here is that such was not Benton's desire—that he never had any intention of doing so.

"The question of whether a person has changed his residence from one place to another must depend largely upon his intention, and that intention is often manifested by the purpose that impelled him in taking up a new place of abode."

It is, of course, true that the mere fact that petitioner was stationed at Camp Beale in California as a member of the armed forces did not, of itself, make him a resident of California, but, as stated in Johnston v. Benton, supra, "the fact of his being on military duty does not preclude him, if he so desires, from establishing residence where he is stationed." If, therefore, petitioner desired to change his legal residence to California after he was stationed in California there was nothing to prevent him from doing so. He was living in California and all that was required to make him a legal resident was a decision or intention on his part to become a resident of California. His affidavit states that he became a resident of California in November, 1942, and continued to be a resident until March 9, 1946. There is nothing in the record to contradict his statement that he was a resident of California unless it can be inferred that he was a nonresident because he came to and was stationed in California as a member of the armed forces. Respondent argues that little reliance should be placed upon petitioner's affidavit because it "merely states his conclusion that he was a resident of the State of California." However, in Johnston v. Benton, supra, the court said 73 Cal.App. at page 570, 239 P. at page 62:

"* * * And in this connection it may be added that Benton's own affidavit, in which he stated that he was a resident of Shasta county, must be considered in corroboration of his oral testimony because it was the statement of a probative fact to which he was qualified to testify. O'Brien v. O'Brien, supra, [16 Cal.App. 103, 116 P. 692]."

[2] We have, therefore, a situation where the record shows that petitioner actually lived in California for more than three years prior to the date of the collision and his own statement that he became a resident of California in November, 1942, and

continued to be such until March 9, 1946. There is no evidence in the record which could support a finding that he was a nonresident of California on February 7, 1946, and in the absence of any such evidence we can reach no other conclusion than that petitioner was not a nonresident of California within the meaning of Section 404 of the Vehicle Code on February 7, 1946, and that the trial court should have granted petitioner's motion to quash service of summons.

In reaching this conclusion we have not taken into consideration Exhibit "D" attached to the petition, which is a certified copy of a certificate of registration showing that petitioner registered as a voter of Yuba County on September 29, 1945, because it is not clear as to whether or not said certificate was before the trial court, although the petition states that it was submitted to the trial court after the submission of the motion to quash and prior to the trial court's order denying said motion.

In view of the foregoing it is ordered that a writ of prohibition issue commanding respondent court to desist from any further proceedings in said action.

THOMPSON, Acting P. J., and PEEK, J., concur.

DIERMAN v. PROVIDENCE HOSPITAL et al. *

Civ. 13279.

District Court of Appeal, First District, Division 1, California.

April 25, 1947.

Hearing Granted June 23, 1947.

1. Hospitals 🔑8
Physicians and surgeons 🔑18(6)

Where surgeon planned to remove wart from patient's nose, after anesthetizing patient with nonexplosive gas, and then to remove tonsils after anesthetizing patient with ether, but while surgeon was cauterizing nose wound with hot electric needle a flash occurred about six inches above patient's face, the res ipsa loquitur doctrine was applicable in personal injury action against surgeon, anesthetist, and hospital.

2. Appeal and error 🔑996, 1001(1)

Where jury was instructed on res ipsa loquitur doctrine and then found in favor of defendants, to reverse the determination, appellate court was required to find that there was no evidence or no reasonable inference from evidence that defendants were not negligent.

3. Appeal and error 🔑996

The rule that conclusion of jury that a given act did not constitute negligence may not be disturbed on appeal, if evidence is such as to allow a difference of opinion among reasonable minds is not abrogated by the res ipsa loquitur doctrine.

4. Negligence 🔑134(1)

The res ipsa loquitur doctrine does not relieve a plaintiff who charges negligence from duty of proving it by preponderance of evidence.

5. Negligence 🔑121(2)

The "res ipsa loquitur" doctrine is a rule of evidence and not of liability, and it does not impose upon one charged with negligence the duty of exercising a higher degree of care than would be required of him in a case where the doctrine was inapplicable.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

6. Negligence 🔑134(1)

The res ipsa loquitur doctrine creates an inference or presumption of negligence that has the legal effect of establishing a prima facie case.

7. Negligence 🔑121(5)

That res ipsa loquitur doctrine is applicable does not impose burden on defendant of establishing the cause of the accident.

8. Negligence 🔑136(5)

Where evidence of due care has been offered by defendants, it becomes a jury question as to whether inference of negligence created by res ipsa loquitur doctrine has been dispelled.

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* Subsequent opinion 188 P.2d 12.

9. Hospitals ⚷8
Physicians and surgeons ⚷18(9)

Where surgeon planned to remove wart from patient's nose, using a nonexplosive anesthetic, and then to remove tonsils after anesthetizing patient with ether, and while surgeon was cauterizing nose wound with hot electric needle a flash occurred about six inches above patient's face, in action against surgeon, anesthetist, and hospital for injuries, negligence of defendants was for jury, notwithstanding failure of defendants' evidence to explain cause of accident.

10. Appeal and error ⚷1002

Appellate court has no power to disturb finding based on conflicting evidence.

11. Negligence ⚷134(1)

The res ipsa loquitur doctrine casts on defendant the burden of producing evidence which equals in evidentiary weight the inference created by the doctrine.

12. Negligence ⚷138(2)

In negligence action under res ipsa loquitur doctrine, instructions given at request of defendants on burden of proof were proper and did not nullify effect of res ipsa loquitur instructions.

13. Appeal and error ⚷216(2)

If plaintiff desired further explanatory instructions on subject of weight of evidence or burden of proof, it was her duty to request them, and, where she did not do so she could not complain on appeal that further instructions were not given.

◆

Appeal from Superior Court, Alameda County; A. J. Woolsey, Judge.

Personal injury action by Mabel Dierman against the Providence Hospital, a corporation, and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Gladstein, Andersen, Resner, Sawyer & Edises, by G. R. Andersen, all of San Francisco, for appellant.

Johnson & Ricksen, of Oakland, for respondent Libby, M. D.

Hoge, Pelton & Gunther, of San Francisco, for respondents Providence Hospital and Treadway.

PETERS, Presiding Justice.

This action was brought by Mabel Dierman against Dr. Robert Green Libby, a duly licensed physician and surgeon, the Providence Hospital, located in Oakland, and Mrs. Vera Jones Treadway, an anesthetist employed by the hospital, for personal injuries suffered in an operation and alleged to have been caused by the negligence of the defendants. The cause was tried before a jury and a verdict rendered in favor of all defendants. From the judgment entered in conformity with the verdict the plaintiff appeals.

The facts are as follows: On July 25, 1944, the plaintiff called at the office of Dr. Libby and was examined by him. She testified that she visited him to have a wart removed from her nose. The doctor testified that she complained to him of dizziness, headaches, hot flashes and of pains in her legs; that he concluded from his examination and diagnosis that the cause of her complaints was that plaintiff was going through the menopause; that he gave her a hormone injection and prescribed various medicines to be taken orally for this condition; that he also discovered that she had enlarged and infected tonsils; that he recommended their removal, and arrangements were made for the operation to be performed at the Providence Hospital on August 15, 1944.

On August 14, 1944, Dr. Libby again saw plaintiff and gave her the routine preliminary examination to determine if she were fit for surgery. He found her in good physical condition. On August 15, 1944, plaintiff was admitted to the hospital and was thereafter taken to the operating room where the accident resulting in her injuries occurred.

Dr. Libby testified that he planned to remove the wart first, and that for this part of the operation the patient was anesthetized with nitrous oxide and oxygen, admittedly a non-combustible, non-explosive and non-inflammable gas. He then intended to remove the tonsils after anesthetizing the patient with ether, a highly inflammable and explosive gas. Admittedly, containers of both gases were in the operating room.

The doctor testified that the patient was completely anesthetized with nitrous oxide and oxygen; that he then removed the wart with an electric needle which gets pretty hot; that after he had finished removing the wart and was cauterizing the wound with the electric needle there was a "flash" and a "pop" about six inches above the plaintiff's face; that as a result of this accident the plaintiff suffered contusions to her left cheek and left eye, and bled profusely from the nose and mouth. Because of these hemorrhages the doctor did not remove the tonsils but immediately called an eye specialist to examine the injured eye.

The doctor also testified that at the time of the "flash" and "pop" the nitrous oxide and oxygen had been turned off and that the ether had not yet been turned on; that to give ether would require the switching of the apparatus; that the apparatus was never switched. The doctor described in detail what he was doing before and at the time of the accident. It is a permissible inference from that evidence, if believed, that he exercised due care.

The anesthetist, Mrs. Vern Jones Treadway, was not available at the time of trial and her deposition was read to the jury. She testified that no ether was used at all in the operation, that only nitrous oxide and oxygen was used; that at the time of the "flash" and "pop" no anesthetic at all was being used. On the official anesthetic record of the hospital, filled out by this witness, under the heading "anesthetic used" appears the symbols for both nitrous oxide and ether, thus indicating that ether was actually administered. However, Mrs. Treadway testified that this report had been filled in by her before the operation started from information furnished her by the hospital office; that she knew both nitrous oxide and ether were to be used and so stated on the form; that the hospital office gets its information from the operating doctor. If her testimony is to be believed it is a permissible inference that she used due care.

The nurse in charge of the ten surgical rooms at the hospital who was not present in the operating room at the time of the accident, testified that the breathing hose that leads from the gas receptacle to the plaintiff's face was washed with soap and water just prior to the operation, and that this was the proper and accepted manner of preparing the hose for use in an operation. This witness contradicted herself several times as to whether she actually saw the hose being washed, but finally testified that she saw it being washed in the approved fashion.

Neither the doctor nor Mrs. Treadway could account, or attempted to account, for the "flash" and the "pop" that caused the injuries. In order to try and supply this information, a Dr. Cardwell, who was director of the anesthetic department of the defendant hospital at the time of trial, but who had not been connected with any of the defendants at the time of the accident, was called as a witness by defendant Treadway and the hospital. He qualified as an expert on anesthesia, and in response to a hypothetical question stating most of the facts surrounding the accident, and requesting his opinion as the cause of the "flash" and the "pop," stated: "I think that the strongest possibility— * * * From the information, I suspect— * * * My opinion would be, one probable likelihood would be, some contaminating substance in one of the tanks, some foreign substance." He admitted, on cross-examination, that a switch from one anesthetic to another can be made without an interval of time between, and that it was possible for a chemical laboratory to test nitrous oxide to see if it is contaminated. Neither the hospital nor the doctor nor the nurse had had such tests made of the nitrous oxide remaining after the operation.

The chief engineer of the hospital testified that he was in charge of purchasing anesthetics for the hospital in August, 1944; that the hospital did not manufacture its own anesthetics; that all anesthetics used by the hospital, including the nitrous oxide, were purchased from a named independent contractor.

There is no doubt that plaintiff received substantial injuries in the accident. Her face was swollen and black and blue and the eyelids of her left eye were so badly swollen that the eye was swollen shut. She bled from the nose and mouth for a considerable period of time. She was hospitalized for fifteen days. As to whether these injuries caused any permanent condition the evidence was highly conflicting. Plaintiff testified that prior to August 15, 1944, she was in excellent health, but that since the accident she was dizzy, unable to work, her eyes were affected and she could not read without discomfort, suffered from headaches, could not go on the street alone, etc. On cross-examination she admitted having been in an automobile accident in 1937 in which she broke her leg, and in the resulting civil action she testified as to severe head injuries. She denied going to Dr. Libby for any ailment other than the tonsils and wart. She denied then having the symptoms testified to by Dr. Libby. The doctor, in addition to testifying that her condition is now about the same as when she first visited him on July 25, 1944, testified that her injuries caused by the accident were completely cleared up by September 15, 1944. He testified that most of her present complaints were caused by the menopause and by the infected tonsils. There was considerable other medical testimony to the effect that the plaintiff was suffering from cervical arthritis not caused by the accident that had been lighted up by the infected tonsils.

The major contention of plaintiff is that on the evidence the trial court should have granted her motion for a directed verdict. This contention is based on the argument that the doctrine of res ipsa loquitur applies to this case, and that under that doctrine, the burden cast on the defendants was to explain the cause of the accident, and, having failed to offer a satisfactory explanation, as a matter of law, the trial court should have directed a verdict for plaintiff. Plaintiff argues that it was not sufficient to take the case to the jury for defendants to testify as to what they did, even though from such evidence an inference that such defendants exercised due care is permissible, but that, in addition, defendants must offer evidence as to how the accident occurred.

[1] The case was tried on the theory that the doctrine of res ipsa loquitur was applicable and the jury was so instructed. There can be no doubt at all that the doctrine is applicable to such a case. Ybarra v. Spangard, 25 Cal.2d 486, 154 P.2d 687, 162 A.L.R. 1258, and cases cited therein. One of the counsel for defendants argues that the doctrine has no application to cases involving surgical operations, but that contention was completely set at rest by the holding and reasoning of the Ybarra case. A clearer illustration of a factual situation giving rise to the doctrine can hardly be imagined than the facts of the instant case.

[2] In support of her contention that the explanation here offered was insufficient as a matter of law, plaintiff cites such cases as Hackley v. Southern Pacific Co., 6 Cal.App.2d 611, 45 P.2d 447; John v. B. B. McGinnis Co., Inc., 37 Cal.App.2d 176, 99 P.2d 323; Judson v. Giant Powder Co., 107 Cal. 549, 40 P. 1020, 29 L.R.A. 718, 48 Am.St.Rep. 146. These cases all contain general language to the effect that as a result of the doctrine the burden is thrown on the defendant to explain "how" the injury occurred, but this language was used in cases (like the three above cited) where the higher court was affirming a judgment for plaintiff, or (like some of the other cases cited) where the higher court was reversing a judgment of nonsuit. In the present case the jury was instructed on the doctrine and then found in favor of defendants. To reverse that determination it must be held that, as a matter of law, there is no evidence or no reasonable inference from the evidence that defendants were not negligent.

[3-5] The precise point now under consideration was considered by the appellate court in Hinds v. Wheadon, 67 Cal.App.2d 456, 154 P.2d 720 (hearing denied without dissenting vote by Supreme Court). There, as in the instant case, the jury was instructed that the doctrine of res ipsa

loquitur was applicable. There, as here, the jury brought in a verdict adverse to the plaintiff. There, as here, on appeal, it was contended that evidence that the defendants used due care was not sufficient to rebut the inference of negligence raised by the doctrine. There, as here, it was contended that defendants were under a duty to explain the cause of the accident. In disposing of this point the court stated 67 Cal.App.2d at page 464, 154 P.2d at page 724: "The explanation which the defendant is required to make is an explanation of his conduct and, to be complete, it must be as broad as the inference. It is for the jury to say whether the inference has been successfully met [citing cases], although if the defendant fails to produce substantial evidence of the use of due care, as where it appears that precautions that should have been taken were not taken, the defense will be held insufficient as a matter of law. [Citing case.] All that he need do in any case is to produce evidence which equals in evidentiary weight the inference which the doctrine creates in favor of plaintiff. [Citing case.]"

At page 465 of 67 Cal.App.2d, at page 724 of 154 P.2d, the following appears: "Since the question of negligence is one of fact, the conclusion of the jury that a given act or omission did or did not constitute negligence may not be disturbed on appeal, if the evidence upon the issue is such as to allow a difference of opinion among reasonable minds. The res ipsa loquitur doctrine does not abrogate this familiar rule. It does not relieve a plaintiff who charges negligence from the duty of proving it by a preponderance of the evidence. It is a rule of evidence and not of liability and it does not impose upon one charged with negligence the duty of exercising a higher degree of care than would be required of him in a case where the doctrine was inapplicable. There is no rule of law applicable to all cases of simple negligence which requires a defendant to prove the exact cause of an accident in order to meet an inference that it was caused by his negligence. Undoubtedly there are cases where the defendant would have to show the immediate cause of the accident and that it was not due to his negligence, as where it must necessarily have resulted from his own act or omission. This is clearly not such a case."

This reasoning is applicable to the present case, and is in accord with the overwhelming weight of authority. Much has been written on the subject of the procedural effect of the doctrine. See Carpenter, "The Doctrine of Res Ipsa Loquitur," 1 Univ. of Chicago Law Rev. p. 519; Prosser, "The Procedural Effect of Res Ipsa Loquitur," 20 Minn.Law Rev. 241; Carpenter, "The Doctrine of Res Ipsa Loquitur in California," 10 Sou. Cal. Law Rev. p. 166; Shain, "Res Ipsa Loquitur," 17 Sou. Cal. Law Rev. p. 187; Heckel and Harper, "Effect of the Doctrine of Res Ipsa Loquitur," 22 Ill.Law Rev. p. 724; Shain on Res Ipsa Loquitur; Prosser on Torts, p. 302, et seq. An examination of these articles, and of the cases decided by the courts, demonstrates that procedurally there has developed three different views as to the nature of the benefit that accrues to the plaintiff under a set of facts bringing him within the doctrine, and of the nature of the burden thrown upon the defendant by operation of the doctrine. The first of these views is that the doctrine creates an inference of negligence which is alone sufficient to get the plaintiff past the danger of a nonsuit, and to permit him to get his case to the trier of the fact. Under this view the burden of proof still lies with the plaintiff and defendant may or may not choose to resist the inference by rebutting evidence. Even if defendant offers no rebutting evidence, it is still for the jury to determine whether the plaintiff —having as he does the inference of negligence in his favor—has made out his case by a preponderance of evidence. It is for the jury to determine whether it will indulge in the inference.

The second view is that the application of the doctrine creates a *presumption* of negligence against the defendant, and thus casts upon him the burden of "going forward" with evidence to rebut the presumption that he had failed to exercise due care. If defendant fails to offer rebutting evidence it is probably the law that a verdict should be directed for plaintiff based upon the presumption.

The third view concerning the procedural effect of the doctrine is that when plaintiff makes out his res ipsa case, there is then a shifting of the burden of proof to the defendant—and it becomes his duty to negate the implication of negligence by a preponderance of evidence. In his text on the doctrine Shain proposes that the true rule in the res ipsa cases should be that the burden of proof shifts to the defendant, and that he should be required to rebut the inference of negligence by a preponderance of evidence. The vehemence with which Shain advances his position indicates that he is arguing for a change of the generally accepted law, and that the "shifting of the burden of proof" view is not now generally accepted. Professor Prosser in his text on torts states (p. 303) that: "The majority of American courts regard res ipsa loquitur as nothing more than one form of circumstantial evidence * * * the inference of negligence to be drawn from the circumstances is left to the jury. They are not compelled to find it."

[6] While there is some doubt in the California cases as to whether or not the defendant must put on some evidence to rebut the inference or presumption of negligence, and whether the finder of fact can find against the inference if no rebutting evidence is offered, there can be no doubt at all that the California courts have not adopted the so-called shifting of the burden of proof view in res ipsa cases. See cases collected 8 Cal.Jur. (10 Yr.Supp.) pp. 388, 389, § 132. The California cases are quite uniform in holding that the doctrine creates an "inference" or "presumption" of negligence that has the legal effect of establishing a "prima facie" case. In Druzanich v. Criley, 19 Cal.2d 439, 444, 122 P.2d 53, 56, the court said that "it is ordinarily a question of fact whether the inference has been dispelled." Under this theory the burden of proof is not on defendant and the evidence of defendant need not preponderate over the evidence created by the inference.

[7] In order for plaintiff to be entitled to a directed verdict in the present case it would be necessary to adopt the theory that the legal effect of the res ipsa case produced by plaintiff was to shift to defendant the burden of proof, which would include the necessity of offering an explanation of the accident. We agree with plaintiff that the so-called explanation of the expert Dr. Cardwell that "I think that the strongest possibility— * * * From the information, I suspect— * * * My opinion would be, one probable likelihood would be, some contaminating substance in one of the tanks, some foreign substance," as a matter of law does not constitute a sufficient explanation if the burden to establish the cause of the accident was on defendants. But that is not the rule in California.

[8] In the present case the defendants did go forward with the evidence by testimony of what they actually did, and from that testimony it is a permissible inference that they exercised due care. Inasmuch as in California the doctrine of res ipsa merely establishes a prima facie case, it would seem to follow inevitably that when evidence of due care has been offered by defendants it becomes a jury question as to whether the inference of negligence created by the doctrine has been dispelled.

There are several cases in addition to Hinds v. Wheadon, supra, where this point has been directly discussed. In Druzanich v. Criley, 19 Cal.2d 439, 444, 122 P.2d 53, 56, the court said: "The application of the doctrine does not give a plaintiff an absolute right to a judgment in every case. [Citing cases.] It does not shift the burden of proof, and when the defendant produces evidence to rebut the inference of negligence, it is ordinarily a question of fact whether the inference has been dispelled. [Citing cases.]"

In denying a petition for hearing in the case of Bourguignon v. Peninsular Ry. Co., 40 Cal.App. 689, at page 694, 181 P. 669, 671, the Supreme Court stated: "The true rule is that, where the accident is of such a character that it speaks for itself, as it did in this case, and raises a presumption of negligence, the defendant will not be held blameless, except upon a showing either (1) of a satisfactory explanation of the accident; that is, an affirmative showing of a definite cause for the accident in which cause no element of negligence on the part of the defendant inheres, or (2) of such care in all possible respects as necessarily to lead to the conclusion that the accident could not have happened from want of care, but must have been due to some unpreventable cause, although the exact cause is unknown."

In Manuel v. Pacific Gas & Elec. Co., 134 Cal.App. 512, at page 517, 25 P.2d 509, 511, the court stated: "* * * the burden of proof remains at all times upon the plaintiff * * * the doctrine * * * merely establishes a prima facie case of negligence which the defendant is bound to meet, and all that the defendant is required to do is to produce evidence sufficient to offset the effect of plaintiff's prima facie case. As to the law, we believe this to be a case for the application of the rule, and as to the facts the jury were apparently not convinced by the theory of the break of appellant, and whether the break was due to the impact of the rifle bullet or to kinks in the line put in when the cable was strung or to a blow from an unknown tool, or to some other unexplained cause, was for them to determine."

In Shearman and Redfield on Negligence, Vol. 1, § 56, p. 154, the following is said: "Rebuttal of the presumption of negligence raised under the rule of res ipsa loquitur has been said to throw upon defendant the burden of presenting an explanation of the accident which is consistent with freedom from negligence. The term 'explanation' as used in the cases properly connotes reconciliation of the event with the absence of negligence on the part of defendant. The term does not necessarily involve making plain how the accident happened." Citing Klein v. Fraser, 169 App.Div. 812, 155 N.Y.S. 848; Carroll v. Boston Elevated Ry. Co., 200 Mass. 527, 86 N.E. 793.

The Klein case cited above is directly analogous. There the plaintiff was injured while a passenger in an elevator which failed to stop at the ground floor and crashed into the hampers below. The trial court correctly held that the doctrine of res ipsa was applicable, but also instructed that the burden was on defendant to explain the accident. The judgment for plaintiff was reversed, the court holding, 169 App.Div. at page 813, 155 N.Y.S. at page 849: "The rule of res ipsa loquitur upon which plaintiff relied to establish defendant's negligence, is merely a rule of evidence, which may be rebutted by a showing by defendant that she in fact had not been negligent. The court in the case at bar imposed a much more onerous burden upon the defendant by charging in plain terms, and more than once, that the fall of the car cast upon defendant the burden of explaining how it fell. What was cast upon the defendant by the fact of the accident was not to prove just how the accident happened, but that she had exercised due care to guard against the happening of such an accident. [Citing cases.]" For other recent cases from other states discussing the problem see MacDonald v. Pennsylvania R. Co., 348 Pa. 558, 36 A.2d 492; Davis v. Teche Lines, 200 La. 1, 7 So.2d 365; see, also, Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 150 P.2d 436; Ales v. Ryan, 8 Cal.2d 82, 64 P.2d 409; cases collected 8 Cal.Jur. (10 Yr. Supp.) p. 395, § 140.

The present case is not one where the only possible explanation of the accident was that defendants were negligent. That may be the most reasonable possibility, but, obviously, there are other possibilities as well. Plaintiff makes much of the fact that defendants did not have an analysis made of the nitrous oxide remaining in the container to see if it was contaminated. That would certainly have been a reasonable step to have taken and undoubtedly plaintiff so argued to the jury. But the jury found against plaintiff. Inasmuch as the law has been established in this state by the Supreme Court that defendants are under no absolute duty of explaining the cause of the accident we cannot hold, as a matter of law, that their failure to ascertain the cause by such an analysis entitles the plaintiff to a directed verdict. If there is to be a change in the nature of the burden cast on defendants by the operation of the res ipsa rule it must be accomplished by the Supreme Court and not by an intermediate court.

[9, 10] From what has been said it follows that plaintiff was not entitled to a directed verdict. The weight to be given the inference of negligence and the weight of the rebutting testimony were questions

for the jury. The jury having impliedly found that the injury was not traceable to any lack of due care on the part of defendants, and that finding being based on the evidence that they exercised due care, this court has no power to disturb the finding.

The plaintiff also contends that the trial court erred in giving certain instructions, contending that such instructions were improper in a res ipsa loquitur case. The Court first gave some general instructions and then directly and at length and correctly, at the request of plaintiff, instructed on the doctrine of res ipsa loquitur. Three such rather lengthy instructions were given. Then the Court gave some instructions requested by defendants. It is the theory of plaintiff that although the jury was correctly instructed on the doctrine of res ipsa loquitur these other instructions nullified the effect of these instructions. Those portions of the instructions of which special complaint is made are as follows:

"I instruct you, ladies and gentlemen, that should you be presented with the situation after having heard all of the evidence that you are unable to determine whether the defendants or any one of them was or were guilty of negligence, and should you further find that the proof offered in the case does not enable you to determine by the preponderance of the whole evidence whether or not the said defendants or any one or more of them was or were guilty of negligence, then I instruct you that your verdict will be in favor of such one one or more of the defendants to which there has been such failure of proof."

"Should you find from the evidence in this action that an accident did occur, but should you further find that the said accident may have happened in several different ways and you are unable to determine from the evidence whether the said accident was brought about by any carelessness on the part of any one or more of the defendants, then I instruct you that your verdict will be against the plaintiff Mabel Dierman and in favor of the defendant against whom the proof is insufficient to show how the accident happened."

"You are hereby instructed that a mere guess that there may have been negligence on the part of the defendants or either of them is not sufficient to justify a verdict against such defendants or either of them. To justify a verdict in favor of the plaintiff since, the burden of proving the carelessness and negligence alleged in the complaint is upon the plaintiff, a mere conjecture or mere guess that there may have been negligence is a conclusion not based upon actual proof and, therefore, in a case of this nature and cannot be the basis for rendering a verdict against a defendant."

Plaintiff urges that the above three instructions, and certain others along the same line, must have successfully erased from the minds of the jury the correct intructions given on the res ipsa doctrine. Plaintiff contends that the constant and repeated reference to plaintiff's burden of proof without reference to the corresponding burden upon defendants created by the doctrine must have had this effect. It is also urged that it was error to refer repeatedly to the fact that the negligence of defendants must be definitely proved without also explaining to the jury that the inference created by the doctrine is in itself evidence of negligence.

[11-13] A trial court cannot state all of the law in each instruction. The court here adopted a logical approach. After its general instructions it immediately instructed on the legal effect of the res ipsa doctrine. Then it instructed on the burden of proof. Under the rule announced in the cases heretofore cited the doctrine (1) raises an inference of negligence, which inference is itself evidence and may not be disregarded; (2) the doctrine does not change the rule as to the burden of proof and the burden rests on the plaintiff to prove his case by a preponderance of the evidence; (3) the doctrine casts on the defendant the burden to produce evidence which equals in evidentiary weight the inference created by the doctrine; and (4) where the defendant produces evidence of his due care it is for the jury to say whether the inference has been met. The instructions here involved, when read as a

whole, correctly state the law. The last instruction above quoted is quite similar to one involved in Hinds v. Wheadon, 67 Cal.App.2d 456, 154 P.2d 720, where it was held to be consistent with an instruction correctly setting forth the res ipsa loquitur doctrine. If the plaintiff desired further explanatory instructions upon the subject of the weight of the inference, or the burden of proof, it was her duty to request them. This she did not do and may now not complain that further instructions on this subject were not given. Armstrong v. Pacific Greyhound Lines, 74 Cal.App.2d 367, 168 P.2d 457; Crooks v. White, 107 Cal.App. 304, 290 P. 497.

The judgment appealed from is affirmed.

WARD, and BRAY, JJ., concur.

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ERICKSON v. BOOTHE.

Civ. 7312.

Sac. 5795.

District Court of Appeal, Third District, California.

April 21, 1947.

Rehearing Denied May 12, 1947.

Hearing Denied June 19, 1947.

1. Appeal and error 🔑781(7)

Where defendant surrendered possession of premises after entry of judgment which ordered that writ of restitution issue in favor of plaintiff, plaintiff was not entitled to dismissal of defendant's appeal on ground that no rights of defendant remained which would be affected by any decision which might be rendered on the merits of the appeal.

2. Landlord and tenant 🔑83(1)

The tenant rather than the landlord is to be favored in construing uncertain provisions of a lease relating to renewals.

3. Executors and administrators 🔑228(1)

"Claim" within statute providing that all claims against estate arising upon contract must be filed refers to a money demand and does not include a claim of right to renew or extend a lease under an option clause therein. Probate Code, § 707.

See Words and Phrases, Permanent Edition, for all other definitions of "Claim".

4. Executors and administrators 🔑150

Probate Code provisions permitting the court to authorize and direct the execution of a lease whenever it shall appear to advantage of an estate are inapplicable to an option to release or for an extension of the term of an existing lease in which the rental, the period and other terms and conditions have already been fixed in the original instrument, since the law does not require the doing of idle acts. Probate Code, §§ 840-843; Civ.Code, § 3532.

5. Executors and administrators 🔑150, 224

Lessee, not in default and desiring to exercise option to re-lease contained in lease which fixed all terms and left nothing to be done except to give notice, was not required as a creditor to file claim against estate of deceased lessor or to secure a new lease by means of statutory proceedings, whether option was construed as providing for a renewal or merely for extension of old lease. Probate Code, §§ 707, 840–843.

◆

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Action by Mazie Erickson, formerly Mazie Tangeman, executrix of the last will of Timothy Carlon, deceased, against Clyde D. Boothe for declaratory relief and for determination of rights and duties under a lease. Judgment for plaintiff and defendant appeals.

Motion to dismiss filed by plaintiff denied; judgment reversed.

Edward T. Taylor, of Modesto, for appellant.

Lafayette J. Smallpage, of Stockton, and T. B. Scott, of Modesto, for respondent.

ADAMS, Presiding Justice.

Respondent, as executrix of the last will of Timothy H. Carlon, deceased, brought this action against appellant for declaratory relief and to have determined their respective rights and duties under a certain lease of real property executed July 27, 1939. Prior to said date decedent, who was the owner of the land, had been judicially declared an incompetent person, and W. J. Ferrel had been appointed and qualified as the guardian of his estate. Pursuant to his authority as guardian, and an order of the court in the guardianship proceedings, the guardian as lessor, and appellant as lessee, entered into the said lease which was for a term beginning with its date, to wit, July 27, 1939, and ending on the 31st day of December, 1945, but contained an option reading as follows: "provided, however, that if, at the end of said period the Lessee shall not be in default under the terms hereof, and shall give written notice to the Lessor of his intention so to do, at least six (6) months prior to the date of termination hereof, said Lessee shall have the option to re-lease said property upon the terms hereinafter set forth, for an additional period of four (4) years."

The lease recited that the land demised was not presently suitable for planting or growing clover, and lessee agreed to level, check and seed same and make ditches, the lessor to furnish seed and furnish concrete pipe, laid. The lessor also agreed to furnish fencing, corrals and scales, the lessee to furnish the labor of installing said scales. In consideration of the work to be done by the lessee, it was agreed that he should not pay any rental on the portion of the property leveled and checked, for a period of two years, commencing January 1, 1940, and ending on December 13, 1941, but for the succeeding four years of the term the lessee was to pay as rental the sum of $10 per acre per annum on all land leveled and checked, the amount of such land to be determined by survey; and the sum of $1 per acre, commencing January 1, 1940, to and including December 31, 1945, upon all of the land not checked and leveled. It was also provided that "In the event that the option hereinabove referred to is exercised by the Lessee, the rental on the leveled and checked land shall be Twelve Dollars ($12.00) per acre per annum, and the rental on the remainder of said land shall be One Dollar ($1.00) per acre per annum."

Carlon died and respondent was appointed as executrix of his last will and testament. She duly filed notice to creditors under which the time for filing claims expired November 26, 1943. On or about June 21, 1945, appellant delivered to respondent a notice of his intention "to release or extend the term of that certain lease dated the 27th day of July, 1939, * * * and to notify you of the fact that I have and do hereby exercise the option given in said lease for an additional period of four years, according to and upon the terms provided in said lease. The cash rental for the clover land for said extended term to be $12.00 per acre, per year, and the rental on the remainder of said land to be $1.00 per acre, per year." Respondent refused to execute another lease, and on or about January 5, 1946, brought this action in which she stated that a controversy had arisen between her and defendant relating to the legal rights and duties of the respective parties, in this: "Plaintiff contends that said property has not been re-leased for the additional four-year period; that no proceedings have ever been had or taken in the Estate of Timothy Carlon, deceased, for the re-leasing of said property, nor has said Defendant filed any claim in the Estate of Timothy Carlon, Deceased, based upon his option to re-lease said real property; that, accordingly, Plaintiff contends that said lease of July 27, 1939 expired on December 31, 1945, and that said Defendant has no right to the possession of said property. Plaintiff is informed and believes and accordingly alleges that Defendant contends that said option was exercised and that a lease for an additional period from and after December 31, 1945 has been effected." She prayed for a declaration of her rights and duties, for a declaration that the right of defendant to the possession of said property ceased on December 31, 1945, and for general relief.

After trial the court found: "That for the purpose of determining the issues presented by the Pleadings and Proofs herein only, the Court finds that said Defendant entered into possession of said premises and all thereof and has fully performed all of the terms and covenants thereof and made all payments of rental as therein provided and is not in default of any obligation or under any of the terms of said lease to and including the 31st day of December, 1945." However, it further found that defendant had failed to file a claim in the estate of Carlon or to institute any proceedings for "the approval of the re-leasing of the aforesaid premises," and as conclusions of law it stated that the option to release gave to the defendant only an option to create a new tenancy and a new lease of the premises; that defendant had failed to perfect his right to a new lease and that he was, and had been ever since January 1, 1946, in possession of said premises unlawfully, without any right thereto whatsoever. In the judgment that followed it was ordered that a writ of restitution issue in favor of plaintiff against defendant for repossession of the property. From the aforesaid judgment this appeal has been taken upon the judgment roll alone. The record was filed in this court on July 31, 1946, appellant's opening brief was filed September 27, 1946, and respondent's brief was filed November 16, 1946. On December 9, 1946, respondent filed in this court notice of a motion to dismiss the appeal. Said motion was noticed for the same date as argument on the merits and was submitted for decision therewith.

[1] The motion to dismiss was based upon the records in the case and an affidavit by respondent in which she alleged: "that by agreement, under and by which Plaintiff and Respondent agreed to waive costs of suit and claim for damage to the real property involved in this action, Defendant and Appellant vacated and surrendered possession of said real property to Plaintiff and Respondent on or about April 10, 1946; that said Defendant and Appellant surrendered possession of and vacated said premises without the issuance of any Writ of Restitution; that affiant is now in complete possession of said premises."

In opposition to respondent's motion appellant filed an affidavit in which he denied that he had surrendered possession of the premises by virtue of the agreement alleged by respondent, and asserted that he surrendered the premises solely because of the demand of plaintiff after the decision of the trial court which adjudged that he was unlawfully in possession and decreed that a writ of restitution issue in favor of plaintiff; that he did not vacate the premises voluntarily and that he had not surrendered the lease or any interest therein, nor surrendered or abandoned or waived a finding of fact of the trial court, which read: "The findings hereinabove under Paragraph (4) are made and by all parties accepted, without prejudice to either party for any claims or obligations of one party against the other which may be the subject matter of any action for damages or otherwise which may be hereafter instituted by either party in connection with the said lease or the use, or deprivation of use, of said premises."

Respondent's motion to dismiss is based upon the assumption that since appellant has surrendered the premises no rights of his remain which will be affected by any decision which may be rendered by this court on the merits of the appeal. We do not agree with such a contention. A pertinent case is Warner Bros. Co. v. Freud, 131 Cal. 639, at page 644, 63 P. 1017, at page 1019, 82 Am.St.Rep. 400, in which the court said: "In Erwin v. Lowry, 7 How. 172, 184, 12 L.Ed. 655, the supreme court of the United States said: 'Five years is the time allowed for prosecuting appeals to and writs of error out of this court, and in many cases decrees and judgments are executed before any step is taken to bring the case here; yet in no instance within our knowledge has an appeal or writ of error been dismissed on the assumption that a release of errors was implied from the fact that money or property had changed hands by force of the judgment or decree. If the judgment is reversed, it is the duty of the inferior court, on the cause being remanded, to restore the parties to their rights.' Upon this point the foregoing is approved in O'Hara v. MacConnell, 93 U.S. 150, 23 L.Ed. 840." Then, 131 Cal. on page 645, 63 P. on page 1019, 82 Am.St.Rep. 400, the court quoted as follows from Freeman on Judgments, section 480a: "One against whom a judgment is entered, if he fails to satisfy it, must expect to see his property seized and sold at a sacrifice; and it is difficult to conceive how his payment of the judgment can give rise to any estoppel against his seeking to avoid it for error. The better view, we think, is that, though the execution has not issued, the payment of a judgment must be regarded as compulsory, and therefore as not releasing errors, nor depriving the payor of the right to appeal."

The Warner Brothers Company case was quoted with approval in Mortgage Securities Company of California v. Pfaffman, 47 Cal.App. 383, 190 P. 641, which involved the question of the right to possession of an automobile as between the plaintiff, holder of a chattel mortgage on the automobile, and the defendant, who claimed a lien thereon for repairs. During the litigation, defendant delivered the automobile to plaintiff. At page 385 of 47 Cal.App., at page 642 of 190 P., the court said: "The chief contention made by appellant is * * * that the evidence showed a voluntary delivery of the automobile by the defendant to the plaintiff, with intent to satisfy the judgment first rendered by the court and to make a settlement of the controversy. That the mere delivery of the automobile to the plaintiff pending the appeal did not deprive the defendant of the right to have a judgment for restitution of the property upon retrial, seems very clear. No stay bond was given, and the plaintiff without doubt had the right, pending an appeal under such circumstances, to require the property to be delivered to it in compliance with the terms of the judgment. The fact that no order or execution was issued upon the judgment does not change the situation, for the law imposed the duty upon the defendant, where execution was not stayed, to deliver the machine to plaintiff upon its demand." In People v. Chamness, 109 Cal.App.Supp. 778, 779, 288 P. 20, 21, the court said: "The rule is well established in civil actions, however, that the satisfaction of a judgment, unless by way of compromise or with an agreement not to take or pursue an appeal, does not operate to terminate the right to an appeal. [Cases]"

In the Michigan case of Hanaw v. Bailey, 83 Mich. 24, 46 N.W. 1039, 1040, 9 L.R.A. 801, 802, which involved a motion to dismiss the appeal on the ground that the lessee had surrendered the land to the lessor, the court said: "The question to be determined by the appeal related to the forfeiture of defendant's contract, and his right to possession at the time the suit was commenced, and not afterwards. It is contended by plaintiff's counsel that this giving up of possession was a satisfaction of the judgment of restitution, and there was then nothing left to appeal from. This contention will not hold in such a case as this. The abandonment of the farm by the defendant cannot be considered as an act in satisfaction of the judgment, or an admission that he was at the commencement of suit holding possession of the land unlawfully. It was a transaction entirely independent of the judgment and prior proceedings in this case."

The Arkansas case of Bolen v. Cumby, 53 Ark. 514, 14 S.W. 926, held that a defendant, in an action of ejectment against whom judgment had been rendered, might submit to the judgment, and surrender the possession, without impairing his right of appeal.

In Keyes v. Hurlbert, 42 Cal.App. 2d 532, 535, 109 P.2d 364, 366, the court said: "It has been clearly established in this state that where there is left any material or vital question for determination the court should not dismiss the appeal but should permit it to be heard on the merits. Hartke v. Abbott, 106 Cal.App. 388, 289 P. 206." Also see Fox v. Grayson, 6 Cal.Unrep. 72, 53 P. 932.

[2] In the instant case there is left a material and vital question for determination, namely, whether appellant is entitled to the leased premises for four more years from December 31, 1945, or whether his rights under his option were lost by reason of his failure to file a creditor's claim in the probate court and/or to take proceedings under sections 840–843 of the Probate Code to secure a new lease of the premises.

It is generally held that in construing provisions of a lease relating to renewals, if there is any uncertainty, the tenant rather than the landlord is to be favored. Streicher v. Heimburge, 205 Cal. 675, 683, 272 P. 290.

[3] Respondent argues that the language of the option clause of the lease was properly construed to mean that at the expiration of the original term thereof an entirely new lease was to be executed by the parties covering a new term of four years, and that the lessee's notice of exercise of the option did not effect an extension of his term; that the terms "renew," "re-lease" and "extension" are distinguishable; that because the option reads that the lessee "shall have the option to release said property upon the terms hereinafter set forth, for an additional period of four (4) years," it must be construed to mean that a new lease was to be executed; and that, in order to secure the execution of same, it was necessary for Boothe to file a claim in the estate of Carlon under the provisions of section 707 of the Probate Code, and/or to secure a new lease by proceedings in conformity with sections 840–843 of that code; and that since he did neither, his right to possession of the premises terminated on December 31, 1945, and his possession thereafter was unlawful.

Options for renewal such as that under consideration are generally held to be in the nature of a present demise for the full period including the renewal period. In the New York case of Orr v. Doubleday, Page & Co., 223 N.Y. 334, 119 N.E. 552, 554, 1 A.L.R. 338, a lease was given for a period beginning November 1, 1904, and expiring October 31, 1914, "with the privilege to said tenant of a renewal for another term of ten years, upon the same terms as are contained herein," provision being made for notice prior to the expiration of the term. The court there said, 119 N.E. at page 553: "The exercise by the defendant of the privilege of renewal extended the term of the lease for the additional period of ten years as a present demise for the full term of twenty years, the last half of which was to take effect at the termination of the first, at the option of defendant. A new lease for the additional years was not necessary." While that court said that there was authority for a contrary view, some authorities making a distinction between a privilege or covenant of a renewal and a privilege or covenant of an extension, it added, 119 N.E. at page 554: "The distinction made by the body of judicial opinion we have referred to is too refined and theoretical to be real, as a matter of law, in practical affairs. Men of ordinary learning, intelligence, and experience do not universally heed or invoke it in their business transactions. The law is neither just nor practical when it founds decisions of controversies exclusively upon that distinction. The word 'renewal' or the words 'to renew' have not a definite and fixed legal significance to which the parties are bound by the use of them. A lease, like any other contract, is to be enforced in accordance with the expressed intention of the contracting parties. If interpretation of its language is necessary, the proper and established rules are to be applied. The language in question of the lease at bar means that the demise was for ten years absolutely and for ten additional years in case the lessee so elected, and gave the required notice of its election. The lease is a present demise of the premises. The defendant entered into occupation under it. The lessor had no choice or decision in the matter of renewal. The letting was for the term of ten years 'with the privilege to said tenant of a renewal for another term of ten years upon the same terms as are contained herein.' There is no express covenant on the part of the lessor to enter into a new lease or do other act. The only acts called for to effect the renewal are on the part of the defendant. The renewal did not evoke new conditions of continuance in occupation, and a new lease would be useless. The acts of the defendant alone were intended, inasmuch as the lease enumerates no other act, to extend the stipulations of the lease to the occupation through the additional years, and it is immaterial that the demise was to take effect as to the additional years or term in the future at the option of the defendant."

The rule above stated has been followed in the following New York cases: Madison Fifty-Second Corporation v. Mulvey, Sup., 46 N.Y.S.2d 779; Horn & Hardart Co. v. 115 East 14th Street Co., Inc., Sup., 7 N.Y.S.2d 688, 689; Feldman v. Sheridan Warehouse Co-Operative Corporation, 247 App.Div. 82, 285 N.Y.S. 1035; Bribitzer v. Wahlig, 235 App.Div. 702, 256 N.Y.S. 45, 46; New York Business Buildings Corporation v. James McCutcheon & Co., 229 App.Div. 681, 243 N.Y.S. 255, 258; Sisson Realty Corporation v. Mathews, 131 Misc. 714, 227 N.Y.S. 721, 724; Bashein v. 2682 Broadway, Inc., City Ct., 39 N.Y.S.2d 137, 138. In the latter case the court said: "Upon the exercise of the option by the tenant a new tenancy was not created to begin at the end of the original term; it is deemed to have effected the continuance of the first seven years for seven years more, thus constituting a lease for fourteen years in legal contemplation."

The same rule has also been followed in other states. See Ackerman v. Loforese, 111 Conn. 700, 151 A. 159, 160; W. G. Maltby, Inc. v. Associated Realty Co., 114 Conn. 283, 158 A. 548, 550; Pritchett v. King, 56 Ga.App. 788, 194 S.E. 44, 46; Khourie Bros. v. Jonakin, 222 Ky. 277, 300 S.W. 612; A. O. Andersen & Co. v. Texas Co., 2 Cir., 279 F. 76, 80; and American Brake Shoe & Foundry Co. v. New York Rys. Co., D.C., 278 F. 842, 843, wherein the court said: "In Orr v. Doubleday, Page & Co., 223 N.Y. 334, 119 N.E. 552, 1 A.L.R. 338, the Court of Appeals adopted a principle not in accord with some authorities; but Judge Collin's opinion is convincing, and announced a doctrine which, it seems to me, is sound both as matter of law and wise from a business standpoint, and is applicable to this case."

In Willoughby v. Atkinson Furnishing Co., 93 Me. 185, 44 A. 612, 613, the facts were that on August 15, 1893, the defendant took a written lease for the term of three years, "with the privilege, at the end of said term, of *re-leasing* for a term of ten years, or any part thereof, at the same yearly rental." (Italics added.) Defendant gave written notice it would release for three months. The court said: "This, accompanied by a continuation of possession, was sufficient for the purpose. According to the weight of authority, the clause in the lease already quoted should be construed as a present demise to take effect in the future at the option of the lessee." To same effect is Oren Hooper's Sons v. Sterling-Cox Shoe Co., 118 Me. 404, 108 A. 353.

There is nothing in the original lease and option in the case before us which suggests that the making of a new lease was intended. In Thurston v. F. W. Woolworth Co., 66 Ind.App. 26, 117 N.E. 686, 688, the court quoted as follows from Underhill on Landlord & Tenant, Vol. 2, sec. 803: "In the absence of an express provision that a new lease is intended to be executed, the presumption is that no new lease is intended, but that the lessee is to continue to hold under the original lease. *The lease must clearly and positively show that the making of a new lease was intended. This must appear from the express language of the parties.* The reason for the presumption is the fact that the making of a new lease will involve trouble and expense which should be avoided by the courts, if possible, unless it is very clear that the parties had expressly agreed to incur such trouble and expense. For if the new lease, as is always the case, when executed, is but a substitute for and a re-execution of the old lease, it is in no wise more efficacious or obligatory, nor does it confer any greater rights than the latter." (Italics added.)

And, 117 N.E. at page 688, the court continued: "It should be noted that in the lease under consideration the lessor did not covenant to renew the lease, the language being that the lessee 'shall have the privilege of renewing this lease,' etc., which implies that the affirmative act of election was the only thing necessary to give appellee the additional term. Under the original lease appellant parted with his right of possession, not only for a term of five years absolutely, but for a further term of five years at the election of appellee. Therefore no further agreement on appellant's part was necessary."

In Wiener v. H. Graff & Co., 7 Cal.App. 580, 95 P. 167, 168, a lease provided that the lessee should "have the privilege of one year's additional lease on the same terms and at the same rental as heretofore, provided that they signify their acceptance in writing" to the lessor on or before a specified date. This court said, 7 Cal.App. at page 583, 95 P. at page 168: "We think, further, that upon compliance with the condition as to giving notice the lessees would then be entitled to hold for the additional term under the original lease and not under the notice—the lease would then become a lease for both the original and extended terms. Sheppard v. Rosenkrans, 109 Wis. 58, 85 N.W. 199, 83 Am.St.Rep. 886."

In Braun v. Leo G. MacLaughlin Co., 93 Cal.App. 116, 269 P. 191, 192, an action for declaratory relief which involved a lease with an option "for an *additional lease* of five years from September 30, 1927, at a monthly rental of $300.00," notice of intention to exercise the option was duly given. The court said, 93 Cal.App. at page 123, 269 P. at page 193: "We are well aware of the fact that there is a clear distinction between the meaning of the expression 'renewing a lease' and 'extending the term' thereof (Shamp v. White, 106 Cal. 220, 39 P. 537; Robertson v. Drew, 34 Cal.App. 143, 166 P. 838; 15 Cal.Jur. 659), but we think the distinction is wholly immaterial under the facts of the case at bar. If the expression 'an *additional lease,*' used in the option, be construed as meaning 'a renewal of the old lease,' then it was incumbent upon respondent to give notice of his election to renew the lease within a reasonable time before the expiration of the original lease. This respondent did. If it be construed merely 'as an extension of the terms of the old lease' (there being no special form of notice required by the option), respondent could have stayed in possession after the expiration of the old lease, and that would have been a sufficient notice of its intention to exercise the option to extend the lease. But in this case the old lease had not expired when the notices of January 6 and January 22, 1925, were given, and respondent was in possession under the old lease; therefore, if the option be construed merely as providing for 'an extension of the old lease,' and respondent had stayed in possession after the expiration of the old lease, the notices would have been unnecessary. On the other hand, if the option be construed as calling 'for a renewal,' meaning a new lease, respondent has fully complied with all the requirements entitling it to a new lease upon the same terms and conditions as the old one, except as to time and rental. Therefore, whether it be treated as an option for a 'renewal,' as the trial court did, or as a 'mere extension of the old lease,' is wholly immaterial, for in either case the *terms and conditions are to be exactly the same.*" Also see Becker v. Submarine Oil Co., 55 Cal.App. 698, 700, 204 P. 245.

The reasoning of the Braun case is applicable to the one before us, that is, it is immaterial whether the option provides for a renewal or a mere extension of the old lease. Even if construed as calling for the execution of a new lease, it does not follow that it was incumbent upon the lessee either to file a claim under section 707 of the Probate Code or to petition for same under the provisions of sections 840–843 of said code. Respondent argues that section 707 provides that "all claims arising upon contract, whether they are due, not due, or contingent" must be filed or presented; that appellant's lease is a *contract,* wherefore he should have presented a *claim.* But the code section does not say that all contracts must be filed, but only "claims" arising upon contract; and respondent has cited no authority nor have we been able to find any, holding that a claim of right to renew or extend a lease under an option clause therein, constitutes a "claim" within the meaning of that term as used in section 707. All of the cases cited by respondent in this connection involved money demands against the general assets of an estate. None is here involved.

In Tanner v. Best, 40 Cal.App.2d 442, 445, 104 P.2d 1084, 1087, the court said that "A 'claim' refers to a debt due the claimant. 11a Cal.Jur. 485"; that it is a "money demand"; and it held that a claimant of specific property cannot properly be called a creditor within the meaning of the statute, citing Estate of Dutard, 147 Cal. 253, 256, 81 P. 519.

In 11a Cal.Jur., sec. 485, pp. 680, 681, it is said: "The word 'claim' is a very broad term, when used in certain connections; and, while not synonymous with 'debt' or 'demand,' in their general senses, in the probate and administration statutes the words 'claimant' and 'claim' are used as synonymous with 'creditor' and 'legal demand for money' to be paid out of the estate, and the words 'claim' and 'debt' are used interchangeably in providing that allowed claims shall be ranked among the acknowledged 'debts' of the estate. * * * Whatever signification may be attached to the term 'claim' standing by itself, in the statute relating to presentation of claims for payment it has reference only to such debts or demands against the decedent as might, if due, have been enforced against him in his lifetime by personal actions for the recovery of money, and upon which only a money judgment could have been rendered. The claim in this sense is a statement of a cause of action for money on which a complaint stating it more particularly might be founded." Also see McKay v. Security-First National Bank, 35 Cal.App.2d 349, 355, 96 P.2d 376; Estate of Bailey, 42 Cal.App.2d 509, 511, 109 P.2d 356; Cohn v. Cohn, 100 Cal.App. 746, 748, 281 P. 504; Newport v. Hatton, 195 Cal. 132, 150, 231 P. 987; Porter v. Van Denburgh, 15 Cal.2d 173, 99 P.2d 265; O'Donnell v. Lutter, 68 Cal.App.2d 376, 385, 156 P.2d 958; In re Brust's Estate, 111 Minn. 352, 127 N.W. 11, 13, 20 Ann.Cas. 852; Patterson v. Carr, 189 Iowa 69, 176 N.W. 265, 266.

In Bewick v. Mecham, 26 Cal.2d 92, 95, 156 P.2d 757, 157 A.L.R. 1277, an action for specific performance, it was held that an option to purchase contained in a lease is a covenant running with the land—that a demand for specific performance of the contract of a decedent to convey, differs from a claim of a general creditor seeking satisfaction out of the assets of the estate, citing Probate Code, sec. 700 et seq., Estate of Dutard, 147 Cal. 253, 257, 81 P. 519; Porter v. Van Denburgh, supra; Estate of Bailey, supra; 21 Am.Jur. 579, 580, sec. 348.

[4, 5] We think it follows from the foregoing that appellant was in no sense a creditor of the estate of Carlon, that his rights under the lease gave rise to no debt on the part of the lessor, and that the filing of a claim against the estate was not necessary.

As for proceedings under sections 840–843 of the Probate Code, we think that those sections are also inapplicable to a case such as this. They provide that whenever it shall appear to the advantage of an estate to lease property of the decedent the court may authorize and direct the execution of a lease. A petition for such a lease must show the advantages to accrue therefrom and the term, rental and general conditions of the proposed lease. On a hearing the court may consider the petition and any objections that may be presented, and, if it is satisfied that it will be to the advantage of the estate, shall authorize the execution of the lease. However, the period of same may not be longer than is prescribed by the statute, and the court's order shall prescribe the minimum rental and the period of the lease, and may prescribe other terms and conditions.

From the language of the sections they are obviously inapplicable to an option to re-lease or for an extension of the term of an existing lease in which the rental, the period and other terms and conditions have already been fixed in the original instrument. Had appellant filed a petition under these provisions there would have been nothing for the court to decide as to whether the additional term would be of advantage to the estate, it would have been powerless to fix the rental, the period or any other terms or conditions, as those matters had already been decided by the court in the guardianship proceeding when it approved the original lease with the option; and, as was found by the trial court in this proceeding, appellant had fully performed all of the terms and covenants, was not in default of any obligations, and had duly given the notice provided for by the instrument. It is a platitude that the law does not require the doing of idle acts (Civ. Code, sec. 3532), and the filing of a claim or proceedings under sections 840–843 would have fallen into that category in this case.

Respondent relies upon Robertson v. Drew, 34 Cal.App. 143, 166 P. 838. There a lease provided that the lessee had the privilege of "renewing the lease" for the further term of from one to five years. The lessee gave notice of desire to renew for a period of two years with an option of two more years at the same rental, but he asked for certain structural changes in the premises to be provided for in the new contract. The court said that there appears to be a distinction between the meaning of the expressions "renewing a lease" and "extending the term" thereof; that the mere fact that "renewal" appeared in the option did not necessarily show the option was not for an extension; that what is meant by the expression "renewal" in a given case may depend upon a reading of the whole instrument and upon the practical construction given to its provisions by the parties themselves, which, in that case, indicated that a new lease was contemplated. No such circumstances appear in the case before us since the terms of the original lease fixed the terms of any renewal or extension, and left nothing to be done by either party except the giving of the notice by the lessee, which was done. It is conceded by respondent in her brief "that had Carlon lived, Boothe has performed all of the conditions precedent to the exercise of his right to a new lease from Carlon, and Carlon would not be entitled to a writ of restitution." In other words, having fully complied with his obligations, Boothe's continued occupancy would have been lawful, without any action by Carlon or his guardian. This is an admission that the parties contemplated no further action to create an additional term. Furthermore, that case did not involve the question upon which the trial court rested its decision in the instant case, to wit, whether the filing of a claim or a petition for a lease were requisite to the perfection of appellant's right to continued possession. Respondent also agrees in her brief that if "the claim is not based upon any contract with the decedent, or, if so based upon a contract the approval of the Probate Court is not necessary to effectuate the same, then it is not necessary to file a claim under Section 707 of the Probate Code." But she argues that because, as she claims, the option is one to "re-lease" upon the terms specified, it requires the approval of the Probate Court, and affirmative action on the part of the executrix. This argument is inconsistent with respondent's concession above noted, that had Carlon lived he would not have been entitled to a writ of restitution since appellant had fully performed—as found by the trial court. If no action on the part of Carlon had he lived would have been required, and he would not have been entitled to a writ of restitution because the lessee had fully performed, the conclusion seems irresistible that, it being agreed that appellant has fully performed, the executrix was not entitled to a writ of restitution.

The motion to dismiss is denied, and the judgment is reversed.

PEEK and THOMPSON, JJ., concur.

79 Cal.App.2d 280

PARETCHAN v. M. & S. FARMS et al.

Civ. 3556.

District Court of Appeal, Fourth District, California.

April 21, 1947.

Master and servant 🔑80(9)
War 🔑4

Evidence established that plaintiff in buying fruits, etc., for defendant was acting merely as an employee and hence was not barred from recovering for services on the ground that he failed to comply with the maximum price regulation respecting the filing of a statment of maximum prices and pricing methods. Emergency Price Control Act of 1942, § 1 et seq., as amended, 50 U.S.C.A.Appendix, § 901 et seq.

◆

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action by Pete Paretchan against M. & S. Farms, a copartnership, and others to recover commission for services rendered in connection with purchase of fruits and for use of truck. From a judgment in favor of the plaintiff, the defendants appeal.

Judgment affirmed.

L. Kenneth Say, of Fresno, for appellants.

Ralph Moradian, of Fresno, for respondent.

GRIFFIN, Justice.

Plaintiff filed this action against defendants, alleging that in 1944 he performed certain services in connection with the purchase of grapes and tree fruits, as an agent and buyer of defendants.

Count one alleged an express contract for payment of a commission of $3.50 a ton for tree fruits and $2 per ton for grapes, totaling $4,857.50, and that $1,150 had been paid on said contract.

Count two alleged an open book account in the same amount.

Count three was for reasonable value of services performed for a claimed balance due.

In count four plaintiff asked for $400 for use and operation of his truck.

The trial court found as to the first count that no express contract was entered into as alleged; and as to count two, that there was no open book account. On count three it allowed $2,450 as the reasonable value of services performed, less a credit of $1,150 theretofore paid, and also allowed $200 on count four for the use of the truck.

Defendants appealed form the judgment, claiming that plaintiff is not entitled to recover for services performed and materials furnished because he failed to comply with the regulation of the Office of Price Administration requiring the filing of a statement of maximum prices and pricing methods; that an illegal contract resulted from the failure to file the statement and that plaintiff can recover neither contractually nor by quantum meruit, citing Maximum Price Regulation No. 165, issued by the Office of Price Administration under the authority of Emergency Price Control Act of 1942, as amended, 50 U.S.C.A.Appendix, § 901 et seq., and particularly sections 14, 15, 21, and 23-(16) thereof, and such cases as Napa Valley Electric Co. v. Calistoga Electric Co., 38 Cal.App. 477, 176 P. 699; Citizens State Bank of Long Beach v. Gentry, 20 Cal.App.2d 415, 67 P.2d 364, to the effect that when it appears that there is a violation of a statute designed for the protection of the public with a penalty prescribed for the violation thereof, such penalty is equivalent to express prohibition, and a contract made in violation of the terms thereof is void, and that illegal contracts, contrary to public morals or public policy, are not enforceable.

Plaintiff concedes the law as stated but claims those cases are completely inapplicable and irrrelevant in so far as the facts and findings in this case are concerned. Plaintiff contends that he, as an employee, was not required to file the OPA statement referred to; that the trial court specifically found that no illegal contract had been made by the parties; that no provision in the OPA statute taints as illegal a contract entered into without the filing of the statement; and even if a void contract had been entered into, and particularly if it were not in violation of public policy, the law and good conscience would permit recovery for the reasonable value of work and labor actually performed.

Section 23-(16) of the regulation respecting the establishment of maximum prices for certain specified services defines the services covered by the regulation to mean "the performance of an act or series of acts rendered, otherwise than as an employee, in connection with the processing, distribution * * * or negotiation of purchase or sales of a commodity * * *."

Plaintiff has contended throughout that he was an employee and came within the exception above noted. Defendants concede that an employee is excepted by the act but argue that the evidence and the findings of the court do not justify the conclusion that plaintiff was an employee.

The evidence shows, by defendant Schoenburg's testimony, that plaintiff was "employed" by him in 1943 for a short period of time; that "he went out and located some crops for us that I went out and bought myself"; that they made a lump-sum agreement or settlement at the end of the season; that nothing was said about how much he was to receive for his services; that he bought for the M. & S. Farms in 1944 and that he told plaintiff that he wanted "him to work with me that year as he had done the previous year"; that nothing was said about pay for his services and that it was his job to go and find the fruit, make an estimate of the tonnage, report back to him, and he would then go back with plaintiff and look over the crop himself and pay the farmer a lump sum for it; that plaintiff advised as to when to pick certain grapes. He then testified that he kept some books of account of the purchases in 1944 but they were "in an awful mess" and he could not make any determination as to the tonnage purchased or the monies earned by plaintiff; that nothing was said at the close of the season as to the amount of money that was to be paid plaintiff; that he had been drawing money along as he needed it and that in August they discovered he was drawing too much so they wanted to put him on a $50 a week basis; that he was on the regular pay roll to that extent. He then testified that they called plaintiff into the office at a later date (August 19), and discharged him.

Plaintiff testified that he was a licensed fruit buyer and bought grapes for Schoenburg in 1943; that he was paid $2 per ton for his services; that in 1944 he had a conversation with Schoenburg and he wanted to know if plaintiff would work for him again; that he told Schoenburg that he "wouldn't work for no salary but on a ton basis" i. e., $2 for grapes and $3.50 for tree fruit, and that he would "follow the fruit up, and see everything is brought to the packing house, take care of the orchard and so forth"; that he agreed, and subsequently they secured a packing house, boxes, labels, etc., and that he was to buy the fruit for shipment and supply the packing house, to superintend the harvesting and when it was ready to pick, it was his duty to help obtain labor "and that sort of thing"; that the only pay he received was what he drew on account; that he demanded his money at the end of the season according to tonnage but that defendants claimed they had to wait until they had the books straightened out; that he left the company because it would not settle with him; that he worked over 18 hours some days and furnished his truck for six months in hauling pickers back and forth and that he received no money for it.

A bill of particulars was filed by plaintiff showing purchases made by him and their estimated tonnage.

This is a resume of the evidence bearing on the question of the nature of plaintiff's employment. The facts stated sufficiently support the implied finding that plaintiff was but an employee, within the meaning of that term. The court did find that there was no illegal contract entered into between the parties and specifically found as untrue the allegations in defendants' amendment to their answer, alleging illegality by reason of the OPA regulation.

In view of this determination, the merits of the other reasons set forth why the judgment should be affirmed will not be considered.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

79 Cal.App.2d 399

In re LOPEZ'S ESTATE.

Civ. 13286.

District Court of Appeal, First District,
Division 2, California.

April 30, 1947.

1. Trusts ⚷227, 315(3)

Under testamentary trust providing for payment of reasonable expenses of trust, including compensation of trustee and attorney, from cash revenue, court in allowing first account, properly charged compensation allowed to trustee and to attorneys for their services one-half against the principal and one-half against income of respective trusts. Gen.Laws Act 8696, §§ 2, 12(1); Probate Code, § 1122.

2. Trusts ⚷227, 317

Services of trustees and attorneys under trust during first year, consisting of acceptance of trust property, putting trusts into operation, determining questions of corpus and income and settling tax problems and setting up necessary machinery, merited higher than ordinary compensation. Gen.Laws Act 8696, §§ 2, 12(1); Probate Code, § 1122.

3. Trusts ⚷227, 317

Allowance to attorneys of $250 in $300,000 trust estate and $50 in $75,000 trust estate for services during first year which involved extraordinary services was not excessive.

4. Trusts ⚷315(3)

In determining compensation of trustee during first year of trusts, which involved accepting trust property and putting trusts into operation and other extraordinary services, there was no basis for comparison of services rendered by an executor or administrator in administering an estate and amount of fees was within sound discretion of court. Gen.Laws Act 8696, §§ 2, 12(1); Probate Code, § 1122.

5. Trusts ⚷329

Order denying motions to vacate and set aside orders settling and approving accounts of trustee under testamentary trust were not appealable. Probate Code, § 1240

◆

Appeal from Superior Court, San Francisco County; Timothy I. Fitzpatrick, Judge.

Wells Fargo Bank & Union Trust Company filed its first account in each of two trusts created by the will of Robert F. Lopez, Deceased, and in the order settling the accounts the court allowed compensation to the trustee and its attorneys and from such orders Winifred Leonardini, a beneficiary, appeals and she also appeals from an order denying motions to vacate and set aside such orders.

Orders settling accounts and approving trustee's report affirmed. Appeal dismissed from the other orders.

Eric Lyders, of San Francisco, for appellant.

Wright & Larson, of San Francisco, for respondent.

GOODELL, Justice.

The respondent trustee filed in the Superior Court its first account and report in each of two trusts created by the will of Robert F. Lopez, deceased, covering the period from December 29, 1944 to December 29, 1945. In the orders settling the accounts the court allowed compensation to the trustee and its attorneys for their services during said first year of administration and charged one-half thereof against the corpus and one-half against the income, of the respective trusts. From those orders this appeal was taken.

Robert F. Lopez died in 1936. The provisions of his will creating the two trusts were incorporated into a decree of partial distribution entered on December 29, 1944.

The Lopez estate consisted almost entirely of a contingent interest in a trust known as the Evans trust, administered in the state of New York, the beneficiary of which was Mary Evans, a sister of Robert. Mary Evans died on July 15, 1944, whereupon testator's contingent interest ripened into an actual interest. By his will the testator created the Leonardini trust, consisting of the residue of his own small estate and a one-quarter share of his contingent interest in the Evans trust. Appellant is the life beneficiary thereof, and on her death the corpus goes to her son. The Leonardini trust is valued at approximately $300,000 according to the statement on appeal.

By his will the testator also created the Kirby trust, the corpus whereof is a one-sixteenth share of decedent's contingent interest in the same Evans trust. Claribel H. Kirby is the life beneficiary, and on her death the corpus goes to appellant or in case of her death to her son. The Kirby trust is valued at approximately $75,000 according to the statement on appeal.

In the Leonardini trust the court allowed $1,105.30 for the trustee's services during the initial year of its administration and $250 for it attorneys. In the Kirby trust the allowances were $318.07 to the trustee and $50 to its attorneys for the same period.

The appellant's contentions are "1. That the trustee may not impair the principal of the trust estate by paying therefrom compensation for itself and its attorneys but must pay such out of the income, and, 2. That the amount of compensation allowed the trustee is excessive and unreasonable * * *."

The testamentary provision creating each trust provides:

"2. The said trustee shall collect and receive any cash dividends which may be declared on any shares of the capital stock of any corporation held by said trustee and any other income issues and profits of the property of the said trust fund and shall dispose of all such cash revenue from said trust fund:

"(a) By first paying out therefrom all calls made or assessments levied on any of said shares of capital stock, and all taxes, state, county, or municipal, or other local taxes, levied or assessed on the property of said trust fund, including income taxes and the reasonable expenses of this trust which shall include the reasonable compensation of said Trustee for its service as Trustee hereunder, and the reasonable compensation of any attorney employed by said Trustee in the administration of said trust fund; and

"(b) By paying out therefrom the surplus to [the life beneficiary, naming her] for her support and maintenance during her life."

Appellant contends that the provisions of paragraph (a) that the net income shall be arrived at after the deduction, inter alia, of the trustee's and attorneys' compensation from the gross income so circumscribes the court's action that it cannot make any charge whatever against corpus. She also invokes section 2 of the Principal and Income Act, Stats.1941, p. 2476, Deering's Gen.Laws, Act 8696, which provides that: "This act shall govern the ascertainment of income and principal, and the apportionment of receipts and expenses between tenants and remaindermen, in all cases where a principal has been established with * * * the interposition of a trust; except that in the establishment of the principal provision may be made touching all matters covered by this act, and the person establishing the principal may himself direct the manner of ascertainment of income and principal and the apportionment of receipts and expenses or grant discretion to the trustee or other person to do so, and such provision and direction, where not otherwise contrary to law, shall control notwithstanding this act."

The year covered by these two accounts, it must be remembered, was the first year of the administration of both trusts. The duties of the trustee and its attorneys during that first year embraced the acceptance of the trust property which, in turn, involved putting both trusts into operation, the determination of questions of corpus and income in organizing the trust funds, the settling of tax problems consequent upon the new administration, setting up the necessary accountancy machinery, and in the case of the Leonardini trust, the purchase of a home in Stockton for the use and occupancy of Mrs. Leonardini, the life beneficiary. None of these can be classified as ordinary, routine, recurring, or year-round duties any more than the tasks connected with the distribution or winding up of a trust can be.

Section 12 of the act provides that the trustee's compensation upon or for acceptance or distribution of principal shall be paid out of principal. The court, acting under this authorization, might have charged against principal more than one-half of the compensation. Respondent relies on section twelve (1) which provides that "Attorneys' fees for ordinary or current services and trustees' compensation for both ordinary and extraordinary services, exclusive of compensation for acceptance or distribution, shall be paid one-half out of income, one-half out of principal, or in such other proportion as the court may direct; * * *". As we view this case it is not necessary for us to decide whether or not the court's action was taken under the Principal and Income Act.

In Estate of Kruce, 10 Cal.App.2d 426, 51 P.2d 1174, the testamentary provision was not substantially different from that in paragraph 2(a) of the Lopez will quoted above. It was that the net income should be paid to the daughter after deducting "all necessary taxes, costs and expenses, including the compensation of said trustees * * *." It was contended that under this provision expenses on distribution had to be charged against income. The court said, 10 Cal.App.2d at page 430, 51 P.2d at page 1176: "We do not agree that the will should be given this construction. It is not questioned that in the absence of contrary testamentary directions the ordinary and current expenses of a trust, including the trustees' compensation, should be paid out of income and that extraordinary and unusual charges should be paid from the corpus of the estate. In re Woods, 6 Coff.Prob. Dec. 451; Estate of Dare, 196 Cal. 29, 42, 235 P. 725; In re Estate of Gartenlaub, 185 Cal. 648, 655, 198 P. 209, 16 A.L.R. 520. We do not think the provisions of the will depart from this rule. *The direction of the will would seem to apply to the current compensation and expenses of the trustees and not to anything of an extraordinary nature.* The services for which the allowances were made consisted of closing the trust and distributing the property remaining therein after the death of the life tenant. They were performed necessarily for the benefit of the remaindermen and were unrelated to the management of the trust for the benefit of the life estate. *They were not such ordinary and current expenses as would have to be deducted from the income periodically in order that the net income might be computed and paid to the life tenant each month as directed by the will.*" (Emphasis added.)

The language just quoted is particularly applicable to this case and we think is controlling. The law as restated in Estate of Kruce has been well settled for a long time. In addition to the cases cited in the Kruce opinion see Estate of Duffill, 188 Cal. 536, 557, 206 P. 42, and Estate of Lair, 52 Cal. App.2d 222, 225, 126 P.2d 133.

[1] In the case at bar the court apportioned the allowances half to principal and half to income. Without the new legislation the court might well have made the self-same apportionment in the exercise of a discretion which it always has had. Sec. 1122, Pro. Code; Estate of Duffill, supra; Estate of McLellan, 8 Cal.2d 49, 55, 63 P. 2d 1120, and cases cited above.

[2-4] Appellant also attacks the allowances as excessive and unreasonable. In discussing the first point it appears, we believe, that a considerable part of the trustee's and attorneys' services for the first year were not at all ordinary or recurring services, but were extraordinary in the very nature of things. If so, they merited higher than ordinary compensation. The allowances to the attorneys of $250 in the $300,000 trust estate and $50 in the $75,000 trust estate cannot, within reason, be criticized. As far as the trustee's compensation is concerned there is no basis for a comparison of its services during the first year of the trusts with services rendered by an executor or administrator in administering an estate in probate. Estate of Duffill, 188 Cal. 536, 547, 206 P. 42, directly so holds. The size of such fees is within the sound discretion of the court (Estate of McLellan, 8 Cal.2d 49, 55, 63 P.2d 1120) and we find no abuse of discretion in this case.

[5] In addition to appealing from the orders settling and approving the two accounts, appeals were taken from the order denying the motions to vacate and set aside such orders. The last-named orders are not appealable (Sec. 1240, Pro. Code; Estate of Spafford, 175 Cal. 52, 165 P. 1; Howard v. Superior Court, 25 Cal.2d 784, 787, 154 P.2d 849), and as to them the appeal is dismissed.

The orders settling the two accounts and approving the trustees' reports are affirmed.

NOURSE, P. J., and DOOLING, J., concur.

79 Cal.App.2d 353

BERNARD v. BERNARD.

Civ. 7302.

Sac. 5792.

District Court of Appeal, Third District, California.

April 26, 1947.

Hearing Denied June 23, 1947.

1. Divorce ⚷199

Where it was impossible for wife to have her right to alimony adjudicated at time interlocutory decree of divorce was granted because husband was served by publication and no judgment in personam in nature of alimony could be made, wife was entitled to her day in court and court might determine the question in an independent suit in equity, especially since action was commenced while parties were still husband and wife. Code Civ.Proc. § 473; Civ.Code, § 139.

2. Divorce ⚷188, 210, 222

Where an independent suit for maintenance is seasonably begun prior to entry of final divorce decree, such decree does not dispose of the question of support at issue in the independent suit, and so far as that matter is concerned, the action for divorce is still pending, so as to warrant making an award of alimony pendente lite, attorney's fees and costs. Civ.Code, § 137.

3. Divorce ⚷289

The court may, at any time during the minority of child, compel father to pay to mother a sum sufficient to meet the needs of child, and within ability of father to pay. Civ.Code, § 138.

4. Divorce ⚷295

A father's statutory duty to support a minor child exists independently of the marriage status, and is a continuing obligation during minority of the child, unaffected by either interlocutory or final decree of divorce, and may be enforced by proper proceeding. Civ.Code, §§ 138, 139.

5. Divorce ⚷308

An order granting wife's motion for support for minor child is not in the nature of a final judgment, and propriety thereof can be determined only in light of the circumstances existing at time application is made, such order not being intended to limit the duty of the parent but primarily to define extent of parent's duty during lifetime of the order. Civ.Code, §§ 138, 139.

6. Divorce ⚷291

The only jurisdictional facts that need be alleged by wife seeking support for minor child from father are the needs of the child and the father's ability to pay. Civ.Code, §§ 138, 139.

◆

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Blossom O. Bernard against Theodore W. Bernard to obtain permanent maintenance for plaintiff, support for her minor son, attorney's fees and costs. From an order granting plaintiff's motion for temporary alimony, defendant appeals.

Affirmed.

Bradford, Cross & Prior, of Sacramento, for respondent.

J. J. Henderson, of Sacramento, for appellant.

PEEK, Justice.

Plaintiff commenced this action in equity to obtain permanent maintenance for herself, support for her minor son, attorney's fees and costs.

The facts as disclosed by the judgment roll, which is the sole record before us, and the briefs of the parties, show that prior to the commencement of this action plaintiff filed her complaint for divorce in San Luis Obispo county. Constructive service was had upon the defendant who at the time was a resident of the State of Arizona. He did not appear in the action and the plaintiff obtained an interlocutory decree of divorce by default. Approximately three months thereafter defendant appeared specially by motion to vacate that portion of the decree wherein the court had awarded to the plaintiff support for herself and their minor son, which motion was granted. The following month plaintiff filed this action, and moved for temporary alimony, support for the child, attorney's fees and costs. Defendant then moved for a change of venue to Sacramento county. Following the transfer of the cause plaintiff renewed her motion, and after a hearing thereon the court made its order granting her the relief sought. It is from this order that the defendant has appealed.

The question presented is whether a wife subsequent to the entry of an interlocutory decree of divorce and prior to a final decree may maintain an independent action in equity for alimony where no such award was made or could have been made in the interlocutory decree because the court had no jurisdiction, the defendant husband residing out of the state. Further, whether an award of alimony pendente lite in such an action is proper. Although the problem has not been squarely presented to the courts of this state our attention has been directed to numerous dicta and expressions of opinion which appear in the decisions.

Much stress has been laid in argument upon the following cases to support the order of the trial court and respondent's contention that a court of equity has inherent jurisdiction, independent of a suit for divorce or other relief, to grant support or alimony to a wife: Galland v. Galland, 38 Cal. 265; Murray v. Murray, 115 Cal. 266, 47 P. 37, 37 L.R.A. 626, 56 Am.St.Rep. 97; Livingston v. Superior Court, 117 Cal. 633, 49 P. 836, 38 L.R.A. 175. We do not question the holdings in these cases but they are not determinative of the problem here. They are authority only for the proposition that a court of equity independent of any statutory authority may enforce the obligation of a husband or wife to support the other spouse.

Appellant in turn relies upon cases holding that where the interlocutory decree is silent as to alimony, or the provision therein made is limited as to time, and the court does not reserve the power, it cannot subsequently modify the decree to grant permanent alimony or alter the limitation imposed, unless upon appeal or relief under Code of Civil Procedure section 473. Bacigalupi v. Bacigalupi, 72 Cal.App. 654, 238 P. 93; Puckett v. Puckett, 21 Cal.2d 833, 136 P.2d 1. See also Gillespie v. Andrews, 78 Cal.App. 595, 248 P. 715; Schnerr v. Schnerr, 128 Cal.App. 363, 17 P.2d 749; McClure v. McClure, 4 Cal.2d 356, 49 P.2d 584, 100 A.L.R. 1257; Tolle v. Superior Court, 10 Cal.2d 95, 73 P.2d 607; Long v. Long, 17 Cal.2d 409, 110 P.2d 383; Gould v. Superior Court, 47 Cal.App. 197, 191 P. 56; Abbott v. Superior Court, 69 Cal. App. 660, 232 P. 154. In all of the cases cited it appears that personal service was had upon the defendant, and the question of alimony was therefore one which could have been litigated in the divorce proceeding. Where the trial court has thus acquired jurisdiction over the person of the defendant, the failure to award alimony is a final determination that the husband shall be permanently free from the obligation to contribute to the support of his former wife and is res judicata. McClure v. McClure, supra. When the judgment becomes final the court cannot in the same proceeding "modify" what never existed. Cases cited, supra, this paragraph.

[1] In the divorce action brought by this plaintiff the defendant was served by publication and no judgment in personam in the nature of alimony could have been made (Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565; De La Montanya v. De La Montanya, 112 Cal. 101, 44 P. 345, 32 L.R.A. 82, 53 Am.St. Rep. 165), nor could the plaintiff by a subsequent notice of motion in the same action obtain a judgment in personam, or a modification of the decree with respect to matters not contained therein. By what reasoning then can we conclude that the inability of the trial court to award alimony under such conditions operates as a final adjudication against the wife and in favor of the husband that he is forever absolved from the obligation to contribute to her support, when admittedly the question was not and could not have been at issue? Since it was beyond the jurisdiction of the divorce court to award alimony, equally so, jurisdiction was lacking to determine such question as against the wife, and therefore there is no basis for a plea of res judicata. The most that can be said is that the issue has never been litigated.

The factual situation here presented is clearly distinguishable from other cases involving constructive service. This is not an attempt to reopen a final decree or have the court modify such decree as in Howell v. Howell, 104 Cal. 45, 37 P. 770, 43 Am.St.Rep. 70, nor is it a collateral attack upon an interlocutory decree attempting to set up a right against a third party. London G. & A. Co. v. Industrial Acc. Comm., 181 Cal. 460, 184 P. 864. No claim is made that a separate maintenance decree entered prior to a final decree of divorce is still in effect. Cardinale v. Cardinale, 8 Cal.2d 762, 68 P.2d 351. Nor was this action instituted subsequent to a final decree secured by the husband in another state (Calhoun v. Calhoun, 70 Cal.App.2d 233, 160 P.2d 923), but during the existence of an interlocutory decree obtained in California for an offense of the husband.

We have given considerable thought to the argument that the legislature in passing section 139 of the Civil Code created a right but intended to limit the remedy for the enforcement of that right to a proceeding in an action for divorce. Although the contention is not without a semblance of merit, such legislative intent does not clearly appear from a reading of section 139, the wording of which is similar to that of statutes in other jurisdictions which have allowed an independent action for alimony even after a final decree of divorce obtained on constructive service. Illustrative thereof is Wick v. Wick, 58 Ohio App. 72, 15 N.E.2d 780, where under Ohio General Code (1938) sec. 11990, it was held that a wife who had obtained a divorce decree against a husband not a resident of the state, service being by publication and the husband not appearing, could subsequently maintain an action for alimony upon obtaining personal service. See also Searles v. Searles, 140 Minn. 385, 168 N.W. 133 (Minn.Gen.Stats.[1913] sec. 7128, now Minn.Stats.[1945] § 518.22, M.S.A.); Honaker v. Honaker, 218 Ky. 212, 291 S.W. 42 (Ky.Stats.1893, c. 205, secs. 26, 27, 28, now Ky.Rev.Stats.[1946] sec. 403.060); Toncray v. Toncray, 123 Tenn. 476, 131 S.W. 977, 34 L.R.A.,N.S., 1106, Am.Cas.1912C, 284 (Shannon's Tenn. Code [1910] sec. 4221); Hutton v. Dodge, 58 Utah 228, 198 P. 165 (Utah Rev.Stats. [1898] sec. 1212, now Utah Code sec. 40-3-5). In the latter case the court states, 58 Utah at page 234, 198 P. at page 167: "It would be a travesty upon justice and a sad commentary on the power of judicial tribunals generally if the courts were powerless to grant relief in a case of this kind where jurisdiction of the defendant is afterwards seasonably obtained and the rights of third parties have not intervened. We have no fault whatever to find with cases which hold that where full and complete jurisdiction has been obtained over the subject-matter and the parties, judgments rendered in divorce cases as well as others are res adjudicata as to every question that might have been litigated under the issues made." There is also respectable authority to the contrary. See Doeksen v. Doeksen, 202 Iowa, 489, 210 N.W. 545; Darby v. Darby, 152 Tenn. 287 277 S.W. 894, 42 A.L.R. 1379; Eldred v. Eldred, 62 Neb. 613, 87 N.W. 340.

Inasmuch as it was impossible for the plaintiff to have her right to alimony adjudicated at the time the interlocutory decree was granted she is entitled to her day in court, and may determine the question in an independent suit in equity, especially since the action was commenced while the parties were still husband and wife.

[2] We now come to the question of the propriety of an award of alimony pendente lite. It is clear that the trial court in an action for divorce may reserve the questions of alimony and property rights until after an adjudication on the merits of the divorce and determine them separately (Periera v. Periera, 156 Cal. 1, 103 P. 488, 23 L.R.A., N.S. 880, 134 Am.St.Rep. 107; McCaleb v. McCaleb, 177 Cal. 147, 169 P. 1023; Elms v. Elms, 4 Cal.2d 681, 52 P.2d 223, 102 A.L.R. 811), and such questions having been reserved, the entry of a final decree does not terminate an order for alimony pendente lite. In re Ambrose, 72 Cal. 398, 14 P. 33. The analogy is inescapable that where, as here, an independent suit is seasonably begun prior to the entry of a final decree, such decree if entered does not dispose of the question of support at issue in the separate proceeding. So far

as these matters are concerned, the action for divorce is still pending within the meaning of Civil Code section 137 so as to warrant making an award of alimony pendente lite, attorney's fees and costs. In re Ambrose, supra; see also Grannis v. Superior Court, 143 Cal. 630, 77 P. 647; Nelson v. Nelson, 7 Cal.2d 449, 60 P.2d 982.

[3] Additional reasons are presented in regard to affirming the award for the support of the minor son. Under section 138 of the Civil Code a court may at any time during the minority of the child compel the father to pay to the mother a sum sufficient to meet the needs of the child, and within the ability of the father to pay. Metson v. Metson, 56 Cal.App.2d 328, 132 P.2d 513; see also 9 Cal.Jur. 806, sec. 146.

[4, 5] Although the court may completely sever the marital relationship, quite obviously it cannot alter the fact that the mother and father are the parents of their offspring. Therefore the duty to support as provided in section 139 of the Civil Code exists independently of the marriage status, and is a continuing obligation "during the minority of any of the children of the marriage." C.C. Sec 138. It is unaffected by either the interlocutory or final decree and may be enforced by a proper proceeding. Whatever orders the court may make pursuant thereto such as the one under attack in the present proceeding are in no wise in the nature of a final judgment, and the propriety thereof can be determined only "in the light of the circumstances existing at the time the application is made." Rosher v. Superior Court, 9 Cal.2d 556, 559, 71 P.2d 918, 920. Such an order is not intended to limit the duty of the parent, although it may do so by specific decree of the court, but primarily it is to define the extent of the parent's duty during the lifetime of the order.

[6] The argument of appellant on this question appears to be that respondent by alleging that she is without funds and is physically unable to support the son, thereby inferentially has admitted that appellant has not failed to support the boy. But as stated in Metson v. Metson, supra, 56 Cal.App.2d at page 331, 132 P.2d at page 515: "Whatever may be the rule in reference to ordinary controversies between litigants as to the necessity of pleading all the facts, this proceeding is not an ordinary proceeding. * * *" The only jurisdictional facts that must be alleged are the needs of the child and the ability to pay. Inasmuch as the present complaint admittedly contains such allegations it follows that the trial court had jurisdiction.

The judgment and order are affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

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79 Cal.App.2d 259

MOKLOFSKY et ux. v. MOKLOFSKY.

Civ. 13285.

District Court of Appeal, First District, Division 2, California.

April 21, 1947.

Hearing Denied June 19, 1947.

1. Specific performance ⇨6

Where executory part of contract for sale of realty could not be enforced by vendor because it called for personal services of purchaser, the contract could not be specifically enforced against the vendor, since there must be mutuality of remedy as well as of obligation.

2. Specific performance ⇨75

Equity courts will only decree specific performance where subject matter is capable of being embraced in one order and is immediately enforceable.

3. Specific performance ⇨75

Where contract, by its terms, stipulates for a succession of acts, whose performance cannot be consummated by one transaction, contract is not enforceable in equity.

4. Specific performance ⇨126(1)

Where parties had understanding that outside stairway was to be built by purchaser so that vendor would have access to apartment without having to go through house and stairway was not to be built until war was over when materials would be available, conditional decree of specific performance providing that when purchase price was paid and when stairway was constructed, purchaser should be entitled to specific performance was improper.

5. Action ⚷6

A declaratory judgment may be based on an oral contract or on a disputed question of fact. Code Civ.Proc. § 1060.

6. Judgment ⚷394

When acting under statute regarding vacation of judgment and entry of other judgment, court has no jurisdiction to change any finding of fact. Code Civ.Proc. § 663.

7. New trial ⚷163(1), 164

When acting on a motion for new trial court has power to change or add to findings, modify judgment, in whole or in part, or vacate the judgment, in whole or in part, where court deems itself mistaken as to its previous view of evidence or in application thereto of the law. Code Civ.Proc. § 662.

8. Appeal and error ⚷933(1), 935(1)

Presumption exists in favor of validity of trial court's order on motions for new trial and to vacate judgment and enter another judgment. Code Civ.Proc. §§ 662, 663.

9. Appeal and error ⚷664(1)

Records and orders of court disclosed that a motion for new trial was denied and that changes made in original findings were made in conjunction with such denial, and therefore, the changes were within jurisdiction of court. Code Civ.Proc. §§ 662, 663.

10. Appeal and error ⚷664(1)

Where record contained affidavit of deputy clerk which contradicted the recital contained in nunc pro tunc order to effect that judge had denied a new trial by order of certain date, statement by judge was conclusive.

11. Action ⚷65

The rights and duties of parties must be measured by situation presented at time of trial, in suit for specific performance. Civ.Code, § 3392.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, judge.

Suit by Albert S. Moklofsky and wife against Helen Moklofsky to compel the specific performance of a contract of sale of real property and for a declaratory judgment, wherein the defendant filed a cross-complaint. From an adverse judgment and from an order vacating a decision in favor of defendant, the defendant appeals.

Judgment reversed and cause remanded for a new trial.

Carl William Anderson, of Burlingame, for appellant.

Joseph A. Brown, of San Francisco, for respondents.

GOODELL, Justice.

This suit was brought by the respondents to compel the specific performance of a contract of sale of real property and for a declaratory judgment.

Two sets of findings and two judgments were filed in this case. The first decision was in favor of appellant. Respondents thereupon moved for a new trial. At the same time they made a separate motion to vacate and set aside the findings and judgment. The court vacated the first decision and then made new findings and entered a new judgment in favor of respondents. This appeal was taken from that judgment and from the order vacating the first decision.

The appellant, who is the mother of the respondent Albert S. Moklofsky, is the owner of a piece of real property in the city of San Mateo upon which there are two houses. She lived in the larger house and rented the smaller one for $40 a month. She desired to have the upper floor of the larger house rebuilt so she could live therein, and found difficulty in getting anyone to do the work. After some discussion with her son and his wife an agreement was reached that the son would do the work and that he and his wife would buy the property.

A written agreement was prepared by the son, in which some changes were made at the mother's request, whereupon it was signed on September 23, 1942. The purchase price was $8,000, on which the buyers were to pay $40 a month until $500 was paid, at which time the seller was to "execute" the agreement which meant, we assume, that a deed was to be made. The buyers were to have possession at once, and they moved into the larger house within a month. They collected the $40 rent from the smaller house, and used it to pay their $40 monthly installments.

The son worked at odd times over a period of several months and built a living room, kitchen and bathroom where before there had been nothing but an unfinished attic. The work involved carpentry, the installation of a bathtub and other fixtures, and papering and painting, to make the place into an apartment for the appellant's occupancy. However, the written contract says nothing on that subject except that "In lieu of interest payments, seller agrees to accept as such rental of apartment to be constructed as agreed, including utilities of hot and cold water, gas and electricity." There is nothing to show what was meant by "constructed as agreed". It simply appears from the testimony that the mother had told the son what she wanted done, and he did it. On several occasions she expressed her dissatisfaction with this or that, but apparently the job was substantially completed except for a stairway on the outside of the house.

The bathtub and some other fixtures and materials had been bought and paid for by appellant before the parties ever discussed a sale. During the progress of the work, however, a bill for $371 came in for other materials, and the mother insisted this should be paid by the son. He denied any such liability, claiming that his obligation went no further than the doing of the work. This dispute precipitated the litigation.

Respondents made a formal demand for a deed and offered to execute a promissory note (bearing 6% interest) for the balance of the purchase price, secured by a deed of trust, all as provided in the agreement. These were refused by appellant, who countered by serving a notice of rescission based on misrepresentations. The suit was then filed, and by her cross-complaint appellant sought to rescind.

The appeal from the judgment.

Appellant's principal contention is that this contract is not enforceable in equity because it calls for personal services (sec. 3390, Civ.Code). Respondents do not challenge this, but they maintain that in this judgment specific performance has not been decreed. They assert that "that question may or may not, be involved at some later date but, at this time, the Court has rendered no judgment decreeing specific performance, and that issue is not before this Court". They admit that the decree, in declaring the duties and obligations of the parties will be res judicata, but they then say that "whether or not the plaintiff may otherwise be entitled to specific performance is a matter not determined or fixed by the provisions of the judgment." The obvious answer to that claim is that if the decree will be res judicata as to rights and duties it will necessarily be res judicata as to specific performance.

The parties apparently had an understanding that an outside stairway was to be built by the son so that the mother would have access to her apartment without going through the house, and the court found that it was not to be built until the war was over when materials would be available.

[1] The decree provides that when the purchase price is paid "and said stairway is constructed plaintiffs shall be entitled to specific performance". This executory part of the contract could not be enforced by appellant, for it calls for personal services. That being so, the contract cannot be specifically enforced *against* her for there must be mutuality of remedy as well as of obligation. Wakeham v. Barker, 82 Cal. 46, 49, 22 P. 1131; Stanton v. Singleton, 126 Cal. 657, 663, 59 P. 146, 47 L.R.A. 334. The provision makes the appellant's obligation to convey conditional upon performance by respondents in the future. See Los Angeles etc. Co. v. Occidental Oil Co., 144 Cal. 528, 532, 533, 78 P. 25.

[2, 3] "Courts of equity only decree specific performance where the subject-matter of the decree is capable of being embraced in one order and is immediately enforce-

able. It will not decree specific performance when the duty to be performed is a continuous one, extending possibly over a long period of time and which, in order that the performance may be made effectual, will necessarily require the constant personal supervision and oversight of it by the court." Pacific Electric Ry. Co. v. Campbell-Johnston et al., 153 Cal. 106, 117, 94 P. 623, 628. The rule is settled that contracts which by their terms stipulate for a succession of acts, whose performance cannot be consummated by one transaction are not enforceable in equity. Stanton v. Singleton, supra; Moore v. Tuohy, 142 Cal. 342, 347, 348, 75 P. 896; Los Angeles etc. Co. v. Occidental Oil Co., supra; Poultry Producers etc. v. Barlow, 189 Cal. 278, 289, 208 P. 93; Long Beach Drug Co. v. United Drug Co., 13 Cal.2d 158, 171, 88 P.2d 698, 89 P.2d 386; Crane v. Roach, 29 Cal.App. 584, 587, 156 P. 375; Lind v. Baker, 48 Cal. App.2d 234, 247, 119 P.2d 806; 23 Cal.Jur. 480.

[4] The conditional decree of specific performance in this case falls squarely within the prohibitions of these rules.

[5] Appellant attacks the declaratory part of the judgment on an altogether different ground. For the most part the showing in this case relating to the construction of the upstairs apartment, the outside stairway leading thereto, the right of occupancy by appellant of the newly-built apartment for the rest of her life and her right to have water, gas and electricity supplied at the expense of respondents, rested on oral testimony, some of which was conflicting. Appellant, relying on Transport Oil Co. v. Bush, 114 Cal.App. 152, 1 P.2d 1060, contends that the court under section 1060, Code Civ.Proc., cannot make a declaratory judgment based on an oral contract or on disputed questions of fact. This court in Zimmer v. Gorelnik, 42 Cal.App.2d 440, 445, 446, 109 P.2d 34, as respondents point out, seriously questioned the authority of the Bush case. Since then the Supreme Court in Columbia Pictures Corp. v. De Toth, 26 Cal.2d 753, 760, 161 P.2d 217, 162 A.L.R. 747, has reaffirmed what was held in Zimmer v. Gorelnik and has set the question at rest. Hence appellant's contention on this point cannot be sustained.

The appeal from the order vacating the first decision and judgment.

The first decision found for appellant on virtually every issue. Respondents moved for a new trial and separately moved to set aside the first findings and judgment, both of which motions were heard at the same time. On October 22 a minute order was made reading as follows: "Motion of plaintiff and cross-defendant to set aside and vacate judgment and enter another judgment therein to-wit in favor of plaintiffs and cross-defendant *to change the findings to conform with the evidence,* and to change the conclusions of law, etc., be and the same is hereby granted. Said plaintiffs and cross-defendant to prepare judgment in accordance with proposal made by attorney for said plaintiffs and cross-defendant upon the hearing of aforesaid motion *and amend and correct the findings to conform to the evidence in the case.*" (Emphasis added.)

When this order was made two motions were under submission, one for a new trial and the other under section 663, Code Civ. Proc. Appellant contends that the order related only to the motion under section 663 because of its language and its silence as to a new trial.

[6, 7] According to a long line of authorities the court, when acting under section 663, has no power or jurisdiction to change any finding of fact. 14 Cal.Jur. 983 and cases cited. When acting under section 662, on the other hand, in ruling on a motion for a new trial the court has ample power to "change or add to the findings, modify the judgment, in whole or in part, vacate the judgment, in whole or in part" where, as said in Spier v. Lang, 4 Cal.2d 711, 714, 53 P.2d 138, 140, the court deems itself "mistaken as to its previous view of the evidence or in the application thereto of the law". The wide divergence between the first findings, for the appellant, and the second, for the respondents, indicates that the court felt that it had been mistaken on the facts.

[8, 9] That portion of the order, then calling for changed findings has no possible

statutory support under section 663 (Hole v. Takekawa, 165 Cal. 372, 376, 132 P. 445; Stanton v. Superior Court, 202 Cal. 478, 261 P. 1001), but does find full support under section 662. If read in connection with an intended ruling under section 662, it makes a tenable and effective order; otherwise it is "ineffectual for any purpose". Hole v. Takekawa, supra [165 Cal. 376, 132 P. 447]. It is not to be presumed that the court meant to make a void order or one even partially so. The presumptions are the other way—in favor of the court's action. Holland v. Superior Court, 121 Cal.App. 523, 526, 9 P.2d 531, and cases cited.

Moreover, while the order neither grants nor denies a new trial *in terms*, there is no escaping the fact that its whole tenor is inconsistent with the *granting* of a motion for new trial, either in whole or in part, conditionally or unconditionally, while wholly consistent with the *denial* of such motion.

On December 21, 46 days after the 60-day period expired, Judge McNutt, who tried the case and heard both motions, made the following order as of October 22:

"It appearing to the court that heretofore the motion for a new trial, and the motion to vacate the judgment and enter a new judgment to conform to the evidence, was considered and submitted to the Court for decision and the Court denied the motion for a new trial, and ordered the previous judgment vacated and a new judgment entered in conformity with the evidence and the intent of the Court;

"And it appearing to the Court that the Clerk inadvertently failed to enter in the minutes of the Court the order denying said motion for a new trial;

"It is hereby ordered, that the motion for a new trial be and the same is hereby denied nunc pro tunc."

We are satisfied that this last order remedied the order of October 22, and that when both are read together it may fairly be said that the new trial was denied on October 22 and that the changes were made in the first findings in conjunction with such denial.

[10] The record contains the affidavit of a deputy clerk which contradicts the recital contained in the nunc pro tunc order to the effect that the judge had denied a new trial in and by the order of October 22, but the cases hold that the statement by the judge is conclusive under circumstances such as these. Carpenter v. Pacific Mutual Life Ins. Co., 14 Cal.2d 704, 96 P.2d 796 and cases cited. For these reasons the order appealed from should be affirmed.

[11] Adverting to the principal questions: the respondents brought this suit seeking specific performance at a time when they had not "fully and fairly performed". Sec. 3392, Civ.Code. That is manifest from the language of the decree which makes the delivery of the deed conditional on the building of the stairway. The rights and duties of the parties must be measured and tested by the situation presented at the time of trial, and when this case was tried the respondents simply had not fully performed. See Wakehan v. Barker, 82 Cal. 46, 49, 22 P. 1131, supra. What the situation will be when the case is retried cannot be anticipated herein.

We might remark that the finding and declaration in the decree that $1,440 has been paid by respondents is not supported by the record as far as we can find. Other parts of the decree are subject to criticism, for instance, the provision "that all public utilities such as water, cooking fuel, bathroom, hot and cold water, and gas and electricity shall be provided for said Helen Moklofsky for the use of her or her tenant during the period of the natural life of Helen Moklofsky" does not say, as it should, by whom and at whose expense they are to be provided.

The order of October 22, 1945 is affirmed.

The judgment is reversed and the cause remanded for a new trial.

NOURSE, P. J., and DOOLING, J., concur.

Hearing denied; **TRAYNOR, J.**, dissenting.

79 Cal.App.2d 321

PEOPLE v. WEBSTER.

Cr. 650.

District Court of Appeal, Fourth District, California.

April 23, 1947.

Hearing Denied May 22, 1947.

1. Criminal law ⚿369(15), 370, 371(1), 372 (1), 680(1)

Evidence of a collateral offense is admissible only after evidence that implicates defendant, first in the principal offense, and then in the collateral offense, and that shows identity of person or crime, scienter, intent, system, or some other integral parts of the exceptions established to the rule excluding evidence of collateral offenses, between the charge under trial and that sought to be introduced, that clearly connects the defendant, by showing that the person who committed the one crime, must have committed the other.

2. Criminal law ⚿369(2)

In prosecution for murder of young woman by strangulation, evidence of subsequent attack by defendant on another young woman, who was choked in similar manner, was sufficient to make proof of subsequent attack admissible.

3. Criminal law ⚿369(1)

That collateral offense was committed after commission of principal offense did not render proof of collateral offense inadmissible.

4. Criminal law ⚿784(1)

Where the case of the people rests entirely on circumstantial evidence, instructions on the law of circumstantial evidence should be given.

5. Criminal law ⚿1172(2)

In a criminal case where the case of the people rests entirely on circumstantial evidence, whether failure to instruct on the law of circumstantial evidence is prejudicial depends on the facts of the particular case.

6. Criminal law ⚿829(15)

In prosecution for murder, where the case of the people rested entirely on circumstantial evidence, and the court properly instructed jury on reasonable doubt, and properly defined direct and circumstantial evidence, refusal to give instructions on law of circumstantial evidence was not prejudicial. Const. art. 6, § 4½.

7. Criminal law ⚿1144(15)

Jurors are presumed to be persons of average intelligence.

8. Criminal law ⚿1186(4)

Conviction of murder of the first degree could not be reversed where a study of the entire record left court with conviction that there had been no miscarriage of justice. Const. art. 6, § 4½.

◆

Appeal from Superior Court, Orange County; Kenneth E. Morrison, Judge.

Robert L. Webster was convicted of murder of the first degree, and from such conviction, and from an order denying motion for new trial, he appeals.

Affirmed.

James Munholland, of Long Beach, for appellant.

Fred N. Howser, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

MARKS, Justice.

Defendant was convicted of murder of the first degree with the penalty fixed at life imprisonment. He has appealed from the judgment pronounced upon him and from the order denying his motion for new trial.

Two errors are alleged here as grounds for a reversal of the order and judgment. The first involves evidence of a separate crime committed on the person of Alice Sullivan, and the second is the refusal of the trial judge to give instructions on circumstantial evidence proposed by defendant.

Defendant was accused and convicted of murdering Carrie D. Bendel, a young woman nineteen years of age. In order to determine the admissibility of the evidence of the separate crime committed by defendant it is necessary to particularize the evidence concerning both offenses in order to determine if there runs through both of them a common plan or scheme which would make the evidence of the assault made on the Sullivan girl admissible in his trial for the murder of Carrie D. Bendel. People v. Albertson, 23 Cal.2d 550, 145 P.2d 7.

Carrie D. Bendel was a waitress employed at Serwell's Cafe in Belmont Shore in the city of Long Beach. On June 30, 1946, she went off duty shortly after two o'clock in the afternoon and proceeded to the El Sombrero, a cocktail bar a short distance from Serwell's. She was dressed in her white uniform. She seated herself at the bar and ordered a drink. Defendant, who did not know Miss Bendel, was seated at the bar a short distance from her. They engaged in conversation and defendant moved to the stool next hers. They remained thus seated for some time and were served several drinks. They left the El Sombrero together. Miss Bendel changed to street clothes consisting of a blouse or sweater, a dark skirt and a coat of a checked pattern. They probably returned to the El Sombrero and probably had another drink there. They appeared in Lashley's Cafe about nine o'clock P. M. and were served dinner which the waitress who served them was able to describe in detail. They left Lashley's together at about ten o'clock. Numerous witnesses testified to these facts so that the testimony of defendant and his statement to officers at the time of his arrest to the effect that he did not know Miss Bendel, had never seen her and had not been in the El Sombrero cocktail bar would seem to be fabrications.

Miss Bendel was not thereafter seen alive. Her body was found next morning by Refugio and Helen Medina. These two left their home in Stanton on the morning of July 1st at about 5:30 o'clock. They drove from their home to the Katella Road, a paved road that runs east and west near Los Alamitos in Orange County. They turned south off of Katella Road onto a dirt road that led to the Buehler farm where Mrs. Medina worked. About sixty feet south of the Katella Road they saw a body lying face down on the weeds immediately west of this road and next to a wire fence and a eucalyptus grove. They called Mrs. Buehler who went to the scene and then called the police officers of Orange County. Two deputy sheriffs immediately responded and others arrived later.

The body was subsequently identified as that of Carrie D. Bendel. It was nude from the waist down. On turning it over numerous bruises, scratches and abrasions were seen on the face. On one side of the throat was the imprint of a thumb and on the other the imprint of four fingers. The autopsy disclosed that death had been caused by strangulation. Remnants of the food which the waitress testified she had served Miss Bendel in company with the defendant were found in deceased's stomach. The autopsy surgeon was of the opinion that death had ensued not more than four hours after the food had been eaten.

The officers found a woman's patent leather pump on the east side of the dirt road opposite the body, and Miss Bendel's purse about twenty-eight feet from the body. This purse had on it a clear fingerprint which was later identified as the print of the index finger of defendant's right hand. Miss Bendel's brassiere and slip were torn in two down the front of her waist leaving the upper portion of her chest bare.

There were tire tracks of an automobile which had been backed from where the body lay out onto Katella Road. The imprint on the pavement of the left rear tire was clear enough to be photographed. This print was later found to correspond to the tread of the tire on the left rear wheel of defendant's automobile. However it should be observed that this tire was a retread with a not uncommon type of tread.

We will now consider the attack made on Alice Sullivan to determine if there was sufficient similarity in the two attacks to show a common scheme or plan to make the evidence of the Sullivan attack admissible in the prosecution for the murder of Miss Bendel.

Miss Sullivan and a Miss Fulton were employed at the Iceland Skating Rink in Hynes. They finished their work at about 10:30 o'clock on the night of August 9, 1946, and went to Sherry's Barn. They sat down at a table and ordered some drinks. Defendant, with whom they were not acquainted, was seated at another table. He came over and joined them. He danced with Miss Sullivan until the place closed at midnight. Two other young men attempted to join the party but were replused. When the place closed the two women and defendant went to the place where Miss Sullivan's Chevrolet coupe was parked and Miss Fulton suggested that the three go to her house for sandwiches and coffee. The two unidentified young men approached and again asked to join the party but were again refused. The two women proceeded to Miss Fulton's home in Miss Sullivan's car being followed by defendant in his automobile and the two strangers in a third car. Miss Sullivan parked her car on the left hand side of the street in front of Miss Fulton's home with the other two cars parking to the rear of her car. Miss Fulton alighted and went into the house. Miss Sullivan got out and was again approached by the two strangers with a renewal of the request that they be permitted to join the party. Defendant came up and he and Miss Sullivan finally convinced them they were not wanted. According to Miss Sullivan this was the last seen of the two men.

Miss Sullivan and defendant then entered the house where Miss Fulton was preparing coffee and sandwiches of which the three partook until some time between 2:30 and 3:30 in the morning on the 10th of August. They were joined by Miss Fulton's brother and another man. According to the evidence no liquor was consumed at this house.

Miss Sullivan and defendant left and went to her car. Defendant suggested that he follow her home in his car as the hour was late. Miss Sullivan did not think this necessary. They both got into her coupe, Miss Sullivan sitting in the driver's seat and defendant to her right with his left arm along the top of the seat behind her. After they had each smoked a cigarette his left hand came up onto her head with the thumb pressing her temple with sufficient force to leave a bruise and his right hand on her throat. He choked her into unconsciousness. When Miss Sullivan regained consciousness defendant was driving the car and she was sitting on the seat at his right. He again choked her into unconsciousness. When she came to she was slumped on the floor of the car with her knees under her chin and her back against the door. Defendant had left. She managed to blow the automobile horn. She unlatched the door and fell onto the road where she remained until neighbors who had been aroused by the horn found her about five o'clock in the morning. They summoned officers who took Miss Sullivan to a hospital.

Miss Sullivan was wearing a white blouse, an underskirt, a skirt, a brassiere, a foundation garment or girdle, a sanitary belt and pad. The brassiere was ripped, the girdle and sanitary belt had been twisted around and the pad was found in the glove compartment of her car. One sleeve had been torn from the blouse and the blouse had been ripped down the front to the waist.

One of the officers called to the scene described Miss Sullivan's condition as follows:

"A. We arrived and found that the victim was in need of medical care, and on our examination we found her blouse had been ripped or torn from her, her tongue was swollen, and there were bruises on the left side of her temple, and her throat had marks upon it, and her blouse as I said before was torn from her.

"Q. How about these marks on the throat? Where on the throat were they? A. Well, there was a large bruise mark on the right side of her throat and several bruises on the left side of her throat. Her head had a rapidly rising swelling near her forehead."

[1] The elements necessary to be established in order to permit evidence of a collateral offense to be admitted against a defendant on trial for another offense are thus stated in People v. Albertson, supra, 23 Cal.2d at page 578, 145 P.2d at page 21:

"These momentous consequences demand a rigorous enforcement of the rule, in criminal charges, that evidence of the collateral offense must never be admitted, unless it can be applied to more certainly demonstrate the truth. Hence: (a) Ground must first be laid implicating the accused in the charge under trial, and unless sufficient evidence of this has been, in the opinion of the trial judge, first adduced, all evidence of other offenses must be excluded; (b) the collateral offense cannot be put in evidence without proof that the accused was concerned in its commission; (c) there must be identity of person or crime, scienter, intent, system, or some integral parts of the exceptions established between the charge under trial and that sought to be introduced, that clearly connects the accused, showing that the person who committed the one crime must have committed the other."

[2, 3] The evidence before us concerning both offenses involved here is sufficient to satisfy the requirements of these rules. Defendant was sufficiently connected with and implicated in the offense for which he was on trial. It was thoroughly established that he spent the afternoon and evening of June 30th with deceased; that he had dinner with her is established by the testimony of the waitress who served them and the remnants of this meal found in her stomach by the autopsy surgeon. The tire track on the road corresponded with the tread of one of the tires on his automobile. Most convincing is his fingerprint found on the purse of deceased. That defendant was concerned in the assault on Miss Sullivan was sufficiently established by her identification of him as her assailant. There was a similar plan or scheme or system appearing in both offenses. Defendant "picked up" both women in cocktail bars and spent considerable time drinking with them. Both women had bruises and abrasions on their heads. Both women were cruelly choked evidently with the right hand of their attacker,—one to death and the other into a state of collapse and unconsciousness. The garments of both were torn open leaving the upper portion of the front of the torso exposed. It would be unusual to find two crimes with greater details of similarity of execution, showing a common plan or scheme or system in the commission of both. Thus the evidence of the collateral crime was properly admitted. People v. Lisenba, 14 Cal.2d 403, 94 P.2d 569; People v. Peete, 28 Cal.2d 306, 169 P.2d 924; Lisenba v. People, 314 U.S. 219, 62 S.Ct. 280, 86 L.Ed. 166. That the collateral crime was committed after the commission of the offense for which defendant was on trial does not in itself furnish sufficient reason for rejection of the evidence concerning it. People v. Gosden, 6 Cal.2d 14, 56 P.2d 211.

The most serious question presented on this appeal is the refusal to give defendant's requested instructions numbered 22 and 23 which read as follows:

"When the case which has been made out by the People against a defendant rests entirely or chiefly on circumstantial evidence, and in any case before the jury may find a defendant guilty basing its finding solely on such evidence, each fact which is essential to complete a chain of circumstances that will establish the defendant's guilt must be proved beyond a reasonable doubt."

"I instruct you further that you are not permitted, on circumstantial evidence alone, to find the defendant guilty of the crime charged against him unless the proved circumstances not only are consistent with the hypothesis that the defendant is guilty of the crime, but are irreconcilable with any other rational conclusion."

[4] It is now established in California that in cases like the one before us where the case of the People rests entirely on circumstantial evidence instructions such as those quoted should have been given. People v. Hatchett, 63 Cal.App.2d 144, 146 P.2d 469; People v. Rayol, 65 Cal.App.2d 462, 150 P.2d 812; People v. Bender, 27 Cal.2d 164, 163 P.2d 8; People v. Koenig, 29 Cal.2d 87, 173 P.2d 1, 4. In the Koenig case it was said:

"The failure either to give the requested instruction or to include in the instruction given a proper statement of the principle that the evidence must be inconsistent with any other rational hypothesis was error. It does not follow, however, that error in this regard necessarily requires reversal of the trial court. In the Bender case, it was held that the failure to give a complete instruction was not prejudicial under the facts in that case. Similarly in the present case such failure was not prejudicial. It is true that in People v. Rayol, 65 Cal.App. 2d 462, 150 P.2d 812, the court held that the failure to give the complete instruction was prejudicial, but a conviction in that case involved the state's proving that the defendant knew that she had participated in an act of sodomy although she was under the influence of intoxicating liquor at the time, and the evidence was confined almost entirely to her participation. The jury could reasonably have concluded that defendant was not a knowing participant in the act. In People v. Hatchett, 63 Cal.App. 2d 144, 146 P.2d 469, the court also held that the failure to give the complete instruction was error, but it did not reverse on this error alone but on this error and several other errors that were substantial."

[5] Thus it must be admitted that the failure to give the requested instructions was error. However it clearly appears from the foregoing cases that the failure to give such instructions is not always sufficiently prejudicial to require a reversal of the judgments.

[6, 7] Here the trial judge properly instructed the jury on reasonable doubt and properly defined direct and circumstantial evidence. He also gave defendant's requested instruction number 24, as follows:

> "If the evidence in this case is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one which points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of defendant's innocence, and reject that which points to his guilt.
>
> "You will notice that this rule applies only when both of the two possible opposing conclusions appear to you to be reasonable. If, on the other hand, one of the possible conclusions should appear to you to be reasonable and the other to be unreasonable, it would be your duty to adhere to the reasonable deduction and to reject the unreasonable."

As we have already observed, all of the evidence in this case connecting defendant with the murder of Carrie D. Bendel was circumstantial. There was no direct evidence that he killed her. If instruction number 24 had opened with the statement to the effect that all of the evidence in this case was circumstantial and the word "circumstantial" had been inserted before the word "evidence" in the first line, it would have been a sufficient statement of the law under the cited decisions which require the jury's attention be directed to this rule of law. However all of the evidence was circumstantial and the jury must have been aware of that fact under the definition of circumstantial evidence which the trial judge gave. Jurors are presumed to be persons of average intelligence and the mere statement in instruction number 24 to the effect that all the evidence was in fact circumstantial, and reference to that circumstantial evidence could add nothing to the knowledge gained through several days of trial during which time the jurors listened to nothing but circumstantial evidence. As reasonable persons they could conclude that instruction number 24 referred to nothing but circumstantial evidence as there was no other evidence introduced connecting defendant with the murder. Therefore we cannot conclude that the jury was mislead by the instructions given or that the failure to give defendant's requested instructions numbered 22 and 23 was sufficiently prejudicial to warrant a reversal of the judgment.

[8] Further, we have studied the entire record and are left with the firm conviction that there has been no miscarriage of justice in this case. Thus we are prohibited from reversing the judgment by section 4½ of Article VI of the Constitution.

The judgment and order denying the motion for new trial are affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

SCHAUER, J., voted for hearing solely for the purpose of noting that the dictum "If instruction number 24 had opened with the statement to the effect that all of the evidence in this case was circumstantial and the word 'circumstantial' had been inserted before the word 'evidence' in the first line, it would have been a sufficient statement of the law under the cited decisions which require the jury's attention be directed to this rule of law," is inconsistent with the holding in People v. Bender (1945), 27 Cal.2d 164, 175, 163 P.2d 8, and the cases there cited.

79 Cal.App.2d 345

ERICH et al. v. DUNKLY et al.

Civ. 7272.

Sac. 5772.

District Court of Appeal, Third District, California.

April 25, 1947.

Hearing Denied June 23, 1947.

1. Chattel mortgages 🔑118

Where mortgagor did not produce fish at hatchery but bought eggs elsewhere and grew fish therefrom selling them when they reached marketable size, chattel mortgage covering trout together with any and all "increases" and additions thereto during life of mortgage, covered increases due to purchase of eggs and was not limited to the natural increase of trout which were at hatchery at time mortgage was executed.

See Words and Phrases, Permanent Edition, for all other definitions of "Increase".

2. Chattel mortgages 🔑102

If language of the mortgage was subject to construction, it was proper for trial court to construe it in light of all circumstances.

3. Appeal and error 🔑1008(3)

Where trial court's construction of chattel mortgage was a reasonable one and consistent with intention of the parties as indicated by the circumstances, the construction would not be disturbed.

4. Landlord and tenant 🔑81(1)

Where chattel mortgages covered trout together with increases and leasehold and all buildings, improvements, equipment, and tools incidental and pertinent to operation of trout farm, foreclosure of mortgagor's equity of redemption, insofar as lease was concerned, was proper, in view of fact that dismemberment of mortgaged property would practically destroy values of most if not all of its parts. Civ.Code, §§ 1636, 1647; Code Civ.Proc. §§ 700a, 1860.

◆

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Action to foreclose a chattel mortgage by W. J. Erich and another against Gerard P. Dunkly, also known as Gerard Dunkly and another. From an adverse decree, defendants appeal.

Affirmed.

Charles A. Christin and Thomas J. Keegan, both of San Francisco, for appellants.

Hardin Barry, of Susanville, and S. C. Young, of Quincy, for respondents.

ADAMS, Presiding Justice.

This is an appeal from a decree of foreclosure and sale which involved two chattel mortgages, the one dated October 13, 1941, given by defendants to secure a promissory note for $1,800 assigned to plaintiffs by the mortgagees, and the other dated April 6, 1944, securing a promissory note for $4,175.03 executed by defendants to plaintiffs.

Defendants, at the time of the execution of said notes and mortgages, were engaged in the business of raising trout for market, their place of business, known as Lava Springs Trout Farm, being located upon certain land in Plumas County upon which they held a lease. The earlier mortgage covered some 260,000 trout of various sizes, "together with any and all increases and additions thereto" during the life of the mortgage. It also covered all buildings, improvements, equipment and tools incidental and appurtenant to the operation of the trout farm, and located thereon, together with all of the mortgagors' right, title and interest in the lease held by them on the property constituting the farm.

The second mortgage covered the leasehold, and a long list of buildings, equipment of various kinds, certain motor vehicles, household equipment, furniture, etc.; also 286,000 trout of various sizes, the instrument reciting that it was intended to include "all trout at hatchery including all future increase."

Prior to the execution of the latter mortgage an agreement was entered into between plaintiffs and defendants under which the plaintiffs agreed to assume certain specified debts owed by defendants and to make certain advances for purposes connected with defendants' operations on the trout farm; and defendants undertook certain specified obligations and to keep the hatchery operating at a capacity of not less than 200,000 trout at all times. The agreement, as well as defendants' promissory note, was agreed to be secured by the aforesaid chattel mortgage. Defendants further agreed to assign their lease to plaintiffs as further security, and provided that upon their default plaintiffs were to be "entitled to immediate possession of the said real property and second parties [defendants] have no further interest thereunder."

Defendants having defaulted in the performance of their obligations, plaintiffs brought this action, alleging in the first count that there was due them under the first mortgage on account of the note and advances made by them together with interest, the sum of $2,638.75. They prayed judgment for that amount, together with a reasonable attorney's fee, and that defendants be foreclosed of all interest, lien, and equity of redemption of the mortgaged property. In a second count, on the second mortgage, judgment was sought for $5,245 and attorney's fees, and plaintiffs prayed that defendants be foreclosed of all interest and equity of redemption of the mortgaged property.

After trial of the cause by the court without a jury, findings were made in favor of plaintiffs, which findings recited that the property mentioned in the mortgages was as therein recited, except that the trout on hand consisted of but 108,000 of varying sizes. Judgment was awarded plaintiffs for $8,468.49, and the decree further provided that the equity of redemption of the defendants and all persons claiming under them "in and to said mortgaged property be and the same is hereby forever barred and foreclosed." The decree set forth in detail the mortgaged property in conformity with the descriptions contained in the mortgages, including all interest in the lease.

From that decree defendants have prosecuted this appeal, asserting two grounds for reversal. The first is, that the undisputed testimony of defendant Dunkly shows that his method of trout farming was to buy trout eggs, which were then incubated at the hatchery, after which the trout were grown to marketable size and then sold; that no trout were raised on the trout farm by natural propagation and that, at the time of the trial, all of the trout which were covered by the chattel mortgages had been sold or had died from natural causes; and that, while the first mortgage included a specified number of fish and purported to cover "any and all increases and additions thereto" during the life of the mortgage, the mortgage of 1944 covered only the number of trout enumerated "including all future increase"; that "increase" must be construed as meaning only the natural increase of the trout which were at the hatchery at the time the mortgage was executed, and not additions thereto, and, as there had been no such increase the court erred in foreclosing defendants' interest in the trout inventory for repayment of the debt secured by the 1944 mortgage.

[1] The trial court found that the parties intended by their mortgages and agreement and by their method of propagating trout commercially, that the word increase should mean and include all additions and replacements of trout at the hatchery, and there is ample evidence to support this conclusion. Mr. Dunkly testified that prior to the execution of either mortgage he explained to the mortgagees his method of operation, that he did not produce fish at the hatchery but bought the eggs elsewhere and grew the fish therefrom, selling them when they reached marketable size. It was therefore inferable that both mortgages were intended to cover increases due to the purchase of eggs, otherwise the second mortgage, in so far as it covered trout, would have been rendered valueless by the mere passage of time and the sale or demise of the trout on hand at the time of the execution of the instrument.

[2, 3] If the language of the mortgage was subject to construction it was proper for the trial court to construe it in the light of all the circumstances; and its construction, being a reasonable one and consistent with the intention of the parties as indicated by the circumstances, will not be disturbed by an appellate court. Woodbine v. Van Horn, 29 Cal.2d 95, 104, 173 P.2d 17; Universal Sales Corp. v. California etc. Mfg. Co., 20 Cal.2d 751, 761, 772, 128 P.2d 665; Enos v. Armstrong, 75 Cal.App.2d 663,

668, 669, 171 P.2d 137; Baird v. Lindblad, 75 Cal.App.2d 202, 204, 205, 170 P.2d 488; Code Civ.Proc. sec. 1860; Civ.Code, secs. 1636, 1647.

[4] Appellants' contention that it was error to foreclose their equity of redemption in so far as their lease was concerned is based upon the provision of section 700a of the Code of Civil Procedure that "Sales of personal property, and of real property, when the estate therein is less than a leasehold of two years' unexpired term, are absolute. In all other cases the property is subject to redemption, as provided in this chapter." Assuming but not deciding the applicability of that section to this case, we think that this contention is disposed of by the decision in Title Insurance & Trust Co. v. California Development Co., 171 Cal. 173, 152 P. 542. That case involved the validity of a decree directing the sale as an entirety and without right of redemption, of all of the property, real and personal, covered by the lien of a mortgage or deed of trust, which property constituted the whole canal and irrigation system constructed and developed for the purpose of diverting water from the Colorado River and applying it to the irrigation of certain lands in Imperial County. There the court said, 171 Cal. at pages 202-203, 152 P. at page 555: "The ground for supporting such sale is to be found in the essential unity of the system. Where there is a mortgage covering real and personal property, comprising parts of a single working plant or utility, in which each part is necessary to give value to the others and where a dismemberment of the system would destroy or greatly impair the usefulness or value of its component parts, the propriety of a decree like the one here made is well settled. The statute giving a right of redemption upon execution sales of real property is held to have no application to such cases." The court there cited cases to a like effect where the property involved constituted a system or plant whose dismemberment would destroy or impair the usefulness or value of the parts. Also see Friedrichsen v. Guaranty Trust Co. of New York, 9 Cir., 39 F.2d 859, 865, certiorari denied 282 U.S. 852, 51 S.Ct. 29, 75 L.Ed. 755.

It is obvious from a reading of the list of properties secured by the mortgages in this case, particularly the second one, and by the nature of the business, that dismemberment would practically destroy the value of most if not all of its parts. Furthermore, the agreement between plaintiffs and defendants, as aforesaid, provided that upon defendants' default plaintiffs were to be entitled to immediate possession of the real property and defendants were to have no further interest therein. Under such circumstances the trial court was justified in foreclosing defendants' equity of redemption, and defendants are in no position to complain. Furthermore, there is nothing in the record to show that appellants raised this point in the lower court.

The judgment is affirmed.

PEEK and THOMPSON, JJ., concur.

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78 Cal.App.2d 849

EDGINGTON v. SECURITY-FIRST NAT. BANK OF LOS ANGELES et al.

Civ. 15372.

District Court of Appeal, Second District,
Division 1, California.
April 1, 1947.

Rehearing Denied April 22, 1947.
Hearing Denied May 29, 1947.

1. Bills and notes 🔑6

Ordinarily, signer is the person making a completed check payable to fictitious payee regardless whether another employee is responsible for seeing that it reaches the payee. Civ.Code, § 3090, subd. 3.

2. Banks and banking 🔑148(3)

A bank depositor need not examine endorsements on returned checks since he may assume that bank has ascertained genuineness of endorsements.

3. Banks and banking 🔑148(2)

Where bookkeeper would prepare pay roll checks for employer's signature and would deliver the checks to foreman or payees, and bookkeeper forged endorsements of actual and fictitious payees such checks were "order" paper, rendering drawee bank liable to employer for amounts paid upon forged endorsements. Civ.Code, § 3090, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Order".

4. Estoppel 🔑110

Estoppel is an affirmative defense which must be affirmatively averred and hence defendants cannot rely on estoppel which has not been pleaded.

5. Banks and banking 🔑148(3)

A drawer was not estopped from recovering from drawee bank the amount of checks paid by bank on forged endorsements of drawer's bookkeeper because a careful inspection after suspicions had been otherwise aroused, disclosed under favorable conditions the erasure of bookkeeper's pencil signatures, especially where payees, for most part, were actual employees whose names were known to drawer and checks passed through banks and clearing house without question.

6. Estoppel 🔑52

The courts cannot create estoppels where none have arisen from act of party sought to be estopped.

7. Estoppel 🔑52

Unless clearly warranted, estoppel is not favored.

8. Estoppel 🔑59

The doctrine of estoppel is intended for protection of a party and is not intended to be used for purpose of permitting one to perpetrate a fraud upon another.

9. Limitation of actions 🔑100(3)

Where more than one year elapsed since return of canceled checks which contained forged endorsements, drawer's action for recovery of amount of such checks was barred by one year limitation notwithstanding fraud was discovered within one year from date of action. Civ.Code, § 3090, subd. 3; Code Civ.Proc. § 340, subd. 3.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by Ralph Edgington, doing business as Edgington Oil Refinery, against Security-First National Bank of Los Angeles and another to recover a deposit with first named defendant which paid out amount of such deposit on checks signed by plaintiff and fraudulently cashed by plaintiff's employee. From an adverse judgment, plaintiff appeals.

Affirmed in part and in part reversed with directions, and attempted appeal from an order dismissed.

Steiner Larsen, of Los Angeles (Jean Wunderlich, of Los Angeles, of counsel), for appellant.

Jennings & Belcher, of Los Angeles (Martin Gendel, of Los Angeles, of counsel), for respondent Security-First Nat. Bank of Los Angeles.

DORAN, Justice.

This is an appeal from a judgment denying plaintiff the recovery of a deposit with the Security-First National Bank in the sum of $7,118.94, said amount having been paid out by the bank on a series of some 145 checks signed by the plaintiff and fraudulently cashed by plaintiff's employee Green, the latter having forged the endorsements of the named payees.

The record discloses that on April 24, 1942 the appellant Edgington employed one Thomas Green as "oil yield clerk" in appellant's refinery located at 200 E. Artesia Blvd. in Long Beach. Green is also referred to as a "payroll clerk" in appellant's brief, and as "office manager" in the trial court's findings. The appellant testified that Green "kept track of the oil movements through the refinery and the disposition of the refined oil products to the various producers. He accumulated the time sheets of the employees; prepared from the time sheets, pay roll cards for each employee; prepared the check in the net amount due to the employe, and brought them in to me for my signature. * * * And then he sent the time cards, the check stubs and the invoices for miscellaneous purchases * * * down to Mr. Bakewell, a certified public accountant, who did the actual bookkeeping for the refinery." After the checks had been signed by Edgington, "Mr. Green normally turned the bulk of these (weekly payroll) checks * * * over to Mr. Bass, who was the foreman, who distributed them to the employees. If they did not happen to be on duty at the time, Mr. Green kept them—and the employee picked them up the next day." At the end of the month the accumulation of paid checks was mailed by the bank to the refinery; Green took the cancelled checks and the accompanying bank statement, and in the course of time forwarded those documents to Mr. Bakewell, the accountant, Bakewell's office not being at the refinery. This was the normal procedure.

About June 26 or 27, 1944, while investigating an apparently excessive expenditure of petty cash in the office, Edgington for the first time discovered that, in reference to the 145 pay roll checks here involved, Green had forged the names of the payees and collected the amounts for which such checks had been drawn. According to the trial court's findings, "Beginning early in 1942, shortly after he was employed by plaintiff, Green prepared various pay checks, naming as payees the employees or former employees of plaintiff. He also prepared fictitious time vouchers with forged signatures of employees for work that was not actually performed." After the checks were signed by Edgington, the modus operandi was that "Green, pursuant to his plan to defraud, indorsed the names of the payees on the checks and took them either to Greywood's or to one of the Swenson's Public Markets where he negotiated them". Some of the checks were negotiated at branches of the Bank of America and the Security Bank, and to individuals. "Upon negotiating the checks Green indorsed his own name in lead pencil." In due course, the Bank of America received certain of these checks, guaranteed prior indorsements, and presented such checks through the Clearing House, which were ultimately paid by the Security Bank, respondent herein. The trial court also found that "Upon receiving the checks from the defendant Security Bank, Green erased, in some cases not completely, his own indorsements. He made a preliminary examination of the statements and then forwarded them to the plaintiff's auditor. Plaintiff did not make actual discovery of the fraud until early in June of 1944. At that time he went to the defendant Security Bank and found among the paid checks charged to his account that month a number bearing forged indorsements on which Green's signature appeared. Green thereupon confessed his forgeries and was prosecuted and convicted". From the statement in court of appellant's counsel it appears that "Mr. Green was a man who had a clear record before that time, and he served a little less than a year and I believe is now out on probation. He is here to testify today". However, Green did not testify at the trial and the only testimony in the record is that of the appellant Edgington.

The crucial issue herein is presented by appellant's contention that "The judgment is erroneous and should have been in favor of plaintiff, because (a) the instruments (checks) were order instruments and the forged indorsements passed no title to the bank, (b) plaintiff's conduct did not estop him to set up the forgeries and the proper interpretation of the evidence". It is, appellant asserts, "the intention of Edgington to the nature and existence of the payee which governs and not the intention of the payroll clerk Green"; this latter statement being made in reference to the interpretation of Section 3090(3) which defines those instruments which are deemed "payable to bearer". This phase of the case therefore depends upon whether the checks in question are to be regarded as *payable to order,* in which event the bank paying same on forged indorsements of Green may be held liable. On the other hand, if the checks are to be deemed *payable to bearer* for the reason that they were drawn in favor of "fictitious" persons as specified in the Uniform Negotiable Instruments Act found in Section 3090 of the Civil Code, then it becomes immaterial who cashed the checks or whether the indorsements were forged or genuine, in which case there would be no liability on the part of the paying bank.

Section 3090 of the Civil Code as it read prior to amendment in 1945, provides that:

"The instrument is payable to bearer—

"(1) When it is expressed to be so payable; or

"(2) When it is payable to a person named therein or bearer; or

"(3) When it is payable to the order of a fictitious or nonexisting person, *and such fact was known to the person making it so payable*". (Italics added.)

In this connection it is interesting to note, although not decisive of the present appeal, that Subdivision (3) of the above section was amended in 1945 to read as follows: "When it is payable to the order of a fictitious or nonexisting *or living* person *not intended to have any interest in it* and such fact was known to the person making it so payable *or known to his employee or other agent who supplies the name of such payee.* (1945 amendments italicized.)

As against the appellant's assertion that the checks were "order" paper, and that it is "the frame of mind and intention of the person signing the checks (Edgington) that determines whether the payee named therein is fictitious or not, since he is the one 'making it so payable' ", within the meaning of Section 3090(3) of the Civil Code; it is the contention of the respondent Security Bank that "The checks involved were bearer paper because the dishonest bookkeeper was the person making the checks so payable", within the meaning of the statute. Respondent also argues that "The checks involved are payable to bearer because the dishonest bookkeeper had the authority to circulate the checks by determining when and where the checks would be delivered". The lower court, as before indicated, took the position that the checks constituted "bearer" paper under the statutory definition; hence that appellant depositor was not entitled to recover as against the paying bank, the forged indorsements by Green being immaterial since, if the checks be deemed payable to "bearer", the bank would be safe in paying the same to any person regardless of indorsements.

[1] The question here presented is not a new one in this state. The cases of Security-First National Bank of Los Angeles v. Bank of America, 1943, 22 Cal.2d 154, 137 P.2d 452, and Los Angeles Investment Co. v. Home Savings Bank, 180 Cal. 601, 182 P. 293, 5 A.L.R. 1193, are cited in appellant's brief; likewise, the respondent's brief asserts that appellant's "entire position must rise or fall on the applicability of (these) two cases to the facts at issue". In the Security Bank case just cited, 22 Cal.2d at page 160, 137 P.2d at page 455, the court states a rule which must determine the present issue, as follows: "Ordinarily, therefore, the *signer* remains the person making the completed check payable to a fictitious payee regardless of whether another employee is responsible for seeing that it reaches the payee. * * * A contrary conclusion has been arrived at when an employee has discretion to decide when and whether checks shall be delivered. See Goodyear Tire & Rubber Co. of California v. Wells Fargo Bank, supra, [1 Cal.App.2d 694, 37 P.2d 483,] and cases there cited. The soundness of these decisions need not be considered, since the claim that Ellis had such authority is based only on conjecture. The evidence shows merely that the checks were returned to the accounting division to be forwarded to the payee". (Italics added.) The Goodyear Tire & Rubber Co. case is relied upon by respondent, but is entirely unlike the present situation, and involved the matter of multiple signers of corporation checks.

The facts in the case of Security-First National Bank of Los Angeles v. Bank of America, 22 Cal.2d 154, 137 P.2d 452, 453, were not materially different from those in the instant litigation. It appeared that one Hadley was employed by the bank to sign checks when presented with proper debit slips. Dee Ellis, Jr., who was head of the accounting division of the trust department and authorized to prepare debit slips and checks but not to sign the checks, fraudulently presented to Hadley for signature certain checks and appropriate debit slips, the checks being made payable to one Bobbitt, an actual person but one not intended to have any interest therein. Ellis fraudulently indorsed Bobbitt's name, and as in the present case, secured the funds. Said the court: "The fact that Bobbitt was an actual person does not prevent his name from being that of a fictitious payee, for it is settled that an instrument is drawn to the order of a fictitious payee if it is not intended that the person named on its face have any interest in it. Union B. & T. Co. [of Los Angeles] v. Security-First Nat. Bank, supra [8 Cal.2d 303, 65 P.2d 355]. Such a check, however, is not payable to bearer unless the fact that the payee is fictitious is known by 'the person making it so payable.' Civ.Code, § 3090", which person, the court held, was Hadley who had signed the checks, and not Ellis who had prepared the paper. So likewise, in the present case, "the person making it so payable" was the appellant signer, and not Green who had fraudulently prepared and presented such checks. That this represents the general rule both here and elsewhere is vouched for in the Security Bank opinion, 22 Cal. 2d at page 159, 137 P.2d at page 454, in the following language: "Throughout the many years since the Negotiable Instruments Law was drafted, this interpretation has been adopted almost universally throughout the country".

[2] A somewhat similar situation in Los Angeles Investment Co. v. Home Savings Bank, 180 Cal. 601, 182 P. 293, 295, 5 A.L.R. 1193, resulted in a similar holding that fictitious payee checks are not to be deemed payable to bearer unless the *signer* thereof is aware of the fraud. The case further holds that "The obligation of the bank is not merely to use reasonable care", but that its undertaking is absolute; hence that "it is wholly immaterial whether the bank was negligent or not in paying on the forged indorsements. * * * That is a risk which the bank and not the depositor assumes". So also, it is held that the intention of the fraudulent employee "that the checks be made payable to persons who were not to receive the paper", was not attributable to the company. "Emory, (the employee)", the court said, "did not execute the checks on behalf of the company. It is the intention of the officers who did that must be taken to be the intention of the company. The execution of the checks was one within the scope of their authority, not within that of Emory. As to these officers, it is plain that they did not intend to execute checks to fictitious parties or to pay money to the person to whom Emory intended it should be paid, to wit, himself." Certainly, in the instant case, the appellant did not intend, when signing the checks, that Green should appropriate the money. The Los Angeles Investment Co. opinion also answers another of respondent's contentions when it says, 180 Cal. at page 611, 182 P. at page 297, 5 A.L.R. 1193, that "a depositor is not bound to examine the indorsements on returned checks. * * * 'When it (the bank) returns the check to the depositor * * * the latter has the right to assume that the bank has ascertained the fact to be that the indorsement is genuine.'"

[3] The respondent's brief admittedly does not indulge "in an extensive analysis of the opinions in both of these cases", but claims that "there are fundamental differences in the facts as found by the trial court in the instant case and * * * in the two aforementioned California cases". Respondent then seeks to distinguish the present situation by reason of the finding that Green had authority to "deliver" the checks, and as the brief asserts, "to circulate the checks by determining when and where the checks would be delivered". However, as mentioned in appellant's brief, the record discloses that, whatever title may be correctly applied to Green, this employee's authority in reference to the checks in question was extremely limited, and of no more than a clerical nature. In arriving at a correct solution of the present controversy, this fact is of considerable importance. As is said in appellant's brief, "In making up the checks he (Green) had to employ only a knowledge of arithmetic. His was not the duty to ascertain whether the time sheets signed by the individual employees were correct or incorrect. * * * Clearly that term (deliver) cannot be meant or understood in the legal sense as bestowing a choice or discretion upon Green as to whether he would deliver

the completed checks or not but only in the mere mechanical sense of handing them over, * * * If a payee called for it, he had to give it up. * * * Nor could he refuse Bass (the foreman) those checks that were meant for employees on duty on pay day". Green kept, in the office safe, those checks which the foreman could not distribute, and later, as a purely clerical or mechanical act, handed over such checks to the employees when the latter called for them, or Green mailed the pay checks to the employees. The respondent's assertion that Edgington, the owner and the person authorized to give life to the checks by signing, was "nothing more than a rubber stamp", and that Edgington's "signing of the checks was purely clerical and not discretionary and that Mr. Green had the actual authority to make the checks payable", borders on the ridiculous, and is in no sense supported by the record. Moreover, such a theory is directly contrary to that expressed in the California cases hereinbefore discussed.

At the conclusion of the case in the Superior Court the trial judge delivered from the bench an oral opinion in which, as appellant observes, great stress was laid upon "the isolated phrase in the Security-First National Bank case, 22 Cal.2d 154, 161, 137 P.2d 452, 455, * * * that 'a contrary conclusion has been arrived at when an employee has *discretion* to decide when and whether checks shall be delivered' ". This oral opinion denominates the Security Bank case as a "throw-back to legal conditions as they existed some twenty years before", and comments that the dissenting opinion therein is more logical than the main opinion. In this connection it may be noted that the Security-First National Bank case was entirely consistent with precedent previously established in this state and elsewhere, and obviously must be followed until the rule has been changed. So far as the present case is concerned, any finding that Green had authority or "discretion" to give or withhold delivery of checks signed by appellant, is without foundation in the record.

It is further asserted by respondent that "If there was any legal liability on the part of the respondent, * * * the conduct of the appellant would estop him from being entitled in equity or law to any judgment in his favor". The alleged estoppel is apparently based on the trial court's finding that, after being returned from the bank, "the checks were inspected either by Green or the auditor or by both. The erasures of the indorsements of Green on the checks were in most cases obvious without any inspection of indorsements". From this premise, apparently, the court found "that more than a year prior to the commencement of the action the plaintiff had actual notice of the erasures of indorsements on the checks sufficient to put an ordinarily prudent person upon inquiry * * * and that by reason of the facts hereinbefore found the plaintiff is estopped and precluded from setting up the forgeries".

[4] As one of several answers refuting the defense of estoppel, it is correctly pointed out in appellant's brief that, "there is absolutely no allegation of an affirmative defense of estoppel on the part of the Security-First National Bank in the pleadings". It is a well-settled principle of pleading that estoppel is an affirmative defense which must be affirmatively averred; Holzer v. Read, 216 Cal. 119, 13 P.2d 697, and other cases holding that defendants cannot rely on an estoppel which has not been pleaded.

[5] Nor does the evidence justify application of the estoppel doctrine even if such defense had been pleaded. For example, the record discloses nothing to show that the erasures of the Green endorsements were "obvious without any inspection of endorsements", as found by the trial court. The only testimony on this subject was that of Mr. Edgington the appellant, who merely stated that such erasures plainly appeared "If, as and when you knew what you were looking for", and that "with the benefit of a magnifying glass * * * and a strong light", it was possible to "still read the Green endorsements on the check". In other words, a careful inspection after appellant's suspicions had been otherwise aroused, dis-

closed, under favorable conditions, the erasure of Green's pencil signatures. The evidence shows that, and only that.

[6-8] When it is considered that the payees named in the checks were, for the most part, actual employees whose names were known to Edgington; that these checks passed through one or more banks and the clearing house without question; that Green's authority, as pointed out, was most limited; and that "a depositor is not bound to examine the indorsements on returned checks" (Los Angeles Investment Co. v. Home Savings Bank, 180 Cal. 601, 611, 182 P. 293, 5 A.L.R. 1193), it is obvious that this is not a proper case for estoppel. Nor do any other unequivocal circumstances support the estoppel theory. As said in an early case, Tewksbury v. O'Connell, 21 Cal. 60, 71, "courts have no power to create estoppels where none have arisen from any act of the parties sought to be estopped". Other California cases have stated that unless clearly warranted, "Estoppel is not favored" (Weinberg v. John A. Vaughan Corporation, 137 Cal. App. 55, 29 P.2d 862, 863); and that the doctrine "is intended for the protection of a party and is not intended to be used for the purpose of permitting one to perpetrate a fraud upon another". Cohen v. Metropolitan Life Ins. Co., 32 Cal.App.2d 337, 350, 89 P.2d 732, 740. That this is the law cannot well be doubted. Moreover, since the obligation of the bank in reference to forged indorsements in an absolute one under the holdings in the California cases hereinbefore cited, an affirmance of respondent's position would open wide the door to unwarranted avoidance of the rule.

Contentions similar to respondent's assertion that "if the appellant had not been negligent the course of conduct of the dishonest employee (Green) would have been discovered within a few months", have doubtless been raised in every case of this kind. Such an argument is well answered here as it was in Los Angeles Investment Co. v. Home Savings Bank, 180 Cal. 601, 611, 182 P. 293, 5 A.L.R. 1193, hereinbefore mentioned, where the court said: "If trusting them in regard to demands for checks for disbursements regular upon their face is negligence, so it would be negligence to trust them in a hundred other ways in which it is within their power to defraud their employer. Business could not be conducted on any such basis". Having rejected the argument that such conduct was negligence, the opinion says: "Even if the company were guilty of negligence in signing the checks upon the fraudulent demands of Emory, it is plain that such negligence did not contribute to or induce the acceptance by the bank of the forged endorsements".

[9] The appellant's contention that full recovery on all checks should be allowed, notwithstanding the fact that more than one year had elapsed since the return of certain of the canceled checks, cannot be sustained. Section 340 (3) of the Code of Civil Procedure requires that an action "by a depositor against a bank for the payment of a forged or raised check, or a check that bears a forged or unauthorized indorsement", be brought within one year. Appellant seeks to interpret this as meaning within one year from discovery of the fraud. However, the statute does not so provide, and in Union Tool Co. v. Farmers, etc., National Bank, 192 Cal. 40, 52, 218 P. 424, 429, 28 A.L.R. 1417, the court said: "It is our view that where, as here, the canceled checks and a statement * * * are regularly furnished to the depositor, the statute begins to run from the time the alleged 'forged or raised' check was delivered to the depositor as a voucher supporting the payment made by the bank". See also Brannan's Negotiable Instruments Law, 6th Ed., page 1191. It appears from the trial court's Finding No. 13 that appellant's causes of action in reference to checks totaling $2,952.63 are thus barred by the provisions of Code of Civil Procedure, Sec. 340(3). As to such checks only, appellant is not entitled to judgment. In reference to the amounts represented by all other checks bearing fraudulent endorsements and covered by the complaint, for the reasons hereinbefore mentioned, plaintiff-appellant is entitled to recover judgment as against the Security-First National Bank of Los Angeles.

That part of the judgment denying plaintiff recovery is therefore reversed with directions to enter judgment in plaintiff's favor in accordance with this opinion; in other respects the judgment of the trial court is affirmed. The attempted appeal from the court's order holding that causes of action on certain checks were barred by the statute of limitations, is dismissed.

YORK, P. J., and WHITE, J., concur.

Hearing denied; CARTER, SCHAUER, and SPENCE, JJ., dissenting.

79 Cal.App.2d 202

PEOPLE v. NEIGHBORS.

Cr. 4069.

District Court of Appeal, Second District,
Division 1, California.
April 17, 1947.

1. Criminal law ⚷775(4)

Where defendant testified that he was in another city than that wherein offense charged was committed at time of its commission and was corroborated by a witness from such other city, court erred in failing to instruct jury that time of offense was material, instead of instructing them that such time was immaterial if crime was committed within three years before filing of information.

2. Criminal law ⚷829(11)

Where evidence of defendant's guilt of crime charged was chiefly evidence of confession, court erred in failing to give defendant's requested more comprehensive instruction on subject of confession than given instruction that question whether confession was voluntary or made because of threats or promise of leniency was for jury and that jury must find that confession was involuntary and disregard it, if found to be result of promises or threats.

3. Criminal law ⚷683(1), 1168(2)

Exclusion of defense witness' testimony, offered to rebut police officers' testimony as to what was said and done when defendant's alleged confession was obtained, on ground that no foundation was laid for impeachment purposes, was prejudicially erroneous as foreclosing defendant from introducing affirmative evidence on vital issue, no foundation being necessary.

◆

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Herman L. Neighbors was convicted of second-degree burglary and grand theft, and he appeals.

Reversed and remanded for a new trial.

Gladys Towles Root, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Defendant was adjudged guilty by a jury of the offense of second degree burglary in one count and in a second count of grand theft. The facts briefly are as follows: A branch office of the Western Union Telegraph Company at San Pedro, California was burglarized and a small safe weighing about five hundred pounds was removed. The offence was committed on the night of Sunday, December 16, 1945, or early Monday morning. The safe was found later; it had been opened and the contents consisting of $8,000 in negotiable checks and over $7,000 in currency had been removed. Two of the checks were later deposited by defendant to his account in a San Pedro bank; one on February 11, 1946 and the other on March 2, 1946. These checks, referred to in the record as "Treasury checks," were drawn on the "Treasurer of the United States" at "Fort MacArthur"; one in the sum of $179.75 and the other for $194.93. Defendant was arrested March 11, 1946. When taken to the police station at San Pedro defendant admitted the burglary and theft to four police officers.

A pair of trousers and a shirt obtained at defendant's home after the arrest which were said to show cuts supposedly from broken glass, were in evidence.

At the trial defendant admitted having confessed to the officers but testified further in substance that it was to avoid punishment likely to result from possession of the aforesaid mentioned "government checks" and because of a promise on the part of the officers that the punishment would be only a jail sentence. For example, defendant testified, referring to one of the officers, "and then he said I can either answer to the Federal government or rap, I forget the term he used, for 10 years on these stolen checks, Government checks, that was taken out of this Western Union, or if you want to coöperate with us and help us clear up this job we will help you in every way we can, I think we can promise you a light jail sentence and we won't oppose straight probation." There was also evidence that defendant was in Modesto at the time of the alleged offense.

It is contended on appeal that the court erred, "in refusing to give certain instructions and in giving other instructions. The jury was instructed that "it is wholly immaterial on what day or night the offense charged in the information was committed, provided you believe from the evidence it was committed, and that the same was committed within three years prior to the filing of the information in this case"; and on the subject of alibi was instructed as follows: "An alibi simply means that the defendant was at another place at the time the crime charged is alleged to have been committed. All the evidence should be carefully considered by you, and, if the evidence on the subject, considered with all the other evidence, is sufficient to raise a reasonable doubt as to the guilt of the defendant, you should acquit him. It is sufficient to justify an acquittal if the evidence upon that point raises a reasonable doubt of his presence at the time and place of the commission of the crime charged, if you find that a crime was committed".

[1] It is argued that the former is misleading and the latter insufficient in the circumstances. Inasmuch as the defendant testified that he was in Modesto and a witness from Modesto corroborated the defendant, it is argued that the law as set forth in People v. Ralls, 21 Cal.App.2d 674, 70 P.2d 265 and People v. Morris, 3 Cal. App. 1, 84 P. 463, should have been applied. There is merit to appellant's argument. The time of the offence was material and the trial court might well have so instructed the jury instead of the above-quoted instruction to the contrary. See People v. Waits, 18 Cal.App.2d 20, 62 P.2d 1054.

[2] It is also contended that the instruction on "confessions", was not sufficiently comprehensive in the light of the record. The instruction complained of properly submitted to the jury the responsibility of determining the character of the confession, as follows: "If there is any conflict in the testimony between the prosecution witnesses and the defense as to the voluntary character of such a confession, it is up to the jury and is the province of the jury to decide the question as to whether such confession was freely and voluntarily made or was an involuntary confession and made because of threats or some promise of leniency made to him in order to get the statement of confession." It is argued, however, by appellant that a consideration of the question was limited to "promises" and "threats" by the following additional sentence, "If you find that such a statement was the result of promises made to the defendant, or threats made against him, then you must find that the confession was involuntary and you must disregard such a confession." More comprehensive instructions requested by defendant were refused. In as much as evidence of defendant's guilt was chiefly evidence of a confession, the court could have given the instruction on the subject of confession as requested by defendant and been well within the rule as set forth in People v. Fox, 25 Cal.2d 330, 153 P.2d 729.

[3] The defense sought to rebut the testimony of the police officers as to what was said and done at the time the alleged confession was obtained. Harold L. Johnson, who was not an officer but who was present at that time and place, was ex-

amined as a witness for the defense; the following are excerpts from the reporter's transcript:

"Q. Well, state what was said.

"Mr. Wildey: Was this in the presence of the defendant?

"Mr. Hix: In the presence of the defendant, yes.

"Mr. Wildey: May I inquire, your Honor, is this as to one of the conversations which have been testified to by the officers?

"Mr. Hix: I suppose so.

"Mr. Wildey: Then if that is true the objection was right, that no foundation was laid for the purpose of impeachment. I cannot see any other purpose in this.

"Mr. Hix: Well, your Honor, that does not necessarily follow, but one of the theories of the defense is the involuntary character of the alleged confession.

"The Court: Well, in other words, it is for impeachment, to impeach the officers in what they said in regard to it being free and voluntary?

"The Court: Then the objection will be sustained. There is no foundation laid for impeachment purposes. It could only be offered for three purposes: It can only be offered for direct testimony pertaining to the issues in this case, or to refresh the recollection of the witness, or for impeachment.

"Mr. Hix: Well, on direct testimony—

"The Court: There can be nothing, as I see it so far, where it could be anything but impeachment.

"Mr. Hix: If your Honor please—

"The Court: No, I sustained the objection. I was just explaining it to you.

"Mr. Hix: If your Honor please, I would like to make an offer of proof, if your Honor please. Shall I do it out of the presence of the jury?

"The Court: Yes.

"(The following proceedings were had at the bench out of hearing of the jurors.)

"Mr. Hix: The defendant offers to prove by this witness that the officers stated if the defendant and this witness would plead guilty they would see to it that they got nothing more than a jail sentence; otherwise that they would go to the penitentiary.

"Mr. Wildey: Is that all?

"Mr. Hix: Yes.

"Mr. Wildey: I renew the objection heretofore made.

"The Court: It is for impeachment purposes? It could be only that. It could be only for impeachment purposes, to impeach the officers. It does not prove or disprove any issue—

"Mr. Hix: It is to prove—

"The Court: It is not for the purpose of proving a material allegation in this case.

"Mr. Hix: It is to prove that there were promises made and that any confession was the result of the promises.

"The Court: You have an objection—

"Mr. Wildey: Yes, I renew my objection made, incompetent, irrelevant, and immaterial, and no foundation laid.

"The Court: The objection will be sustained. You have to lay a foundation for this. You have to lay a foundation. When you had the police officers on the stand why didn't you ask them if this witness was present at the time and if you didn't say so-and-so in his presence? If you didn't, you haven't laid the proper foundation to offer the proof. I will sustain the objection."

The rulings were error and clearly prejudicial. The defendant was thus foreclosed from introducing affirmative evidence on an issue vital to the defense. No foundation was necessary; the rules relating to impeachment did not apply. The defense, when the prosecution rested, had the right to prove by independent and affirmative evidence, if such was available, everything that occurred at the time the confession was obtained. Its value was for the jury to determine.

For the foregoing reasons the judgment is reversed and the cause remanded for a new trial.

YORK, P.J., WHITE, J., concur.

79 Cal.App.2d 389

In re HERRINGTON'S ESTATE.

HERRINGTON v. HERRINGTON et al.

Civ. 3545.

District Court of Appeal, Fourth District, California.

April 29, 1947.

Hearing Denied June 26, 1947.

1. Courts ⟹202(5)

Since probate proceedings are strictly statutory, the only appealable orders in probate matters are those designated in statute, with the exception of an order made on motion for new trial. Probate Code, § 1240.

2. Wills ⟹358

Order granting executor's motion to vacate and annul citation served on him in will contest, to dismiss will contest as to him, and to vacate his default which had been entered in will contest, was not an appealable order. Probate Code, § 1240.

◆

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Proceeding in the matter of the estate of Albert B. Herrington, also known as A. B. Harrington, deceased, wherein Blanche Herrington filed a contest to the probate of the will of the deceased, opposed by Albert W. Herrington, Paul Hornung, nominated by the will as executor, and others. Paul Hornung did not appear and answer the contest, and his default was entered by the clerk. Thereafter Paul Hornung filed notice of motion to vacate and annul the citation served on him, to dismiss the contest of the will as to him, and to vacate his default which had been entered. From an order granting such motions, the contestant appeals, and the respondents move to dismiss the appeal.

Appeal dismissed.

Mack & Bianco, of Bakersfield, for appellant.

Harvey, Johnston, Baker & Palmer, of Bakersfield, for respondent.

MARKS, Justice.

Albert B. Herrington died testate about the 5th day of August, 1945. He left surviving him, Blanche Herrington, his widow, and two children, the issue of a former marriage. His will nominated and appointed Paul Hornung as executor.

Mr. Hornung filed the will together with a petition for its probate. Blanche Herrington filed a contest to the probate of the will on various grounds. Citation was served on Paul Hornung as well as others. Hornung did not appear and answer the contest and his default was entered by the clerk. He filed his notice of motion (1) to vacate and annul the citation served on him, (2) to dismiss the contest of the will as to him, and (3) to vacate his default which had been entered. These motions were granted and Blanche Herrington appealed from the order. A motion to dismiss this appeal is pending.

The contest to the probate of the will went to trial and at the close of contestant's case the court granted a motion for nonsuit. Contestant appealed from that order. This appeal was dismissed on consent of the parties on March 11, 1947.

The cause is now before us on the motion to dismiss the appeal first mentioned and on the merits of that appeal.

[1] It seems to be the rule in California that as probate proceedings are strictly statutory "the only appealable orders in probate matters are those designated in subdivision 3 of section 963 of the Code of Civil Procedure" (Estate of Edelman, 148 Cal. 233, 82 P. 962, 963, 113 Am.St.Rep. 231) which is now section 1240 of the Probate Code, with the exception of an order made on motion for a new trial. Estate of Allen, 175 Cal. 356, 165 P. 1011; Estate of Armstrong, 8 Cal.2d 204, 64 P.2d 1093; Estate of O'Dea, 15 Cal.2d 637, 104 P.2d 368. It is intimated that orders such as are now before us are intermediate orders that are reviewable on appeal from an order admitting the will to probate. Estate of Stierlen, 199 Cal. 140, 248 P. 509; Estate of Patterson, 220 Cal. 370, 31 P.2d 197; Bales v. Superior Court, 21 Cal.2d 17, 129 P.2d 685; Estate of Rawson, 66 Cal.App.

144, 225 P. 474; Estate of Bearns, 77 Cal. App.2d 221, 175 P.2d 283.

In resisting the motion to dismiss the appeal, appellant relies on the cases of Estate of Baker, 170 Cal. 578, 150 P. 989; O'Day v. Superior Court, 18 Cal.2d 540, 116 P.2d 621, and Estate of Katz, 49 Cal. App.2d 82, 120 P.2d 896.

In Estate of Baker, supra, it appears that Samuel F. Baker died testate. His will was admitted to probate and Mary J. Farrand, his sister, filed her contest of the will and prayed for the revocation of its probate. She died before the hearing of the contest. Before an administrator of her estate had been appointed the trial court on motion dismissed the contest. After an administrator of contestant's estate had been appointed and had qualified he moved to vacate the order of dismissal as being beyond the jurisdiction of the court, there being no proper parties before the court at the time the order was made. The motion to vacate the order of dismissal was denied and the administrator appealed. The Supreme Court refused to dismiss the appeal from the order under attack and reversed it on the ground that the trial court had exceeded its jurisdiction in making the order of dismissal because no proper parties were in court at that time. The appealability of the order refusing to vacate the order of dismissal under the provisions of subdivision 3 of section 963 of the Code of Civil Procedure (now section 1240, Probate Code) was not considered or discussed. The justice of the holding in Estate of Baker is evident as an order or judgment clearly beyond the jurisdiction of the court making it should be open to attack.

O'Day v. Superior Court, 18 Cal.2d 540, 116 P.2d 621, was a renewal of the effort of the same purported heirs of Michael F. O'Dea to establish their heirship as those appealing in Estate of O'Dea, 15 Cal.2d 637, 104 P.2d 368, 369. As appears in the O'Dea case the trial court had dismissed the petition of the purported heirs to establish their heirship. They then moved to vacate this order under the provisions of section 473 of the Code of Civil Procedure and appealed from the order denying their motion. The motion to dismiss this appeal was granted, the court saying: "Section 1240 of the Probate Code specifies the orders and judgment in probate from which an appeal will lie, and an order denying relief under section 473 of the Code of Civil Procedure is not one of the orders so specified. A proceeding to determine heirship is a matter in probate. In re Blythe's Estate, 110 Cal. 226, 42 P. 641. As this order denying the appellants' motion brought under section 473 of the Code of Civil Procedure to be relieved of their default was one made in probate, no appeal will lie from said order under the provisions of said section 1240 of the Probate Code. * * * Section 1240 of the Probate Code is simply the reenactment of subsection 3 of section 963 of the Code of Civil Procedure, and this court has on numerous occasions held that no appeal will lie from an order in probate denying relief under section 473 of the Code of Civil Procedure, or from any other order not specified in subsection 3 of section 963 of the Code of Civil Procedure, with the one exception above mentioned. (Citing cases.)"

In O'Day v. Superior Court, supra, it appears that the purported heirs whose petition to establish heirship had been dismissed, filed a second petition to establish heirship which the trial court refused to hear. These purported heirs then applied to the Supreme Court for a writ of mandate to compel the Probate Court to hear the matter. The Supreme Court discharged the alternative writ and dismissed the proceeding but in doing so did not disapprove or depart from the rule announced in Estate of O'Dea, supra, already quoted.

Estate of Katz, supra, [49 Cal.App.2d 82, 120 P.2d 897], is more nearly in point. A petition to probate the will of Maurice D. Katz was filed as was a contest by a grandson of deceased. The contest was dismissed by the contestant "without prejudice". The next day the probate judge made an order dismissing the contest "with prejudice" and an appeal was taken from that order. This court was of the opinion that this "order was not only erroneous but void" and that the order comes "within the provision of section 1240 of the

Probate Code which makes appealable an order 'determining * * * the persons to whom distribution should be made.'" Thus Estate of Katz not only recognizes but follows the general rule that only those orders in probate are appealable that are made so by section 1240 of the Probate Code.

[2] We find nothing in that section of the code which gives the right of appeal from such orders as we have before us here. As the appeal must be dismissed we do not need to consider the cause on its merits.

The appeal is dismissed.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; CARTER, J., dissenting.

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79 Cal.App.2d 383

PEOPLE v. BROWN.

Cr. 1992.

District Court of Appeal, Third District, California.

April 29, 1947.

1. Criminal law 🔑935(1)

The grant of new trial after conviction of grand theft based upon fraudulent representations in obtaining money, on ground that there was no evidence of false pretense or embezzlement of any money, was not an abuse of discretion.

2. Criminal law 🔑1158(1)

On motion for new trial after conviction on ground of insufficiency of evidence to support the conviction, weight to be given to other circumstances was for trial court.

3. Criminal law 🔑935(1)

The grant of new trial does not constitute an abuse of discretion even though, had trial court denied motion for new trial, it might be possible to find in evidence sufficient support for such denial.

4. Criminal law 🔑1144(18)

On appeal from order granting accused's motion for new trial, evidence is not viewed in light most favorable to the prosecution but the presumptions favor the order.

Appeal from Superior Court, San Joaquin County; R. M. Dunn, Judge.

W. Grant Brown was convicted of grand theft, and from an order granting defendant a new trial, the People of the State of California appeal.

Affirmed.

Fred N. Howser, Atty. Gen., and Ruth Bernfeld, Deputy Atty. Gen., for appellant.

J. O. Stemmler and C. H. Hogan, both of Stockton, for respondent.

ADAMS, Presiding Justice.

This is an appeal by the People from an order granting defendant a new trial, after conviction by a jury. The amended information upon which defendant was tried charged him in two counts with grand theft, the first count alleging that on February 19, 1946, by false and fraudulent representations defendant obtained $300 from H. M. Weil, and the second count, that on March 7, 1946, by the same means defendant obtained $500 from the same person.

On December 7, 1945, Weil and defendant Brown entered into a contract by which Brown agreed to construct for Weil in Lodi a one-story garage building for $21,000, payable in five installments as specified portions of the buiding were completed. With the contract an escrow arrangement was made with a bank, by which all material bills for the job would be approved and presented by Brown, and thereupon paid by the bank; all checks were to be made payable to Brown and the vendors, jointly; all labor on the job was to be paid weekly upon presentation of contractor's statement of total accrued weekly payroll, check to be made payable to the contractor, Brown; sufficient funds were to be kept in the escrow deposit so that the accrued payrolls would be paid immediately upon presentation as aforesaid; written statements of material charges accompanied by copies of invoices and labor disbursements were to be made and filed with the bank; no payments were to be made to Brown in excess of the designated periodic draws as specified in the agreement. The contract, however, also provided that in the event that shortages of material became imminent, and, by making purchases in advance, delay in construction could be avoided, it was Brown's prerogative to make additional draws to cover such contingencies, upon approval by Weil.

The evidence indicates that Brown was insufficiently financed to carry on this and other construction jobs which he had undertaken, and that he was also embarrassed at his inability to purchase necessary materials. Eventually Weil canceled the contract.

Regarding the $300 which defendant is charged with having secured by false and fraudulent representations, the evidence shows that it was advanced by Weil on representations by Brown that he had an opportunity to buy nails—a particularly scarce commodity—from a Naval Supply Depot. He asked for an advance of $750 for this purpose, but Weil agreed to an advance of $300 only. Thereupon defendant purchased 58 kegs of nails for $200, and the nails were delivered to and stored in defendant's warehouse. Weil admitted that he knew at the time he approved the advance that $300 worth of nails would not be required in the construction of his own building. The evidence also shows that at the time of the cancellation of defendant's contract by Weil, 27 kegs of the nails were still in defendant's warehouse, some having been used on the Weil job, and some on other jobs.

The testimony regarding the $500 advance shows that defendant secured it on representations to Weil that he could buy 15,000 board feet of sheeting lumber which he would use in the construction of the roof on Weil's building, but would have to make an advance payment of $500 to secure it. Brown made the deposit of the $500 with the seller, Ed M. Rose & Co., and a portion of the lumber was delivered to the Weil job. It was, however, rejected by the building inspector of Lodi, as used lumber unfit for the intended use, and was returned to the seller. The evidence also showed that at the time of the trial Brown had a credit on the books of the Rose Company for the $500 which he had paid them; and he testified that a credit memorandum for the amount would go to Weil.

The trial court granted the new trial on the ground that there was no evidence of a false pretense or the embezzlement of any money by defendant; that Brown used $200 of the $300 advanced to buy nails, for that purpose, and that if he used the other $100 for his own purpose he was, at most, guilty of petty theft. That as for the $500 advanced, that also was paid out for the purpose for which it was secured, and was still available, the lumber having been returned to the seller.

[1] We think that under the circumstances the trial court cannot be said to have abused its discretion in granting the new trial.

In People v. Knutte, 111 Cal. 453, 455, 44 P. 166, a prosecution for obtaining money and property by false pretenses, the court said that it had been so repeatedly held as to be axiomatic that where a new trial is granted upon the ground of insufficiency of the evidence, its action will not be disturbed except in a case showing a manifest and unmistakable abuse of discretion; that this discretion is, of course, not arbitrary, but like any other judicial function, is to be exercised under the sanction of the judicial oath; that the strong presumption being always that it was so exercised, it will require in any case a very clear showing to the contrary to overcome such presumption and enable an appellate court to say that the power of the court in that respect was abused; that while it is the exclusive province of the jury to find the facts, it is one of the most important requirements of the trial judge to see to it that this function of the jury is intelligently and justly exercised, and that the trial judge should always satisfy himself that the evidence as a whole is sufficient to sustain the verdict; and if, in his sound judgment, it is not, he should unhesitatingly say so and set the verdict aside.

It was also said in that case that the fact that the evidence in the case might have a legal tendency to prove all the material facts did not affect the question; that guilt is to be established beyond a reasonable doubt; and while there might be some evidence to support each fact, this did not signify that it was necessarily such as to satisfy the conscience of the judge that a case was made which warranted conviction.

In People v. Canfield, 173 Cal. 309, 312, 159 P. 1046, 1048, the court, in affirming an order granting a new trial, said: "We can hardly manufacture in fancy a hypothetical situation in which a reviewing court would be justified in questioning the discretion of a trial court who should grant a new trial in a case involving a criminal charge. Surely there is no basis in the case before us for the substitution of the discretion of this court for that of the superior court. We must assume that the learned judge of the trial court acted with a full appreciation of his duties and obligations, with the cited section of the Constitution in mind, and that the conclusion which he reached was not governed by any idle nor any mere technical reasons."

In People v. Westcott, 93 Cal.App. 216, 220, 269 P. 724 (hearing in Sup.Ct. denied), the court said that when a trial judge in a criminal case, sitting as he does as a thirteenth juror, is not convinced to a moral certainty and beyond a reasonable doubt that the evidence is sufficient in character and weight to justify a conviction, it is not for a reviewing court to say as a matter of law that the granting of a new trial constituted an abuse of discretion.

In People v. Mattmueller, 25 Cal.App.2d 418, 421, 77 P.2d 504, in affirming an order granting a new trial it was said that even though the reader of the cold record might conclude that the evidence was ample to sustain the conviction, reversal of the order granting a new trial is not warranted; that the judge who presided at the trial and had the opportunity to observe the demeanor of the witnesses as they testified and of discovering the motives that may have animated them in giving their testimony, and the interest, if any, which they had in the outcome of the case, occupied a superior position to that which a reviewing tribunal occupies in deciding whether or not a retrial is justified. Also see People v. Harband, 99 Cal.App. 32, 36, 277 P. 1102; People v. White, 85 Cal.App. 241, 259 P. 76; People v. Prudencio, 93 Cal.App. 241, 248, 249, 269 P. 698; People v. Washington, 86 Cal.App. 133, 260 P. 806; People v. Williams, 64 Cal.App. 144, 148, 220 P. 675.

In granting the motion for a new trial in this case the trial court said that he had been unable to find any evidence of false pretenses in securing either the $300 or the $500 advance, or that, having received the money, defendant embezzled it; that Weil admitted that at the time he gave Brown the $300 to buy nails he knew that it could not possibly take $300 worth to complete the Weil building, and consequently he must have advanced the money to allow Brown to buy some other nails to help him along; that it was not shown that the nails were not still in the warehouse. Also as regards the $500 transaction, that no evidence was presented to show any false pretenses, or that after he got the money, he embezzled it.

[2-4] Before the trial court the attorney for the prosecution, while arguing in opposition to the motion for a new trial, admitted that if only the two transactions charged in the information were considered and other circumstances regarding defendant's dealings with Weil were eliminated, possibly the court's position in the matter would be proper, and that the state had failed to prove its case; that if only the testimony regarding those particular counts were considered and the entire transaction between the two parties was left out, probably a man should not be prosecuted on that evidence alone. But he urged there, as he does here, that defendant made other misrepresentations to Weil and secured other advances, and that these other transactions should be considered as showing the intent of defendant when he secured the two advances charged in the information, and as evidence of bad faith on his part. Without passing upon the admissibility of the evidence of other circumstances relied upon by the prosecution, in the absence of a showing of fraudulent mis-

representations regarding the transactions charged, and absence of evidence that the moneys were not used for the purpose for which defendant represented he needed them, bad faith or misrepresentations in other matters do not *compel* a conclusion that defendant is guilty as charged; and the weight to be given to such other circumstances was a matter for the trial court to consider in determining the motion for a new trial. And we cannot review that evidence and determine therefrom that the trial court should have drawn different inferences therefrom, and abused its discretion by failing to do so. Even though, had the trial court denied the motion for a new trial, it might be possible to find in the evidence sufficient support for such action, it does not follow that there was an abuse of discretion in its granting such motion. This is not a situation in which the evidence is to be viewed in the light most favorable to the prosecution, as the People's brief suggests, but one in which presumptions favor the order of the trial court.

The order appealed from is affirmed.

SCHOTTKY, J. pro tem., and THOMPSON, J., concur.

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79 Cal.App.2d 409

MARTIN v. MARTIN.

Civ. 7303.

District Court of Appeal, Third District, California.

April 30, 1947.

1. Trial 🔑29(2)

When a trial judge sits as a trier of facts, he takes the place of a jury, and his conduct is subject to the same rules, one of which is that before the case is submitted to him he should not form or express an opinion thereon, but he is not a mere functionary whose sole purpose is to preserve order and lend ceremonial dignity to the proceedings. Code Civ.Proc. § 611.

2. Divorce 🔑253

Statements made by trial judge in divorce action while making necessary inquiries as to the community property of the parties and their general financial condition, were not improper on ground that thereby the trial judge, during the trial, evidenced a prejudgment thereof in violation of statute. Code Civ.Proc. § 611; Civ.Code, §§ 137, 139, 146, subd. 1.

3. Divorce 🔑253

Trial judge's statement in divorce action, which was merely a summation of his views on questions relative to property rights of the parties, was not a prejudgment in violation of statute forbidding trier of facts to form or express an opinion before submission of a case. Code Civ.Proc. § 611; Civ.Code, §§ 137, 139, 146, subd. 1.

4. Divorce 🔑253

Evidence sustained disposition made by trial court, in divorce action, of community property.

5. Appeal and error 🔑989

The duty of a reviewing court begins and ends with a determination as to whether there is any substantial evidence contradicted or uncontradicted, which will support the trial court's findings and conclusions.

6. Appeal and error 🔑1011(1)

A judgment predicated on a fact question is supported by the evidence so that it must be affirmed on appeal, though testimony in relation thereto is in complete conflict.

7. Divorce 🔑130

Evidence sustained decree of divorce for wife on ground of extreme cruelty.

8. Divorce 🔑245(2)

If future change of circumstances should arise so divorced husband is unable to obtain remunerative work, he may move the court for modification of permanent alimony award to wife. Civ.Code, § 139.

9. Divorce 🔑286

Where there was no indication that court abused its discretion in granting wife permanent alimony, husband had not sustained burden on him of showing that there was an abuse of discretion.

◆

Appeal from Superior Court, Placer County; Dal M. Lemmon, Judge.

Action for divorce by Cable Martin against Izora Martin, wherein defendant filed a cross-complaint for divorce. From a judgment in favor of defendant, plaintiff appeals.

Judgment affirmed.

F. H. Bowers and L. DeWitt Spark, both of Roseville, for appellant.

C. E. Tindall, of Auburn, and Al. B. Broyer, of Roseville, for respondent.

PEEK, Justice.

The present controversy arises out of an action for divorce instituted by the appellant husband. His charges of extreme cruelty were denied by the respondent wife, who by her cross-complaint likewise alleged and prayed for a decree upon the same ground. At the conclusion of the hearing upon the issues so joined, the trial court entered its order decreeing that the wife was entitled to an interlocutory decree of divorce. Additionally the court awarded her certain community property and a monthly allowance as alimony.

Four issues are raised by appellant: (1) That statements made by the trial judge during the course of the trial and prior to the time the cause was submitted evidenced a pre-judgment thereof, thereby preventing a fair hearing; (2) that the findings relative to the community property of the parties are not supported by the evidence; (3) that findings of fact, conclusions of law, and the granting of an interlocutory decree to the wife are not supported by the evidence, and (4) that the award of certain community property and alimony to the defendant wife was an abuse of discretion.

[1, 2] It is true, as appellant contends, that when a trial judge sits as a trier of the facts he takes the place of a jury, and his conduct is subject to the same rules, one of which is that before the case is submitted to him he should "not form or express an opinion thereon * * *". C.C.P. sec. 611. But that is not to say that during the course of a trial he is a mere functionary whose sole purpose is to preserve order and lend ceremonial dignity to the proceedings. Of necessity in a case such at the present, the court was compelled to assign the property of the parties "in such proportions as the court, from all the facts of the case, and the condition of parties, may deem just." C.C. 146 (1). Obviously, therefore, a trial judge in order to carry out the admonition of said section would be compelled to inquire as to the community property of the parties. Likewise under the provisions of Civil Code sections 137 and 139 it also becomes necessary for the trial judge, in order to properly grant or deny a request for alimony, to thoroughly understand the general financial condition of the parties, the earnings of the husband and comparable matters, including agreements, if any, and the intent of the parties concerning such questions. Our examination of the record shows nothing more than this to have been the substance of the first comment of the trial judge, which is attacked by appellant.

[3] The second comment made by the court, which appellant charges was improper, was made after both parties had rested. Such statement was, in the words of the trial judge, merely a summation of his views on the questions relative to the property rights of the parties. It therefore appears that such statement does not fall within the expressed prohibition of said section 611. Appellant has not cited, nor has our research discovered, any case to the contrary. The two cases cited by him are not in point. The first, Rosenfield v. Vosper, 45 Cal.App. 2d 365, 114 P.2d 29, related to the propriety of certain acts of a trial judge in urging a settlement by the defendant before he, the defendant, had an opportunity to present his case. The second, Pratt v. Pratt, 141 Cal. 247, 74 P. 742, concerned the virtual threat by a trial judge to prejudge the case unless a wholly competent witness, a daughter of the parties, was withdrawn. Neither condition is present in the instant case.

[4] Likewise we find no merit in appellant's contention that the judgment is not supported by the evidence particularly in regard to the disposition made by the trial court of the community property of the parties.

[5] It is well established that the duty of a reviewing court "begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support * * *" the findings and conclusion of the trial court. Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689, 690.

Much testimony was introduced relative to the execution and delivery of a deed to the home of the parties by the plaintiff husband to the defendant wife sometime prior to the commencement of this proceeding. Although by his complaint plaintiff alleged that he and his wife had divided their community property, he testified that he had executed and delivered the deed to his wife at her request for the sole reason that it would avoid difficulties should anything happen to him; that he had no intention of conveying all of his right, title and interest in the property to her; that he continued to pay taxes, made improvements thereon and in general treated the property as community; but admitted that subsequent to the delivery of the deed he had agreed to buy the property back from his wife.

The wife, however, denied generally plaintiff's testimony relative to the circumstances surrounding the execution and delivery of the deed, and to the contrary testified that at the time the deed was delivered to her there were serious difficulties between them, that they were going to separate; that plaintiff told her that if she would stay with him he would deed the property to her; that she agreed with his proposal and did not leave him; that some time thereafter plaintiff stated he was going to leave; that she pleaded with him to stay but that finally he left voluntarily.

[6] A judgment predicated upon a question of fact is supported by the evidence, although the testimony in relation thereto is in complete conflict. Such is the situation here. Additionally we are confronted with the presumption contained in Civil Code section 164 which, for the same reason, has not been rebutted.

[7] Appellant, further, would have us reverse the interlocutory decree of divorce on the pretext that the judgment here is also without support in the evidence. The transcript is replete with testimony which if taken alone is sufficient to convince an unprejudiced mind of the truth of the respondent's accusations and her right to a divorce on the ground of extreme cruelty. It is true that there is evidence tending to show acts of cruelty on the part of the respondent wife. The trial court, however, found the acts to be justified. At this point the following statement of the court in Norris v. Norris, 50 Cal.App.2d 726, at page 730, 123 P.2d 847, 850, is particularly apropos: "In justice to appellant we must state in passing that the evidence would have been sufficient to sustain a divorce in her favor had the trial court concluded that such was proper. The trial court has a wide range of discretion in determining whether either spouse was guilty of 'extreme cruelty' and in view of the evidence which substantially supported the findings and conclusions of law we must hold that the trial court did not abuse its discretion in awarding the divorce to respondent. Andrews v. Andrews, 120 Cal. 184, 187, 188, 52 P. 298."

[8] Lastly appellant maintains that the trial court abused its discretion in awarding community property and permanent alimony to the wife. The husband is characterized by his counsel as being "in ill health, with a broken back and unable to do physical labor." The record shows that over the past few years he has built up a substantial insurance business and that the award of alimony is not beyond his ability to pay. If a future change of circumstances should arise, as for example that he was forced to do physical labor to earn a living, and is unable to obtain remunerative work, he may move the court for a modification of the award under Civil Code section 139.

[9] There is no indication that the court abused its discretion in matters of this nature, and in the absence of such a showing, appellant has not sustained the burden placed upon him. Sharpe v. Sharpe, 55 Cal.App.2d 262, 130 P.2d 462.

For the foregoing reasons the judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

79 Cal.App.2d 207

PEOPLE v. DUNLOP et al.

Cr. 4058.

District Court of Appeal, Second District, Division 3, California.

April 17, 1947.

1. Criminal law ⚷824(4)

Though substantial alibi evidence may be given by the defense, it is not trial court's duty, in absence of any request, to give a specific charge on the subject of alibi.

2. Criminal law ⚷825(3)

Alibi instructions given by court, when considered with general instructions given regarding reasonable doubt and burden of proof, were sufficient in absence of any request by defendant for more specific instructions on the subject.

3. Criminal law ⚷1086(14)

Where record in first degree robbery prosecution failed to disclose that defendant requested an instruction regarding lesser and included offenses, he could not for first time on appeal urge that omission to instruct jury thereon was reversible error.

4. Criminal law ⚷1171(1)

Statements by district attorney in first degree robbery prosecution that if jury let defendant go, defendant might rob again and kill someone, in which case the blood would be on jury's hands, and that defendant failed to take the stand in his own defense but relied on the eloquence and ability of his attorney to confuse and befuddle the jury, did not constitute prejudicial error, where no request was made for court to admonish jury to disregard the statements, and conviction would probably have resulted if statements had not been made.

5. Criminal law ⚷1037(2), 1129(1)

Unless harmful result of alleged misconduct of district attorney in statement to a jury cannot be obviated by appropriate instructions, a defendant may not predicate error on appeal, in absence of assignment of alleged misconduct as error, and a request to trial court to instruct jury to disregard statement.

Appeal from Superior Court, Los Angeles County; Allen W. Ashburn, Judge.

Frank C. Dunlop, Bud Lilly and William J. Finley were convicted of robbery in the first degree, and from an order denying motions for a new trial and from judgments of conviction, Frank C. Dunlop and Bud Lilly appeal.

Judgments and orders affirmed.

Lorrin Andrews and Randolph Weltner, both of Los Angeles, for appellant Frank C. Dunlop.

Morris Lavine, of Los Angeles, for appellant Bud Lilly.

Robert W. Kenny, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

KINCAID, Justice pro tem.

By Information, the appellants Dunlop and Lilly, together with their co-defendant, William J. Finley, were charged with the crime of robbery, a felony, which crime was alleged to have been committed in Los Angeles County on or about the 14th day of January, 1946. Dunlop was also charged therein with four prior convictions, Lilly with three prior convictions, and Finley with two prior convictions. Each defendant entered a plea of not guilty of the crime of robbery, but each defendant admitted the prior convictions as charged in the Information. After trial by jury, each defendant was found guilty of robbery in the first degree. Motions for new trial followed, which were denied, and each defendant was adjudged to be an habitual criminal and sentenced to the State Prison accordingly. The defendants Dunlop and Lilly appeal from the order denying their motions for new trial and from the judgment of conviction.

The evidence shows that the robbery took place at approximately 10:45 a. m., on January 14, 1946, in the office of a bowling alley, the office being on the second floor of the building which housed the alleys. Each of the defendants entered the office and was armed with and exhibited a revolver. Money was forcibly taken, both from the person of one of the owners of the bowling alley and from the office safe. The defendant Finley was captured at the scene of the crime, and Dunlop and Lilly were apprehended elsewhere shortly thereafter. Each of the defendants was positively identified, both at and near the scene of the crime, by several witnesses. The defense of the defendants Dunlop and Lilly was an alibi.

Appeal of Bud Lilly.

Appellant Lilly contends, as his one point on appeal, that the trial judge committed prejudicial errors of omission and commission in instructing the jury with regard to the evidence of alibi which he produced.

After fully and completely instructing the jury as to the doctrine of reasonable doubt and burden of proof, the following instructions on the subject of alibi were given by the court: "The burden of proving the presence of the defendant, at the time and place of the alleged crime, devolves upon the state, and the state must prove beyond a reasonable doubt that he was present at the time of the alleged commission of the offense. It does not devolve upon the defendant to prove that he was not present." "An alibi means that the defendant was at another place at the time the crime charged is alleged to have been committed. All the evidence should be carefully considered by you, and if the evidence on the subject, considered with all the other evidence, is sufficient to raise a reasonable doubt as to the guilt of the defendant on that particular count, you should acquit him. It is sufficient to justify an acquittal if the evidence upon that point raises a reasonable doubt of his presence at the time and place of the commission of the crime charged, if you find that a crime was committed." No other instruction on the subject of alibi was offered by Lilly, or either of his co-defendants, or given by the court.

Appellant Lilly contends that the instructions so given were misleading and erroneous. He argues that the court should, of its own motion, have instructed the jury more specifically "to acquit unless convinced beyond a reasonable doubt that the defendant was at the place charged at the hour when the People's evidence shows the crime to have been committed, because, in such cases, time is a material fact and factor" and the commission of the offense charged during the time the People's evidence shows the crime to have been committed is an essential element of the crime requiring an instruction by the court on its own motion, even though no such instruction was submitted or requested by the defendant.

[1] The rule in California is well established that, although substantial alibi evidence may be given by the defense, in the absence of any request for an instruction in respect thereof, it is not the duty of the trial court to give a specific charge upon that subject. People v. Whitson, 1944, 25 Cal.2d 593, 603, 154 P.2d 867; People v. Foster, 1926, 198 Cal. 112, 243 P. 667; People v. Jori, 1929, 99 Cal.App. 280, 283, 278 P. 250; People v. Tracy, 1937, 18 Cal.App.2d 444, 446, 64 P.2d 166; People v. Ramirez, 1937, 21 Cal.App.2d 466, 69 P.2d 913; People v. Keilly, 1942, 54 Cal.App.2d 764, 129 P.2d 939; Hall v. State, 135 Neb. 188, 280 N.W. 847, 118 A.L.R. 1300, at page 1303.

As was said in People v. Whitson, supra, at pages 603, 604 of 25 Cal.2d, at page 872 of 154 P.2d: "Neither do we perceive any valid reason why the fact that an alibi is offered by one defendant and not by another should change the general rule. In the case of People v. Tracy, supra, which involved a similar situation, the general rule was held applicable. And if the sole defense of a defendant is an alibi, it would seem that less reason exists for requiring an alibi instruction on the court's own motion, since the general instructions regarding reasonable doubt, burden of proof, etc., would apply directly to the only defense, and there could exist no possibility of confusion."

[2] The general instructions on the subject of alibi in the instant case, particularly when considered with the general instructions given regarding reasonable doubt and burden of proof, under the conditions here existing properly charged the jury as to this phase of the case. People v. Notz, 1946, 73 Cal.App.2d 439, 440, 441, 166 P.2d 607.

Appeal of Frank C. Dunlop.

[3] The appellant Dunlop contends, as his first point on appeal, that the court committed error in failing to give an instruction of its own motion defining grand theft and kindred lesser offenses included in the crime of robbery, even though no such instruction was offered by this appellant or his co-defendants. He argues that such an instruction is one on the general principles of law pertinent to this case making it incumbent upon the court to give it of its own motion. He relies upon the case of People v. Best, 1936, 13 Cal.App.2d 606, 57 P.2d 168, in support of this contention. In that case the defendant was charged with murder, the jury was instructed that manslaughter was an included offense, a form of verdict of manslaughter was given the jury, but no instruction was given defining the crime of manslaughter, even though one was offered by the prosecution. In that case it was held to be prejudicial error for the court to have failed to instruct the jury on the definition of manslaughter. In the instant case no instruction was given by the court concerning any lesser but included offense, nor that the jury could find the appellant guilty of any crime excepting robbery, which was fully defined, and no instruction was here offered by anyone in the case relating to included or lesser offenses. Where, as here, the record fails to disclose that the defendant requested an instruction regarding lesser and included offenses, he may not for the first time on appeal urge the omission to instruct the jury thereon, as reversible error. People v. Welsh, 1936, 7 Cal.2d 209, 211, 60 P.2d 124; People v. Coleman, 1942, 53 Cal.App.2d 18, 26, 127 P.2d 309; People v. Ramirez, supra, 21 Cal.App.2d 466, 468, 69 P.2d 913.

Appellant Dunlop next urges that the district attorney was guilty of prejudicial misconduct, in two instances, in his closing argument to the jury. The substance of the first remark, of which complaint is now made, is that if the jury should let the defendant go he might rob again and if someone is killed in the commission of that crime the blood will be on the jury's hands. No objection nor assignment of error was made to the remark at the time of its utterance and no request was made of the court to instruct the jury to disregard it. The second remark concerned the failure of the defendant Dunlop to take the stand in his own defense but in lieu thereof his reliance upon the eloquence and ability of his attorney to confuse and befuddle the jury. Counsel for Dunlop did object to the remark and assign it as error, but failed to request the trial judge to admonish the jury to disregard it.

[4] While a prosecuting officer should not overstep the bounds in his argument to the jury we are of the view that no prejudice could have resulted from the remarks here complained of even if we should concede, without deciding, that such remarks were intemperate and might well have been left unuttered. In our opinion, the result in this case would have been the same if there had been no argument. The case against this appellant was not a close one. He was identified as one of the perpetrators of the robbery by three eye witnesses, he was seen in the building with the other two defendants shortly before the robbery occurred, and running out of this same building where the robbery was committed with a handkerchief to his chin following its commission.

The only evidence offered by this appellant in his own defense was that of a Mr. Brown, who testified that he had seen Dunlop on the street in Wilmington at about 10:30 on the morning of January 14, 1946, and had talked with him there for 20 or 25 minutes. He then admitted that he was vague about the time of the meeting.

[5] In any event the appellant Dunlop did not lay a proper foundation at the trial for a review of the claimed prejudicial statements of the district attorney. As was stated in People v. DuBois, 1936, 16 Cal. App.2d 81, 87, 60 P.2d 190, 193: "Unless the harmful result of the alleged misconduct of * * * the district attorney * * * cannot be obviated by appropriate instructions of the trial court, a defendant may not predicate error in this court in the absence of (1) assignment of such alleged misconduct as error, and (2) a request to the trial court to instruct the jury

to disregard it." In view of the foregoing statement as to the strong condition of the evidence with reference to the culpability of this appellant it is our opinion that this is not a case whereby any harmful result of the claimed misconduct could not easily have been obviated by an instruction to disregard them. It was the duty of counsel for defendants to have requested an admonition to the jury to disregard the objectionable remarks and this was not done. We may not now assume that the trial judge would have refused such a request nor that the jury would not have followed such an admonition. Under these circumstances there is no foundation for the assignment of error. People v. Knott, 1940, 15 Cal.2d 628, 633, 104 P.2d 33, 128 A.L.R. 1367; People v. Chilcott, 1937, 18 Cal.App.2d 583, 589, 64 P.2d 450. The record discloses, additionally, that the jury were fully instructed concerning their duty to consider only the evidence presented during the trial and that they were to be careful not to regard statements of counsel as evidence.

The judgments and the orders denying the motions for a new trial are affirmed.

SHINN, Acting P. J., and WOOD, J., concur.

29 Cal.2d 848

KERN v. CITY OF LONG BEACH et al.

L. A. 19553.

Supreme Court of California, in Bank.
April 1, 1947.

Rehearing Denied April 28, 1947.

1. Mandamus 🔑172

Whether one employed in city of Long Beach fire department at time city charter provided for pension at termination of 20 years aggregate service acquired a vested right to a pension which city could not abrogate by repealing the charter provision before employee completed his 20 years employment without impairing obligation of city's contract could properly be raised in mandamus proceeding to require payment. St.1925, p. 1334, § 187(2); St. 1931, p. 2788, § 187; St. 1945, p. 2954, § 187.1.

2. Municipal corporations 🔑200

Nature and extent of obligation of city of Long Beach to pay pension to employee who entered service of city fire department at time charter provided for a pension after 20 years aggregate service but who achieved the 20 years service approximately a month after the city had repealed the pension provisions was required to be ascertained not only from the language of the pension provisions but also from the judicial construction of those provisions or similar legislation at the time the contractual relationship was established. St. 1925, p. 1334, § 187(2); St.1931, p. 2788, § 187; St.1945, p. 2954, § 187.1.

3. Municipal corporations 🔑200

In determining nature and extent of obligation of city to pay pension to employee who entered service of city of Long Beach fire department at time charter provided for a pension after 20 years aggregate service but who achieved 20 years service approximately a month after the city had repealed the pension provisions, judicial decisions construing those provisions or similar legislation were not conclusive but were required to be given great weight. St.1925, p. 1334, § 187(2); St. 1931, p. 2788, § 187; St.1945, p. 2954, § 187.1.

4. Constitutional law 🔑102(2)

Pension rights acquired by public employees under statutes become vested as to each employee at least upon the happening of the contingency upon which the pension becomes payable.

5. Constitutional law 🔑140(2)
Pensions 🔑2

A "pension" is a gratuity only where it is granted for services previously rendered which at the time they were rendered gave rise to no legal obligation, but where services are rendered a government under a pension statute, the pension provisions become a part of the contemplated compensation for those services and so in a sense a part of the contract of employment itself.

See Words and Phrases, Permanent Edition, for all other definitions of "Pension".

6. Constitutional law 🔑140(2)

The right of a city employee to a pension is an integral portion of contemplated compensation and cannot be destroyed once it has vested without impairing a contractual obligation.

7. Constitutional law 🔑102(2)

Although a city employee has a vested right to a pension, the amount, terms and conditions of the benefits may be altered.

8. Municipal corporations 🔑220(9)

A city employee employed during period legislation grants pension benefits does not earn the right to a full pension until he has completed the prescribed period of service, but he has earned some pension rights as soon as he has performed substantial services for the city.

9. Officers 🔑94

One of the primary objectives in providing pensions for government employees is to induce competent persons to enter and remain in public employment.

10. Constitutional law 🔑102(2), 140(2)

Petitioner who was employed in city of Long Beach fire department at time charter provided for pension at termination of 20 years aggregate service acquired a vested right, and repeal of provisions providing for the pension without providing for a substitute was an attempt to impair a contractual obligation and was ineffective as to petitioner who achieved 20 years service approximately a month after the repeal. St.1925, p. 1334, § 187(2); St.1931, p. 2788, § 187; St.1945, p. 2954, § 187.1.

◆

Mandamus proceeding by Henry A. Kern against City and others to compel the city to pay petitioner a pension.

Writ granted.

Joseph A. Ball and Kenneth Sperry, both of Long Beach, for petitioner.

Irving M. Smith, City Atty., and Clifford E. Hayes, Deputy City Atty., both of Long Beach, for respondents.

GIBSON, Chief Justice.

In this proceeding petitioner seeks a writ of mandate compelling respondent city to pay him a pension under a provision of the city charter which was repealed shortly before he would have been entitled to retire.

[1] Petitioner entered upon his duties as a member of the city fire department on May 1, 1925, at which time subdivision (2) of section 187 of the charter, St.1925, p. 1334, provided that after 20 years' aggregate service a member on application "shall be retired and paid in equal monthly installments" a limited pension equal to 50 per cent of his annual salary. Beginning in March, 1931, pursuant to an amendment to the charter, two per cent of the employee's salary was deducted and paid into a pension fund. St.1931, p. 2788. Effective as of March 29, 1945, approximately 32 days before petitioner completed the required 20 years' service, a new section was added to the charter purporting to repeal the pension provisions and to eliminate pensions as to all persons not then eligible for retirement. St.1945, p. 2954, § 187.1. Upon completion of his 20 years' service, petitioner requested that he be retired and paid a pension. The city rejected his application and petitioner instituted this proceeding to compel payment of installments as provided by the charter before the purported repeal. The issue presented here may properly be raised by a proceeding in mandamus. McKeag v. Board of Pension Commissioners, 21 Cal.2d 386, 392, 132 P.2d 198; see, also, England v. City of Long Beach, 27 Cal.2d 343, 163 P.2d 865; Sweesy v. Los Angeles County Peace Officers' Retirement Board, 17 Cal.2d 356, 110 P.2d 37; Dillard v. City of Los Angeles, 20 Cal.2d 599, 127 P.2d 917, 128 P.2d 537; Dillon v. Board of Pension Com'rs, 18 Cal.2d 427, 116 P.2d 37, 136 A.L.R. 800; Sheehan v. Board of Police Com'rs, 197 Cal. 70, 239 P. 844; French v. Cook, 173 Cal. 126, 160 P. 411.

The question to be determined is whether petitioner acquired a vested right to a pension which the city could not abrogate by repealing the charter provisions without impairing its obligation of contract.

[2, 3] The nature and extent of the city's obligation must be ascertained not only from the language of the pension provisions but also from the judicial construction of this or similar legislation at the time the contractual relationship was established. See Warburton v. White, 176 U.S. 484, 495, 20 S.Ct. 404, 44 L.Ed. 555; Ennis Water Works v. City of Ennis, 233 U.S. 652, 657–658, 34 S.Ct. 767, 58 L.Ed. 1139; cf. Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 361-362, 53 S.Ct. 145, 77 L.Ed. 360, 85 A.L.R. 254; Coombes v. Getz, 285 U.S. 434, 445, 451, 52 S.Ct. 435, 76 L.Ed. 866; Wood v. Lovett, 313 U.S. 362, 370, 61 S.Ct. 983, 85 L.Ed. 1404; Rottschaeffer, Constitutional Law (1939) 560. Moreover, decisions rendered after the time of the making of the contract, although not conclusive, will be given great weight. Dodge v. Board of Education, 302 U.S. 74, 79, 58 S.Ct. 98, 82 L.Ed. 57; Warburton v. White, supra, 176 U.S. at pages 495–496, 20 S.Ct. 404, 44 L.Ed. 555.

In some states pensions for government employees are treated as gratuities or bounties which can be withdrawn at any time. See People ex rel. Donovan, v. Retirement Board, of Policemen's Annuity and Benefit Fund, 326 Ill. 579, 158 N.E. 220, 54 A.L.R. 940, 943; State ex rel. Holton v. City of Tampa, 119 Fla. 556, 159 So. 292, 98 A.L.R. 501, 505; City of Dallas v. Trammell, 129 Tex. 150, 101 S.W.2d 1009, 112 A.L.R. 997, 1009; Talbott v. Independent School District, 230 Iowa 949, 299 N.W. 556, 137 A.L.R. 234, 249. In California, however, section 31 of article IV of the Constitution forbids gifts of public money to an individual, and this prohibition may have influenced our courts to hold that a pension right constitutes something more than a mere gratuity.

[4] It is settled in this state that pension rights acquired by public employees under statutes similar to the Long Beach charter become vested as to each employee at least on the happening of the contingency upon which the pension becomes payable. Kavanagh v. Board of Police Pension Fund Com'rs, 134 Cal. 50, 66 P. 36; McCarthy v. City of Oakland, 60 Cal.App.2d 546, 550, 141 P.2d 4; see Gibson v. City of San Diego, 25 Cal.2d 930, 936–937, 156 P.2d 737; Sweesy v. Los Angeles County Peace Officers' Retirement Board, 17 Cal.2d 356, 361, 110 P.2d 37; Klench v. Board of Pension Fund Com'rs, 79 Cal.App. 171, 182, 249 P. 46; see, also, England v. City of Long Beach, 27 Cal.2d 343, 163 P.2d 865; City of Long Beach v. Lentz, 27 Cal.2d 890, 165 P.2d 677.

[5] In the Kavanagh case, the court, following a suggestion in Pennie v. Reis, 80 Cal. 266, 22 P. 176, Id., 132 U.S. 464, 10 S.Ct. 149, 33 L.Ed. 426, held that the right of the widow of a public employee to a pension benefit "became vested while the statute under which she claims was in full force, and it was not competent for the legislature, or any other authority, to deprive her of that vested right." 134 Cal. at page 52, 66 P. at page 37. The Pennie and Kavanagh cases did not analyze the problem, but the nature of the right was subsequently stated in O'Dea v. Cook, 1917, 176 Cal. 659, 661-662, 169 P. 366, 367, as follows: "A pension is a gratuity only where it is granted for services previously rendered, and which at the time they were rendered gave rise to no legal obligation. * * * But where, as here, services are rendered under such a pension statute, the pension provisions become a part of the contemplated compensation for those services, and so in a sense a part of the contract of employment itself." This language has been quoted with approval in Gibson v. City of San Diego, 25 Cal.2d 930, 937, 156 P.2d 737, and Riggs v. District Retirement Board, 21 Cal.2d 382, 385, 132 P.2d 1. The New York Court of Appeals has recently declared: "Pension annuities * * * are in the nature of compensation for the services previously rendered for which full and adequate compensation was not received at the time of the rendition of such services. They are in effect pay withheld to induce long-continued and faithful services." Giannettino v. McGoldrick, 1946, 295 N.Y. 208, 66 N.E.2d 57, 59.

It is contended by the city, however, that petitioner did not acquire any vested right to a pension because he did not complete the prescribed period of service prior to the time the pension provisions were repealed. It is therefore necessary to ascertain whether any rights vested prior to the repeal and, if so, the nature and extent of those vested rights.

This court has stated in two recent decisions that the right to a pension vests upon acceptance of employment. In Dryden v. Board of Pension Com'rs, 6 Cal.2d 575, 579, 59 P.2d 104, 106, the court said: "It has been clearly held that the pension provisions of the city charter are an integral portion of the contemplated compensation set forth in the contract of employment between the city and a member of the police department, and are an indispensable part of that contract, and that the right to a pension becomes a vested one upon acceptance of employment by an applicant." In French v. French, 17 Cal.2d 775, 777, 112 P.2d 235, 236, 134 A.L.R. 366, we said: "The Dryden case concerned the rights of a policeman in a pension fund to which he had made contributions while he was on active duty. It was held that by the provisions of the city charter, under which that fund was created and maintained, the right to a pension was an integral part of the contract of employment and became a vested right at the time the employment began." See, also, Aitken v. Roche, 48 Cal.App. 753, 755, 192 P. 464.

[6] The quoted statements are not in conflict with language appearing in some cases to the general effect that public employment is not held by contract. See Miller

v. Kister, 68 Cal. 142, 144, 8 P. 813; Risley v. Board of Civil Service Com'rs, 60 Cal. App.2d 32, 36, 140 P.2d 167; Nider v. City Commission, 36 Cal.App.2d 14, 30, 97 P.2d 293; Mansfield v. Chambers, 26 Cal.App. 499, 504, 147 P. 595. These cases involve the right to remain in an office or employment, or to the continuation of civil service status. Although there may be no right to tenure, public employment gives rise to certain obligations which are protected by the contract clause of the Constitution, including the right to the payment of salary which has been earned. Since a pension right is "an integral portion of contemplated compensation" (Dryden v. Board of Pension Com'rs, 6 Cal.2d at page 579, 59 P.2d 104), it cannot be destroyed, once it has vested, without impairing a contractual obligation. Thus the courts of this state have refused to hold, in the absence of special provision, that public employment establishes tenure rights, but have uniformly held that pension laws such as the Long Beach charter provision establish contractual rights. It was the failure to recognize this distinction that led to an erroneous criticism of the Dryden case in Risley v. Board of Civil Service Com'rs, 60 Cal.App.2d 32, 39–40, 140 P.2d 167. The fact that a pension right is vested will not, of course, prevent its loss upon the occurrence of a condition subsequent such as lawful termination of employment before completion of the period of service designated in the pension plan.

The city relies upon cases holding that the governing body may make modifications in a pension system prior to the time for commencement of payments. It is true that there are many decisions in this state which permit modifications, but it does not follow that an employee may be deprived of all pension benefits by a repeal of the statute without the enactment of a substitute, and no decision has been found holding that an employee's pension rights may be entirely destroyed in that manner. Although there is language in some of our cases to the general effect that a repeal operates to take away pension rights, the statements must be considered in relation to the facts in issue, and an examination of these decisions reveals that they relate either to modifications of a pension system or to the construction of legislation, and none of them involves the outright repeal of a pension statute. (See Sweesy v. Los Angeles etc. Retirement Board, 17 Cal.2d 356, 361–362, 110 P.2d 37; O'Dea v. Cook, 176 Cal. 659, 662, 169 P. 366; Brophy v. Employees Retirement System, 71 Cal.App. 2d 455, 459, 162 P.2d 939; Risley v. Board of Civil Service Com'rs, 60 Cal.App.2d 32, 39–41, 140 P.2d 167; McCarthy v. City of Oakland, 60 Cal.App.2d 546, 550, 141 P.2d 4; Jordan v. Retirement Board, 35 Cal.App. 2d 653, 657, 96 P.2d 973; Brooks v. Pension Board, 30 Cal.App.2d 118, 120–121, cf. 123, 85 P.2d 956; Klench v. Board of Pension Fund Com'rs, 79 Cal.App. 171, 183, 249 P. 46; Richards v. Wheeler, 10 Cal.App.2d 108, 115, 51 P.2d 436.)

In the leading case of Pennie v. Reis, 1889, 80 Cal. 266, 22 P. 176, (affirmed in 132 U.S. 464, 10 S.Ct. 149, 33 L.Ed. 426), a death benefit payable to legal representatives was eliminated by the implied repeal of a pension statute, but the repealing statute substituted a more comprehensive pension system which included a death benefit payable to certain dependents. The practical result was a modification which gave the employees more pension benefits than they had before. This case therefore does not stand for the proposition that an employee may be deprived of all pension rights. Clarke v. Reis, 87 Cal. 543, 25 P. 759, and Clarke v. Police & Health Ins. Board, 123 Cal. 24, 55 P. 576, were based on the same statute and are distinguishable on the same grounds. Cf. Cohrn v. Henderson, 1912, 19 Cal.App. 89, 124 P. 1037; Burke v. Board of Trustees, 1906, 4 Cal.App. 235, 87 P. 421.

The kind of modification that has been upheld is illustrated by Brophy v. Employees Retirement System, 71 Cal.App.2d 455, 162 P.2d 939, where the court sustained an amendment, made before the time for retirement, reducing the monthly amount to be paid to retired employees engaged in gainful occupations. It has also been held that a pension could be reduced prior to retirement from the two-thirds to one-half of the employee's salary, and modifications have been approved in some cases when made after the happening of the contingencies upon which the payments were to commence. Brooks v. Pension Board, 30 Cal.App.2d 118, 85 P.2d 956; Sweesy v. Los Angeles etc. Retirement Board, 17 Cal.2d 356, 110 P.2d 37; Home v. Souden, 199 Cal. 508, 250 P. 162; Casserly v. City of Oakland, 6 Cal.2d 64, 56 P.2d 237; Brophy v. Employees Retirement System, 71 Cal.App.2d 455, 162 P.2d 939; McCarthy v. City of Oakland, 60 Cal.App.2d 546, 550, 141 P.2d 4; Vero v. Sacramento City Employee's Retirement System, 41 Cal.App.2d 482, 486, 107 P.2d 82.

The ruling permitting modification of pensions is a necessary one since pension systems must be kept flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system and carry out its beneficent policy. The permissible scope of changes in the provisions need not be considered here, because the respondent city, with a minor exception, has repealed all pension provisions.

[7] Thus it appears, when the cases are considered together, that an employee may acquire a vested contractual right to a pension but that this right is not rigidly fixed by the specific terms of the legislation in effect during any particular period in which he serves. The statutory language is subject to the implied qualification that the governing body may make modifications and changes in the system. The employee does not have a right to any fixed or definite benefits, but only to a substantial or reasonable pension. There is no inconsistency therefore in holding that he has a vested right to a pension but that the amount, terms and conditions of the benefits may be altered.

[8] Insofar as the time of vesting is concerned, there is little reason to make a distinction between the periods before and after the pension payments are due. It is true that an employee does not earn the right to a full pension until he has completed the prescribed period of service, but he has actually earned some pension rights as soon as he has performed substantial services for his employer. See Dryden v. Board of Pension Com'rs, 6 Cal.2d 575, 579, 59 P.2d 104; French v. French, 17 Cal.2d 775, 777, 112 P.2d 235. He is not fully compensated upon receiving his salary payments because, in addition, he has then earned certain pension benefits, the payment of which is to be made at a future date. While payment of these benefits is deferred, and is subject to the condition that the employee continue to serve for the period required by the statute, the mere fact that performance is in whole or in part dependent upon certain contingencies does not prevent a contract from arising, and the employing governmental body may not deny or impair the contingent liability any more than it can refuse to make the salary payments which are immediately due. Clearly, it cannot do so after all the contingencies have happened, and in our opinion it cannot do so at any time after a contractual duty to make salary payments has arisen, since a part of the compensation which the employee has at that time earned consists of his pension rights.

[9] To hold otherwise would defeat one of the primary objectives in providing pensions for government employees, which is to induce competent persons to enter and remain in public employment. See Whitehead v. Davie, 189 Cal. 715, 717, 209 P. 1008; Board of Directors v. Nye, 8 Cal. App. 527, 545, 97 P. 208; Talbott v. Independent School Dist. of Des Moines, 230 Iowa 949, 299 N.W. 556, 563, 137 A.L.R. 234, 243; State ex rel. Sena v. Trujillo, 46 N.M. 361, 129 P.2d 329, 332, 142 A.L.R. 932; Giannettino v. McGoldrick, 295 N.Y. 208, pages 212, 213, 66 N.E.2d 57, 59; 1 Dillon on Municipal Corporations [5th ed., 1911], § 430. It is obvious that this purpose would be thwarted if a public employee could be deprived of pension benefits and the promise of a pension annuity would either become ineffective as an inducement to public employees or it would become merely a snare and a delusion to the unwary. See Gibson v. City of San Diego, 25 Cal.2d 930, 934–935, 156 P.2d 737; England v. City of Long Beach, 27 Cal.2d 343, 348, 163 P.2d 865.

[10] Accordingly, we conclude that petitioner has a vested pension right and that respondent city, by completely repealing all pension provisions, has attempted to impair its contractual obligations. This it may

not constitutionally do, and therefore the repeal is ineffective as to petitioner. Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 58 S.Ct. 443, 82 L.Ed. 685, 113 A.L.R. 1482; cf. Lynch v United States, 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434; Perry v. United States, 294 U.S. 330, 349 et seq., 55 S.Ct. 432, 790 L.Ed. 912, 95 A.L.R. 1335.

Let a peremptory writ of mandate issue directing respondents to grant petitioner's application for a retirement pension, as provided by section 187, subdivision (2), of the city charter before the repeal.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

30 Cal.2d 49

HAMILTON v. ABADJIAN et al.

L. A. 19934.

Supreme Court of California, in Bank.

May 2, 1947.

1. Gaming ⇨25

Though gambling is licensed in Nevada, the Nevada courts follow the general rule, which prevails in California, and refuse to lend their process to recover winnings in gambling transactions.

2. Gaming ⇨19(1)

The owner of a gambling house who honors a check for the purpose of providing a prospective customer with funds with which to gamble, and who then participates in the transaction thus promoted by his act, cannot recover on the check.

3. Gaming ⇨19(3)

Assignee of owner of hotel in which gambling casino was maintained could not recover from maker on checks cashed by hotel owner to provide maker with funds to use in gambling in casino.

4. Gaming ⇨49(1)

In action to enforce payment of checks which owner of hotel with gambling casino cashed for defendant, wherein defendant contended that proceeds of checks were used for gambling and that plaintiff could not therefore prevail, plaintiff presented a prima facie case for recovery as to certain of the checks by showing that they were made by defendant in due form and remained unpaid after payment was stopped.

5. Gaming ⇨49(1)

In action to enforce payment of checks which owner of hotel with gambling casino cashed for defendant, wherein defendant contended that proceeds of checks were used for gambling and that plaintiff could not therefore prevail, plaintiff was entitled to rely on presumptions that there was sufficient consideration for the checks, that the entire transaction was legal, and that it was not contrary to public policy. Civ.Code, §§ 1614, 1667, 3105; Code Civ.Proc. § 1963, subds. 1, 19, 20, 21.

6. Gaming ⇨49(1)

Where a transaction is fair and regular on its face, burden of proving that the transaction was based on unlawful purpose of gaming is on the person asserting the illegality.

7. Witnesses ⇨315, 316, 363(1)

In passing on the credibility of a witness, the jury is entitled to consider witness' interest in the result, his motive, the manner in which he testifies, and the contradictions appearing in the evidence.

8. Gaming ⇨49(3)

In action to enforce payment of checks which owner of hotel with gambling casino cashed for defendant, wherein defendant contended that proceeds of checks were used for gambling and that plaintiff could not therefore prevail, evidence sustained finding that certain checks were not cashed by owner of hotel to furnish defendant with funds to gamble in hotel's casino.

9. Evidence ⇨222(6)

In action to enforce payment of checks which owner of hotel with gambling casino cashed for defendant, wherein defendant contended that proceeds of checks were used for gambling and that plaintiff could not therefore prevail, statements made by defendant to hotel employees for his refusal to pay the checks were admissible.

10. Appeal and error ⟹1047(3)

In action to enforce payment of checks which owner of hotel with gambling casino cashed for defendant, refusal to strike testimony of assistant manager of hotel that when defendant had stated to him that he could not pay his gambling losses, assistant manager asked defendant what had happened to the $10,000 that defendant had previously won at the casino, was not prejudicial error.

11. Appeal and error ⟹1050(1)

In action to enforce payment of checks which owner of hotel with gambling casino cashed for defendant, admission of photograph showing defendant at the casino on a prior occasion sitting at a table with chips in front of him was not prejudicial error, where defendant had testified that he had gambled at the casino on prior occasions.

◆

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by A. K. Hamilton against Irene Abadjian, O. Abadjian and others to recover money advanced by plaintiff on checks presented to plaintiff's assignor for cashing by O. Abadjian. From a judgment for the plaintiff, O. Abadjian appeals.

Judgment affirmed.

Prior opinion, 171 P.2d 923.

Marcus L. Roberts and Joseph R. Vaughan, both of Los Angeles, for appellant.

Tripp, Callaway, Sampson & Dryden, of Los Angeles, for respondent.

GIBSON, Chief Justice.

On defendant's return to Los Angeles he stopped payment on six checks aggregating $11,450, part of the proceeds of which were used in financing gambling operations at Las Vegas, Nevada, during the preceding week end. This action was then brought to enforce payment on the checks, and defendant appeals from a judgment entered pursuant to a verdict for plaintiff in the sum of $5,000. Plaintiff does not claim as a holder in due course, but as assignee for collection of the payee, the hotel in whose casino the gambling occurred.

During the week-end of May 12–14, 1944, while defendant was a guest at the hotel, he gave five checks in the amount of $2,000 each and a sixth check for $1,450, all of which were drawn on a Los Angeles bank. It was stipulated that the checks were signed by defendant and given to the hotel, that they had not been paid, and that payment had been stopped.

Plaintiff's evidence, with respect to the circumstances under which the checks were honored, is as follows:

The first check was signed and delivered at a gaming table in the casino as defendant started to play the game of black-jack on the first evening of his stay at the hotel. Defendant was given cash for this check and lost all of the proceeds at the black-jack table.

The second, third and fourth checks were honored during the week end and appeared in the receipts of the hotel, but plaintiff's witnesses could not identify the transactions involving those checks. They testified, however, that no restrictions were ever placed on the use of money received when checks were honored, either in the casino or in the hotel, and that it was the rule to give money and not chips for checks.

The fifth check was written and accepted in the casino and defendant received cash for it while at the black-jack table.

The sixth check was given at the close of the week-end after defendant stopped gambling, and for it defendant received $1,000 in cash, the balance of $450 being in payment of prior losses at black-jack.

There was also testimony that defendant stated to the assistant manager of the casino that he had lost $2,500 during the week-end at another gambling establishment.

Defendant testified that the first five checks were written in the casino, that he received chips for them in the course of play, and that all of the proceeds of these checks were lost playing black-jack. With respect to the sixth check, he testified that it was presented after he had stopped gambling, and that it was given, together with $550 in chips which he held, in exchange for another check, not in evidence, which he had previously written for $2,000.

The jury returned a verdict for plaintiff in the sum of $5,000 and the principal question is whether there is sufficient evidence to support the verdict for that amount.

[1] Inasmuch as the checks were made and honored in Nevada but drawn on a California bank a problem would ordinarily arise as to which law should be applied. It is unnecesary, however, to decide that question here since the same result would be reached whether the transaction is held to be governed by the law of California or Nevada. Although gambling is licensed in Nevada, the courts of that state follow the general rule, which prevails in California, and refuse to lend their process to recover losses in gambling transactions of the type here involved. See Scott v. Courtney, 7 Nev. 419; Evans v. Cook, 11 Nev. 69; Burke & Co., v. Buck, 31 Nev. 74, 99 P. 1078, 22 L.R.A.,N.S., 627, 21 Ann. Cas. 625; Menardi v. Wacker, 32 Nev. 169, 105 P. 287, Ann.Cas.1912C, 710; 10 Nevada State Bar Journal, 209; Johnston v. De Lay, Nev., 158 P.2d 547; Bryant v. Mead, 1 Cal. 441, 444; Carrier v. Brannan, 3 Cal. 328, 329; Union Collection Co. v. Buckman, 150 Cal. 159, 161, 88 P. 708, 9 L.R.A., N.S., 568, 119 Am.St.Rep. 164, 11 Ann.Cas. 609; Wallace v. Opinham, 73 Cal.App.2d 25, 28, 165 P.2d 709; see also Restatement of Contracts, §§ 525, 602; Appleton v. Maxwell, 10 N.M. 748, 65 P. 158, 55 L.R.A. 93; Brinley v. Williams, 189 Okl. 183, 114 P.2d 463; Catton v. Catton, 69 Wash. 130, 124 P. 387; Ash v. Clark, 32 Wash. 390, 73 P. 351; Whorley v. Patton-Kjose Co., 90 Mont. 461, 5 P.2d 210; L.R.A.1918C, 247, 251.

[2, 3] The evidence is undisputed that the first check was honored at the black-jack table and that all of its proceeds were lost there. It is likewise undisputed that the fifth check was honored at the black-jack table and that play commenced soon thereafter. The owner of a gambling house who honors a check for the purpose of providing a prospective customer with funds with which to gamble and who then participates in the transaction thus promoted by his act cannot recover on the check. See Burke & Co. v. Buck, 31 Nev. 74, 80, 99 P. 1078, 22 L.R.A.,N.S., 627, 21 Ann. Cas. 625; Poorman v. Mills & Co., 39 Cal. 345, 353, 2 Am.Rep. 451; Appleton v. Maxwell, 10 N.M. 748, 750, 65 P. 158, 55 L.R.A. 93; L.R.A.1918C, 247, 251. Plaintiff, therefore, was not entitled to recover on the first and fifth checks.

It is conceded that the evidence is sufficient to support a recovery of $1,000 as to the sixth check and it is likewise admitted that no recovery can be had as to the balance of $450.

[4, 5] As to the second, third and fourth checks, plaintiffs presented a prima facie case for recovery by showing that they were made by defendant in due form and remained unpaid after payment was stopped. Thom v. Stewart, 162 Cal. 413, 419, 122 P. 1069; see Italo Pet. Corp. & America v. Shingle, 23 Cal.App.2d 422, 427, 73 P.2d 611. Plaintiff's assignor was operating a hotel as well as a casino, and there was evidence that it was the custom to give cash for checks and that no restrictions were placed by the payee upon the use of the money. Moreover, plaintiff was entitled to rely upon the presumptions that there was sufficient consideration for the checks, that the entire transaction was legal, and that it was not contrary to public policy. Civ.Code, §§ 1614, 1667, 3105; Code Civ. Proc. § 1963, subds. 1, 19, 20, 21; see Barrios v. G. V. Pettigrew Co., 68 Cal.App. 139, 143, 228 P. 676; Thom v. Stewart, supra; 20 Am.Jur. pp. 221, 236; cf. Burne v. Lee, 156 Cal. 221, 229, 104 P. 438.

[6-8] Where a transaction is fair and regular on its face, the burden of proof of unlawful purpose is upon the person asserting the illegality. Grimes v. Nicholson, 71 Cal.App.2d 538, 542, 162 P.2d 934; Barrios v. G. V. Pettigrew, 68 Cal.App. 139, 143, 228 P. 676; Live Oak Lumber Co. v. Farr, 28 Cal.App. 641, 643, 153 P. 741; 12 Am.Jur. p. 744. The only evidence of illegality as to the second, third and fourth checks is defendant's testimony regarding the circumstances under which these checks were cashed and the proceeds used. The jury, however, was not bound to accept defendant's version of these transactions. He was an interested party and his testimony was contradicted in several particulars. Plaintiff produced evidence that de-

fendant received cash and not chips for checks, that he lost $2,500 in another establishment, and that he did not give the sixth check in lieu of a prior illegal check as claimed. In passing on the credibility of a witness, the jury is entitled to consider his interest in the result of the case, his motive, the manner in which he testifies, and contradictions appearing in the evidence. Blank v. Coffin, 20 Cal.2d 457, 461, 462, 126 P.2d 868; Code Civ.Proc. § 1847. The jury therefore could, and evidently did, disbelieve the testimony of defendant with respect to the circumstances under which at least two of these three checks were honored. It is immaterial that the evidence might have supported a larger verdict, since defendant was not prejudiced, and plaintiff has taken no appeal.

[9, 10] Defendant also complains of the admission of evidence which he contends was irrelevant. He alleged in his answer that he was cheated and defrauded by employees of the casino through "their manipulation of cards" in the black-jack game. In refutation of this claim, the assistant manager of the casino testified to the following conversation with defendant, just before the latter's departure from the hotel: "Well, he told me that he could not pay. He said he had had a very bad week in the stock market, he had lost a lot of money, that he just could not pay it. I said 'Well, how about the $10,000 you won the time before. We paid you.' He said 'Well, I just cannot pay.' I asked him what he intended to do about it. He said, well he would probably pay it in time but right then he wasn't able to pay it." No objection was made to the introduction of this evidence but, to the contrary counsel for the defendant stated that he would make no objection. Later, however, he moved to strike the "reference to any alleged winning of $10,000." The motion was denied. The statements made by defendant giving the reasons for his refusal to pay the checks were admissible and, although evidence of prior winnings may not have been material to the issues in this case, it was not prejudicial error under the circumstances to refuse to strike that portion of the conversation.

[11] It is also contended that it was error to introduce in evidence a photograph taken of defendant on a prior visit to the casino showing him sitting at a table with chips in front of him. Defendant had testified that he had gambled at the casino on prior occasions, and it was not prejudicial error to admit the photograph in evidence.

The judgment is affirmed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

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30 Cal.2d 97

TINGEY et al. v. E. F. HOUGHTON & CO.

HULSIZER v. SAME.

L. A. 19972, 19973.

Supreme Court of California, in Bank.

May 6, 1947.

Rehearing Denied May 29, 1947.

1. Appeal and error 🔑931(1)

On appeal from judgments, all conflicts must be resolved in favor of respondents and all permissible inferences drawn to uphold the judgments.

2. Explosives 🔑8

In actions for damages caused by explosion of liquid heat quench manufactured by defendant, evidence supported finding that contents of the liquid heat quench drum, when shipped, contained impurities which defendant should have discovered and that explosions resulted from contamination of the salt by some foreign substance.

3. Witnesses 🔑311, 315, 316, 363(1)

In passing on credibility of witnesses and weight to be given to their testimony, jury may consider witnesses' interest in result, their motives, the manner in which they testify and the contradictions appearing in the evidence. Code Civ.Proc. § 1847.

4. Explosives 🔑8

In actions for damage caused by explosion of liquid heat quench manufactured by defendant, whether foreign substance which discolored the salt was present in the liquid heat quench drum when shipped, whether defendant was fully aware of dangerous consequences which would follow from contamination when salts were used in normal manner, whether defendant negligently failed to discover defective condition of its product and whether explosion resulted from such defect were for jury.

5. Explosives ⚷8

In actions for damages caused by explosion of liquid heat quench manufactured by defendant, whether the mixing with resulting explosion was a direct consequence of defendant's negligence in failing to give an adequate warning of dangerous nature of its products was for jury.

6. Negligence ⚷27

A manufacturer must give an appropriate warning of any known dangers which the user of its products would not ordinarily discover especially where there is a representation that product is not dangerous.

7. Negligence ⚷27

The likelihood of an accident taking place and the seriousness of the consequences are pertinent matters to be considered with respect to duty to provide a sufficient label on product sold.

8. Explosives ⚷8

In actions for damages caused by explosion of liquid heat quench manufactured by defendant, whether defendant should have foreseen that workers in purchaser's shop might fail to take all necessary precautions to avoid contamination with draw temp salt in absence of a warning and whether without such warning purchaser's employee was bound to anticipate that there would be a violent chemical reaction or explosion upon the mixing and heating of the two salts, both of which were intended for same method of use and same general purpose, were for jury.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Val Tingey and Gloria Tingey, minors, by and through their guardian ad litem, Virginia D. Tingey, and Virginia D. Tingey, individually, against E. F. Houghton & Company for the wrongful death of Neville Tingey, consolidated for trial with the action by Raymond Hulsizer against E. F. Houghton & Company for personal injuries. From judgments for plaintiffs, defendant appeals.

Affirmed.

Prior opinion, 172 P.2d 715.

Chase, Barnes & Chase, Stanley N. Barnes and Donn B. Downen, Jr., all of Los Angeles, for appellant.

Hildebrand, Bills & McLeod and Angus C. McBain, all of Los Angeles, and Leonard J. Dieden, of Oakland, for respondents.

GIBSON, Chief Justice.

These cases involve identical issues of law and fact, both arising out of an explosion of chemicals sold by defendant to the Fray Tool and Reamer Company. In the first case the widow and children of Tingey, an employee of the tool company, sought damages for his wrongful death, and in the second case, Hulsizer, also an employee, claimed damages for injuries suffered in the same accident. Defendant has appealed from judgments based on verdicts in both cases, contending that the evidence is insufficient to support the implied finding of negligence.

[1] The testimony is conflicting in many respects and is not as clear as might be desired on some matters, but in accordance with the established rule all conflicts must be resolved in favor of respondents and all permissible inferences drawn to uphold the judgments.

A few weeks prior to the accident, the tool company installed an apparatus called a "draw pot," which was designed to heat chemical salts beyond the melting point to form a liquid used for heat-treating tool steel. The equipment consisted of a thick cast-iron pot, supported in a standard and heated by gas and air under pressure. Defendant, after examining the equipment and investigating the tool company's requirements, recommended its product, Liquid Heat Quench, for the desired service. An order was placed with defendant for one drum of Liquid Heat Quench and one drum of another salt called "Draw Temp," also used for treating steel. The Liquid Heat Quench was capable of transferring heat up to 1500 degrees, while the Draw Temp salt functioned at a lower temperature. Defendant's salesman, referring to Liquid Heat Quench, stated that "this new salt was not dangerous," and compared it with salt containing cyanide which gives off "extremely dangerous fumes."

The tool company's superintendent examined the containers when they arrived at the plant. He testified that the name "Liquid Heat Quench" was stenciled on one drum, but that it had no label or other markings. The Draw Temp drum had a colored label giving the name of the product and stating that its purpose was "for use in heat-treating" and that it "was not to be used in a container that had previously held potassium cyanide."

About one week prior to the accident the superintendent, with Tingey present, opened both drums and examined the contents. The salt in the Liquid Heat Quench drum was a "yellowish gray" and "dirty looking" granular compound. The salt in the Draw Temp drum appeared to be "a little lighter, but it was in a hard chunk." The lids on both drums were replaced, and the contents of the Liquid Heat Quench drum were not disturbed until Tingey prepared to heat-treat some steel on the day of the accident. The two drums were then moved close to the pot, and Tingey and the superintendent loosened the lid on the Liqquid Heat Quench container. The superintendent, after observing that Tingey had turned on the gas and was adjusting the burner under the pot, left the plant on an errand. The draw pot, which held approximately two and a half gallons, was then new and clean and no salt, had, as yet, been placed in it.

Plaintiff Hulsizer, observing the heating operations immediately before the accident, noticed one salt container with no lid on it standing alongside the draw pot. He saw only the one drum, and no salt was transferred from it to the pot while he was present. The salt came up to within four or five inches of the top of the drum and the draw pot was then about two-thirds full of "grayish" salt. The salt in the pot had not begun to melt and "it looked just like what was in the can then." There was a label on the open drum which stated that melting would begin at 300 to 350 degrees Fahrenheit, and Hulsizer noted that the thermometer connected with the draw pot registered around 300 degrees. He did not see either "Liquid Heat Quench" or "Draw Temp" on the label or elsewhere on the drum.

The explosion occurred about a minute after Hulsizer looked at the thermometer. There was a loud noise, a big flash in the draw pot, and the plant filled with smoke. A few seconds later there was a second and more violent explosion followed by a loud "shush" and a slight blaze. The Liquid Heat Quench drum was blown to pieces. The Draw Temp container stood intact and its screw-type lid was on but loosened so that a half turn was necessary to tighten it. This drum was removed by defendant several days after the accident, and it was not returned nor was its disposition explained.

Defendant's plant manager, who had charge of the manufacture of the products sent to the tool company and who was a chemist and metallurgist, testified at length with respect to the manner in which the salts were compounded at the factory. He stated that all products are made from a formula, the original of which is retained in the safe at the plant. The formula is compounded in a room separate from the shipping room, and, before any material leaves the compound room, a test is made of a sample. The product is then either put in storage or sent to the shipping room. Before the material is shipped, a sample is taken from the container and a second test is made and approved. A sample of salt assertedly taken from the batch of Liquid Heat Quench manufactured for shipment to the tool company was introduced in evidence. It was pure white in color.

The plant manager testified that Liquid Heat Quench is not grayish in color but is a white, granular compound coarser than table salt. Draw Temp salts are white with a little yellow tinge or "cream white." He said that these salts, when heated alone, and not mixed together or containing any foreign material, will not become dangerous or explode no matter how much heat is applied, but that, if mixed together or if certain other substances are added, they will be explosive when heated. Specifically, it appears that Liquid Heat Quench, containing cyanide, will be explosive at elevated temperatures if nitrates, water or a large percentage of moisture is present. Further, cyanide is a "fire hazard" if acid gets to it and forms a gas. Draw Temp will explode on heating, if carbonizing material, moisture or cyanide is added, or if it is brought in contact with a combustible material. Liquid Heat Quench starts to melt at 950 degrees and has a working range up to 1500 degrees.

Another expert witness called by defendant testified that if Liquid Heat Quench and Draw Temp were mixed, an explosion would occur if and when the mixture reached a temperature of from 300 to 350 degrees, and, as we have seen, the explosion did occur about a minute after the temperature had risen to slightly above 300 degrees.

[2] The evidence is clearly sufficient to support a finding that the contents of the Liquid Heat Quench drum when shipped contained impurities which defendant should have discovered, and that the explosions resulted from a contamination of the salt by some foreign substance. When the salt in the Liquid Heat Quench drum was inspected by the superintendent of the tool company shortly after it was delivered, it was not white, as it was supposed to be if pure, but was a dirty yellowish-gray color. Draw Temp, however, normally has a "yellow tinge," or "cream white" color, and the testimony of the superintendent, therefore, would justify an inference that some Draw Temp salt was then present in the Liquid Heat Quench drum. The Liquid Heat Quench drum was closed by a snap-on lid, and the jury could properly have rejected the rather remote possibility that a foreign substance was introduced during shipment. Moreover, there is testimony that the contents were not tampered with or exposed to contamination after the drums were delivered to the tool company. There is no evidence that the Draw Temp drum was ever opened after delivery except when it was inspected by the tool company superintendent, and it was found intact with the lid screwed on after the explosion. The Draw Temp drum was taken away from the plant by defendant, its disposition was not explained, and there was no evidence indicating that the contents, which were in the form of a "hard chunk", had ever been disturbed or any part thereof removed. The Liquid Heat Quench drum was not opened after it was inspected by the superintendent until the lid was removed by Tingey in preparation for the heat-treating operation shortly before the explosion. Accordingly it is permissible to infer that the discoloration of the Liquid Heat Quench was caused by the presence of Draw Temp or other foreign substance, and that the contamination occurred before the drum left defendant's factory.

[3] Although the testimony of the plant manager, if believed by the jury, would indicate that defendant exercised great care to prevent contamination, it is not sufficient as a matter of law, under all of the facts of this case, to compel a finding that the product was pure when shipped. It does not necessarily follow from the fact that defendant ordinarily exercised great care that departures from the usual practice were never made. Moreover, the testimony of the tool company superintendent, that the contents of the Liquid Heat Quench drum were a dirty, yellowish-gray color when he made his inspection shortly after delivery, is in conflict with defendant's claim that the product shipped was the same as the pure white sample assertedly taken from the batch compounded for the tool company. In passing on the credibility of witnesses and the weight to be given to their testimony, the jury is entitled to consider their interest in the result of the case, their motives, the manner in which they testify, and the contradictions appearing in the evidence. Blank v. Coffin, 20 Cal.2d 457, 461, 462, 126 P.2d 868; Code Civ.Proc. § 1847.

[4] The jury could properly conclude, therefore, that some foreign substance which discolored the salt was present in

the Liquid Heat Quench drum when shipped, that defendant was fully aware of the dangerous consequences which would follow from contamination when the salts were used in a normal manner, that it negligently failed to discover the defective condition of its product, and that the explosion resulted from this defect.

[5, 6] There is also evidence which will support a recovery on an entirely different theory. The expert witness called by defendant testified that in his opinion the first explosion was caused by the accidental mixing of some of the Liquid Heat Quench with the Draw Temp "just prior to" the explosion, and that when some of the material was blown out of the pot it came into contact with the Liquid Heat Quench in the container, causing the second explosion. Accepting this theory, which compels the conclusion that the mixing or contaminating was done in the tool company's plant by Tingey or some other employee of the tool company, the jury nevertheless could have found that the mixing, with the resulting explosion, was a direct consequence of defendant's negligence in failing to give an adequate warning of the dangerous nature of its products. The courts have frequently ruled that a manufacturer must give an appropriate warning of any known dangers which the user of his product would not ordinarily discover. Farley v. Edward E. Tower & Co., 271 Mass. 230, 171 N.E. 639, 86 A.L.R. 941; Genesee County, etc. v. Sonneborn Sons, Inc., 263 N.Y. 463, 189 N.E. 551; Clement v. Crosby & Co., 148 Mich. 293, 111 N.W. 745, 10 L.R.A.,N.S., 588, 12 Ann.Cas. 265; Orr v. Shell Oil Co., 352 Mo. 288, 177 S.W.2d 608, see Stultz v. Benson Lumber Co., 6 Cal.2d 688, 690, 59 P.2d 100; Rest., Torts, § 388; 86 A.L.R. 947. There is a particular need for a sufficient warning where, as here, there is a representation that the product is not dangerous. Cf. Maize v. Atlantic Ref. Co., 352 Pa. 51, 41 A.2d 850, 160 A.L.R. 449; Henry v. Crook, 202 App.Div. 19, 195 N.Y.S. 642. There was a sharp conflict in the evidence with reference to the labels on the two drums, and if this conflict is resolved, as it must be, in favor of the plaintiffs, it appears that there was no warning whatsoever on the Liquid Heat Quench drum. The Draw Temp drum was removed by defendant and was not introduced in evidence, but it appears from the testimony that there was a statement on the drum that the product should not be used "in a container that had previously held potassium cyanide." There was no warning, however, by label or otherwise that Liquid Heat Quench contained cyanide; to the contrary, defendant's salesman in stating that "this new salt" was not dangerous, contrasted it with products containing cyanide, which gives off "extremely dangerous" fumes.

[7, 8] The likelihood of an accident taking place and the seriousness of the consequences are always pertinent matters to be considered with respect to the duty to provide a sufficient label. See Rest., Torts, §§ 291, 388, Comment 1, pp. 1051-1052; § 397, Comments b-d. Defendant knew of all the perils involved, and it was for the jury to determine whether defendant should have foreseen that workers in the tool company's shop might fail to take all necessary precautions to avoid contamination in the absence of a warning. On the other hand, the jury could properly conclude that without such a warning label neither Tingey nor any other tool company employee was bound to anticipate that there would be a violent chemical reaction or explosion upon the mixing and heating of the two salts, both of which were intended for the same method of use and the same general purpose.

Since the verdicts are supported by specific evidence of negligence, it is unnecessary to pass upon the contentions of the parties with respect to the applicability of the doctrine of res ipsa loquitur.

The judgments are affirmed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

29 Cal.2d 857

PERGUICA et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Sac. 5826.

Supreme Court of California, in Bank.
April 1, 1947.

Rehearing Denied May 1, 1947.

1. Workmen's compensation ⟹1939

Generally, whether essential employer-employee relationship exists for purpose of awarding compensation is a question of fact for Industrial Commission, whose finding supported by substantial evidence will not be disturbed. Labor Code, §§ 3353, 5705(a).

2. Workmen's compensation ⟹1710

If, from all the facts, only a single inference and one conclusion may be drawn, the question whether one for whose death compensation was sought was an employee or an independent contractor is a question of law. Labor Code, §§ 3353, 5705(a).

3. Workmen's compensation ⟹1710

Evidence established as matter of law that one employed by owner of house under construction to do lathing at certain price a square foot was an "independent contractor," and that he was not an "employee," and hence his death as result of injuries sustained during performance of the work was not compensable. Labor Code, §§ 3353, 5705(a).

See Words and Phrases, Permanent Edition, for all other definitions of "Employee" and "Independent Contractor".

4. Workmen's compensation ⟹307

A material factor in distinguishing between status of an "independent contractor" and an "employee," within coverage of compensation act, is right of an employer to exercise complete and authoritative control of mode and manner in which the work is performed, and existence of such right of control, and not extent of its exercise, gives rise to the employer-employee relationship. Labor Code, §§ 3353, 5705(a).

5. Workmen's compensation ⟹309

Strong evidence of employer-employee relationship for purpose of awarding compensation is the right of employer to end the service whenever he sees fit to do so.

6. Workmen's compensation ⟹305

Factors to be considered in determining whether "employer-employee relationship" exists for purpose of awarding compensation, or whether employee has a distinct occupation or business, are whether the work is usually done under direction or without supervision, the skill required, who supplies the tools and place of work, length of time required, method of payment, whether the work is a part of principal's regular business, and whether the parties believe they are creating such relationship. Labor Code, §§ 3353, 5705(a).

See Words and Phrases, Permanent Edition, for all other definitions of "Employer-Employee Relationship".

GIBSON, C. J., and CARTER and SCHAUER, JJ., dissenting on rehearing.

◆

Proceeding by Manuel Perguica and another to review an order of the Industrial Accident Commission awarding compensation to Ruth Walker and others for death of Dallas Walker, alleged employee.

Award annulled.

Prior opinion 173 P.2d 376.

Leonard, Hanna & Brophy and Donald R. Brophy, all of San Francisco, for petitioners.

R. C. McKellips, Edward A. Sarkisian, and John A. Rowe, Jr., all of San Francisco, for respondents.

SPENCE, Justice.

Petitioners seek annulment of an award based upon the death of one Dallas Walker, who was fatally injured while transporting scaffolding to a house which petitioner Manuel Perguica was having built and on which the deceased was to do the lathing. In challenge of the jurisdiction of the respondent commission to make such award, petitioners urge: (1) That Walker was an independent contractor but (2) even if he were an employee of Perguica, the injury was not one arising out of and occurring in the course of the employment. Since the record sustains petitioners on the first issue, the second need not be here considered.

There is no dispute as to the facts. Perguica, a farmer, was having a house constructed on his farm. He hired men on a daily wage basis to do the carpenter work, but he became dissatisfied with such arrangement because it permitted too much "loafing around * * * on [his] pocketbook." After that experience with the carpentry, Perguica entered into a contract with one Witmer for the plastering to be done for a lump sum payment. But Witmer could not proceed with his work until wire netting or screening was attached to the outside of the house to serve as a lathing for the plaster. Accordingly, Witmer brought Walker, a lather by occupation, to the farm and introduced him to petitioner as "the fellow to do the job; to put [up] the wires." Walker agreed to do the wiring for "fifteen cents per yard" and on that basis he "got the job." Perguica knew nothing about lathing and did not discuss any of the details of the work with Walker; but just took Witmer's word that Walker "was a good worker" and that the quoted price was the general charge in that locality. Perguica "was expecting" that Walker would "begin on Thanksgiving Day" but that he would work as he pleased. Payment was to be made after the work was done, the amount to be computed according to the number of rolls of wire used. Perguica was to furnish the wire, but Walker was to provide his own tools and equipment. Prior to the commencement of the work on the house Walker needed a scaffold, and it was while he was in the act of transporting this equipment by truck to Perguica's farm late on Thanksgiving Day that Walker sustained his fatal injuries.

[1-3] Witmer was not a witness before the respondent commission; so the nature of Perguica's conversation with Walker in the presence of Witmer and its legal effect rest entirely upon the testimony of Perguica. Generally speaking, it is a question of fact to be determined by the commission, from the evidence adduced, whether the essential employer-employee relationship exists (Riskin v. Industrial Acc. Comm., 23 Cal.2d 248, 255, 144 P.2d 16), and the commission's finding on that issue will not be disturbed where it is supported by substantial evidence. S. A. Gerrard Co. v. Industrial Acc. Comm., 17 Cal.2d 411, 414, 110 P.2d 377. But "if from all the facts only a single inference and one conclusion may be drawn, whether one be an employee or an independent contractor is a question of law." Baugh v. Rogers, 24 Cal.2d 200, 206, 148 P.2d 633, 637, 152 A.L.R. 1043; Yucaipa Farmers, etc., Ass'n v. Industrial Acc. Comm., 55 Cal.App.2d 234, 238, 130 P.2d 146; see, also, Burlingham v. Gray, 22 Cal.2d 87, 100, 137 P.2d 9. Here any reasonable view of the evidence on the issue of Walker's status compels the conclusion that petitioners met their burden of proving that he was an independent contractor (Labor Code, § 5705(a)), and that the commission's award based on a contrary finding is not sustainable . Ponsetti v. Industrial Acc. Comm., 5 Cal.App.2d 498, 42 P.2d 1043; Winther v. Industrial Acc. Comm., 16 Cal.App.2d 131, 60 P.2d 342; State Comp. Ins. Fund v. Industrial Acc. Comm., 46 Cal.App.2d 526, 116 P.2d 173.

[4-6] An independent contractor is one "who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished." Labor Code, § 3353. The distinction between the status of an independent contractor and that of an employee rests upon several important considerations. A material and often conclusive factor is the right of an employer to exercise complete and authoritative control of the mode and manner in which the work is performed. The existence of such right of control, and not the extent of its exercise, gives rise to the employer-employee relationship. S. A. Gerrard Co. v. Industrial Acc. Comm., supra, 17 Cal.2d 411, 413, 414, 110 P.2d 377; Riskin v. Industrial Acc. Comm., supra, 23 Cal.2d 248, 253, 144 P.2d 16; Industrial Indemnity Exchange v. Industrial Acc. Comm., 26 Cal.2d 130, 135, 156 P.2d 926. Strong evidentiary support of the employ-

ment relationship is "the right of the employer to end the service whenever he sees fit to do so." Press Publishing Co. v. Industrial Acc. Comm., 190 Cal. 114, 120, 210 P. 820, 823; see, also, Hillen v. Industrial Acc. Comm., 199 Cal. 577, 582, 250 P. 570; Riskin v. Industrial Acc. Comm., supra, 23 Cal.2d 248, 253, 144 P.2d 16; California Employment Comm. v. Los Angeles, etc., News Corp., 24 Cal.2d 421, 425, 150 P.2d 186; Yucaipa Farmers etc., Ass'n. v. Industrial Acc. Comm., supra, 55 Cal.App.2d 234, 237, 130 P.2d 146. "An employee may quit, but an independent contractor is legally obligated to complete his contract." Baugh v. Rogers, supra, 24 Cal.2d 200, 206, 207, 148 P.2d 633, 152 A.L.R. 1043; Los Flores School Dist. v. Industrial Acc. Comm., 13 Cal.App.2d 180, 183, 56 P.2d 581. There are "other factors to be taken into consideration," as stated in Empire Star Mines Co. v. California Employment Commission, 28 Cal.2d 33, at page 43, 168 P.2d 686, 692: "(a) Whether or not the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee. (Rest., Agency, § 220; Cal.Ann., § 220.)"

The controlling facts as to the working arrangement between Perguica and Walker stand undisputed, by inference or otherwise. It appears to have been simply an informal agreement showing that Perguica was interested solely in the final result to be attained, the lathing of his house; but that he had not the slightest concern either in the means by which the work should be done or in the details of its accomplishment. Perguica testified that he was a "dairy farmer" who knew nothing about lathing or other work incident to "the building of houses." When asked whether he told Walker "exactly what work there was to be done," Perguica said: "No, I didn't, because I didn't know; he knew." Walker was an experienced lather, and he had undertaken to furnish his own tools and equipment. Perguica agreed to furnish the wire and pay on the "yardage basis," but with respect to any other phase of the work, Perguica testified: "We don't mention anything. He just got the job. He just got the job. That is all that was said. The work should be done; then afterwards I was going to pay him then; I didn't know. I didn't know." Walker was free to set his own hours and days for working, the length of time depending on the job's duration, for Perguica stated that he did not know whether it would take "one day or five days." Nor did Perguica know "whether [Walker] was going to do it all by himself or whether he was going to have anybody to help him." Perguica reserved no right to discharge Walker at will but Walker "just got the job" and was to receive upon its completion "fifteen cents a yard" for the wire used, the customary rate of pay in that locality for such a "specialist." While the preceding carpentering work on Perguica's house had been performed on a "daily wage basis," Perguica was firm in his stand that he did not want such hiring to prevail with respect to other work on his house. Thus, Perguica testified that he employed the carpenters "by the day" because "that's the only way I could get it [the carpenter work]" but he was dissatisfied with such arrangement inasmuch as it permitted "loafing around * * * on [his] pocketbook." To avoid such time-wasting practices at his expense, Perguica decided to adopt a different arrangement with respect to other construction work on his house and to pay "for the job" done, both the "lathing" by Walker and the "plastering" by Witmer.

These considerations demonstrate this to be a case of independent contractorship, and that Perguica and Walker intended it as such, though they never had the opportunity to proceed under their agreement inasmuch as Walker was fatally injured before "the wiring job" was actually commenced. Perguica not only did not reserve the right to exercise any shadow of control over Walker's work, but he could not have done so had he desired. Having no knowledge of the specialized type of work in question, Perguica "called in" an experienced lather, "just as one would summon a plumber, an auto mechanic, or an electrician" to work "upon his own time and in the exercise of his own knowledge and skill." Ponsetti v. Industrial Acc. Comm., 5 Cal.App.2d 498, 500, 42 P.2d 1043. It is immaterial that another element entered into the factual situation in the Ponsetti case, for the decision is precisely in point in legal principle. While the machinist there involved was "one engaged to repair a dough mixer" for some bakers and was injured while attempting "of his own accord" to "grease the gears," the fact that he so proceeded without instructions was not made the premise of the decision. Rather the determinative factor negativing the propriety of the compensation award was the working arrangement between the parties, emphasizing the bakers' lack of control over the machinist's operations because of his pursuit of "an independent employment or occupation of a highly technical character" and their "want of knowledge and experience in mechanical repairs." Like considerations prevail here in fixing the status of Walker as an "independent contractor" under the established rules.

The award is annulled.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, and TRAYNOR, JJ., concurred.

SCHAUER, Justice.

I concur. I think, however, that this decision, like that in Empire Star Mines Co. v. California Emp. Comm. (1946), 28 Cal. 2d 33, 168 P.2d 686, is substantially inconsistent with the holding of this court in Pacific Lumber Co. v. Industrial Acc. Comm., (1943), 22 Cal.2d 410, 139 P.2d 892. The facts of that case (material to the relationship of the parties) as established by undisputed evidence and the express finding of the commission (for those facts see dissenting opinion, pages 423 et seq., of 32 Cal.2d, page 899 of 139 P.2d) when compared with those of the case at bar do not, in my estimation, admit reasonably of affirming an award in the one case and annulling it in the other. I would concede error in the earlier case and squarely overrule it.

Rehearing denied; GIBSON, C. J., and CARTER and SCHAUER, JJ., dissenting.

79 Cal.App.2d 233

PEOPLE v. LUTES et al.

Cr. 4071.

District Court of Appeal, Second District, Division 3, California.

April 18, 1947.

1. Rape ⇨16(1)

In prosecution for assault with intent to commit rape, assault being proven, intent with which it was committed was vital element in ascertaining nature of the offense.

2. Rape ⇨16(7)

Crime of assault with intent to commit rape is complete if at any moment during assault defendant intends to have carnal knowledge of victim and to use for that purpose whatever force may be required, and hence fact that defendant desisted is immaterial.

3. Rape ⇨57(5)

In prosecution for assault with intent to commit rape, where assault was proven, whether intention to have carnal knowledge of victim and to use whatever force would be necessary existed must be determined from all circumstances and acts of defendant, which is a question of fact.

4. Rape ⇨53(2)

Evidence sustained conviction of assault with intent to commit rape.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

William Lutes and another were convicted of assault with intent to commit rape, and from an order denying his motion for a new trial, the named defendant appeals.

Affirmed.

Franklin B. MacCarthy, of Los Angeles, for appellant William Lutes.

Fred N. Howser, Atty. Gen., and Henry A. Dietz, Deputy Atty. Gen., for respondent.

WOOD, Justice.

Defendants Lutes and Childs were convicted of the crime of assault with intent to commit rape. Trial by jury was waived. No judgment was entered, the proceedings having been suspended and probation having been granted. Defendant Lutes appeals from the order denying his motion for a new trial.

Appellant contends that the evidence is insufficient to sustain the conviction.

Pursuant to stipulation the case was submitted on the transcript of the preliminary hearing and the testimony introduced on behalf of defendants. The defendants did not testify at the preliminary hearing or at the trial.

The prosecutrix testified in substance that on February 28, 1946, about 8 p. m., the defendants came into the driveway at her home in a coupe automobile; that the horn of the automobile was sounded, and she went out to the automobile; that she knew the defendants, and had been out socially with each of them; that appellant asked her if she would go for a ride, and she said no—that she had some work to do; that Childs then said something to appellant about the front tire having a leak; that appellant got out of the automobile, looked at the tire and then grabbed the witness and started shoving her into the automobile; that Childs took hold of her arm and pulled her into the automobile; that appellant then got into the automobile and started backing out the driveway; that the prosecutrix was sitting between them and they were holding her hands, and she shouted to her mother and tried to "jam" the gearshift with her feet; that after they had proceeded down the street "about 9 houses," the prosecutrix succeded in getting the keys out of the ignition lock, and tried to throw them out the window but was unable to do so; that appellant took the keys from her and they proceeded down the street; that she again succeeded in getting the keys, and Childs took them from her; that while Childs was trying to put them back into the lock she opened the door, but Childs pulled it shut; that appellant drove beyond Sunland and an area known as the Tujunga Wash, then stopped the automobile and Childs got out; that she and appellant were alone in the automobile two or three minutes during which time they talked about appellant's girl friend, and appellant made no improper suggestions or advances at that time; that Childs re-entered the automobile, and appellant turned it around and drove back to Sunland where the three of them went into a beer parlor and each drank a glass of beer; that they then re-entered the automobile and, with Childs driving, returned to the Tujunga Wash where Childs stopped the automobile and said, "Do we have to fight for it, or do we take it away?" and "Are we going to take you down, or are you going to turn it over?"; that she was so frightened she could hardly talk, and she nodded her head "no"; that appellant then grabbed her arm and held it behind her while Childs took off her slacks; that her shoes and underpants came off with her slacks which left the lower portion of her body nude; that Childs then left the automobile, and appellant asked her if she "was going to do it," and she said "no"; that he tried to talk her into it; that he tried to get her against the corner of the automobile, and he took "his privates out of his pants"; that while they were struggling she took hold of his shirt and heard it rip; that appellant got "mad" and hit her on the jaw; that she tried to get away, and reached for the steering wheel to pull herself up but she could not reach it; that appellant proceeded to and did get on top of her; that she tried to reason with him; that she told him he wasn't much of a man to bring some one else along to help him do his dirty work, and "shortly" after that he got out of the automobile; that the witness then "reached in back" where Childs had thrown her clothes and got them; that she put them on, and then Childs entered the automobile and she had a struggle with him during which he threatened to kill her, struck her with his fist and hit her head against the window, then gave up the struggle and called the appellant; that appellant re-entered the automobile and they drove her home; and that during these struggles she received bruises on her right hip and on both shoulders.

A deputy sheriff testified that he had a conversation with appellant on March 2, 1946, during which appellant told him that there was a struggle and considerable force was used in getting the prosecutrix into the automobile; that she was pulled and pushed into the automobile; that later there was a struggle over the keys; that appellant said he had his penis out when he was on top of the prosecutrix and it was on her bare legs; that after a short period of struggling with prosecutrix he left the automobile and told Childs that he "couldn't do any good."

[1-3] The assault being proven, the intent with which it was committed becomes the vital element in ascertaining the nature of the offense. People v. Bowman, 6 Cal. App. 749, 751, 93 P. 198. It is asserted on behalf of appellant that he had no intention of committing rape, and it is argued in his behalf that the fact that he had the physical power, ability and opportunity to have committed the act and voluntarily gave up the quest without outside interference or fear of interruption is evidence that he had no such intention. The fact that appellant desisted is immaterial. The crime is complete if at any moment during the assault the defendant intends to have carnal knowledge of the victim and to use for that purpose whatever force may be required. People v. Harshaw, 71 Cal.App. 2d 146, 149, 161 P.2d 978; People v. Stewart, 97 Cal. 238, 240, 32 P. 8; People v. Jones, 112 Cal.App. 68, 75, 296 P. 317. Whether or not such intention existed must be determined from all the circumstances and the acts of the defendant, and is a question for the trial court.

[4] The evidence is sufficient to support the trial court's finding that appellant was guilty as charged. She was taken forcibly from her home, after dark, driven to a remote spot where it was unlikely he would be interrupted or any outcries would be heard. It is apparent from his conduct that he intended to have carnal knowledge of the prosecutrix and to use whatever force was required to do so. The mere fact that appellant changed his mind before he accomplished his purpose has no bearing on the case. It was stated in People v. Stewart, 97 Cal. 238, 32 P. 8, which involved the same crime as that charged herein, that (at page 240 of 97 Cal., at page 9 of 32 P.): "If an assault with the intent here alleged is made, it is no less a crime, though the aggressor should abandon his intentions before the consummation of the act, by reason of the pains of a stricken conscience alone." In the present case every act and circumstance surrounding the assault is inconsistent with any inference other than an intent on the part of appellant to use such force as might be necessary to accomplish his purpose.

Appellant does not rely upon any error of law during the course of the trial.

The order denying appellant's motion for a new trial is affirmed.

SHINN, Acting P. J., and KINCAID, J. pro tem., concur.

79 Cal.App.2d 191

NEILL v. FIVE C REFINING CO. et al.

FIVE C REFINING CO. et al. v. HAWN.

MAGUIRE OIL & REFINING CORPORATION v. FIVE C REFINING CO. et al.

NEILL et al. v. FIVE C REFINING CO. et al.

Civ. 15322.

District Court of Appeal, Second District, Division 1, California.

April 17, 1947.

Hearing Denied June 12, 1947.

1. Action ⚷6

Where, during trial it developed upon interrogation of counsel by trial judge that there was an agreement between three of the parties, that if any one of them was successful in action in securing residuum of crude oil, it would be sold and proceeds divided among the parties, any controversy as between such parties became moot.

2. Action ⚷8

An action not founded upon an actual controversy or prosecuted for gratification of the curiosity of the litigants is collusive and will not be entertained.

3. Bankruptcy ⚷268

Evidence supported finding that defendant company was owner of all recoverable residuum crude oil in sumps wherein it was stored by a company which was adjudicated a bankrupt, either by prior purchase from company operating bankrupt's refinery, with approval of referee in bankruptcy or upon payment therefor under option granted to it.

4. Appeal and error ⚷1010(1)

Appellate court has duty to affirm a judgment supported by substantial evidence.

5. Appeal and error ⚷1107

A judgment against one of the parties entered in a prior action with its consent was binding in present case, notwithstanding that thereafter judgment in prior case was reversed by District Court of Appeal as against another defendant in the same action. Code Civ.Proc. § 579.

6. Estoppel ⚷118

Evidence supported finding that plaintiff in intervention was estopped to question rights of defendant company to recoverable residuum remaining after refining of crude oil in sumps wherein it was stored by oil company which was thereafter adjudicated a bankrupt by virtue of purchase from company operating bankrupt's refinery, with approval of referee in bankruptcy.

7. Bankruptcy ⚷252

An agreement conveying bankrupt estate of oil refining company to another refining company approved by all of parties having interest in bankrupt estate was authorized under Bankruptcy Act. Bankr.Act, § 27, 11 U.S.C.A. § 50.

8. Estoppel ⚷118

Evidence supported finding that neither plaintiff claiming title to recoverable residuum of crude oil in sumps wherein they were stored by a defining company which was thereafter adjudicated a bankrupt nor his predecessor could equitably question agreement conveying bankrupt estate of refining company to another company which in turn sold residuum to defendant company. Bankr.Act. § 27, 11 U.S.C.A. § 50.

◆

Appeal from Superior Court, Los Angeles County; Jess E. Stephens, Judge.

Action by David P. Neill against Five C Refining Company and others to determine ownership of residuum remaining after refining of crude oil, wherein the defendants filed a cross-complaint against the plaintiff and R. H. Hawn, and the Maguire Oil & Refining Corporation intervened. From judgment and decree entered, the original plaintiff, the cross-defendant and the plaintiff in intervention appeal.

Affirmed.

Chandler & Wright, of Los Angeles, for appellant Hawn.

Sullivan & Lane, of Los Angeles, for appellant Maguire Oil & Refining Corporation.

Macdonald, Wallace, Cashin & Arrington, of Los Angeles, for appellant Neill.

Roy P. Dolley, of Los Angeles, for respondents.

DRAPEAU, Justice pro tem.

Sunshine Oil Company was the owner of an oil lease in the Santa Maria field in Santa

Barbara County. From producing wells on the lease crude oil was sold to an assignor of Maguire Oil & Refining Company. As security for payment of the purchase price of the oil, a chattel mortgage of the personal property on the lease was executed and delivered, which Maguire assumed and agreed to pay.

Maguire refined the oil and extracted from it the more volatile and valuable portions, an oil product generally known as "tops". That part of the oil which was left after the tops were taken out may be denominated "residuum". And it is concerning the ownership of this residuum with which this case has to deal.

The residuum was conducted through pipes from the refinery to sumps prepared for its storage. These sumps were areas of land, upon which power shovels or clamshells were used for excavations, the excavated earth being piled around the sides to increase storage capacity. There were seven sumps in all, five constructed by Maguire, and two later on by a liquidating corporation named Silver Wing Oil Company. Into these sumps residuum from the refining operations of Maguire and Silver Wing was piped and stored.

The residuum was commercially valuable as a base for preparation of different grades of asphalt and oil for road purposes. During the second world war there was little demand for this product, hence its storage in large quantities in the seven sumps.

Sunshine Oil Company was adjudged bankrupt, and its affairs were administered in the Federal Court. The trustee in bankruptcy brought an action in the Superior Court against Maguire Oil & Refining Company to foreclose the mortgage heretofore mentioned. The files in that action disclose that the Maguire Company consented to a judgment against it, as prayed. This judgment in due time became final, and by process based upon it the residuum was sold by the sheriff of Santa Barbara County to the trustee in bankruptcy.

To facilitate liquidation, all of the creditors and the bankrupt entered into an agreement, conveying all of the assets in bankruptcy to a corporation named Silver Wing Oil Company. This corporation was given the power to sell the assets and to operate the property, subject to the approval of the referee in bankruptcy, to make payments of liquidating dividends to creditors, and to convey any balance to the bankrupt.

Silver Wing operated the refinery, excavated two new sumps as stated, and added additional residuum to the sumps. Silver Wing, with the approval of the referee in bankruptcy, sold 250,000 barrels of residuum to Five C Refining Company, and granted an option to the latter company to purchase an additional 150,000 barrels. This sale is evidenced by a written agreement, dated February 26, 1942. Later, in February, 1944, Silver Wing sold to Hawn (predecessor to plaintiff Neill) the real property upon which were located the sumps, and the refinery. But both Hawn and Neill agreed in writing to assume and to be bound by the agreement of sale of Silver Wing to Five C.

In 1944, Neill as plaintiff brought action against Five C, and certain operating assignees of Five C, to-wit: Guy Cherry, Sr., and Guy Cherry, Jr., and Independent Asphalt Company. Other parties were brought into the action; R. H. Hawn, cross-defendant, and the Maguire Oil and Refining Corporation, intervenor. But the issues may be simply stated as between Neill, plaintiff, and Five C Refining Company, and between Five C and Maguire.

[1, 2] During the trial it developed upon interrogation of counsel by the trial judge that there was an agreement between Maguire, Hawn and Neill that if any one of them was successful in the action in securing the residuum, it would be sold and the proceeds divided among these three parties. This makes any controversy as between them moot. An action not founded upon an actual controversy, or prosecuted "for the gratification of the curiosity of the litigants" is collusive and will not be entertained. City and County of San Francisco v. Boyd, 22 Cal.2d 685, 694, 140 P.2d 666, 670, and cases there cited; 1 Cal.Jur. 335; Southern Pacific Co. v. Eshelman, D.C., 227 F. 928.

After weeks of trial, the trial court found that 400,000 barrels comprised practically all of the recoverable residuum in the sumps, and that Five C Refining Company was the owner of all of it, either by prior purchase or upon payment therefor under its option.

[3, 4] A review of the reporter's transcript, consisting of 2192 pages, mostly interminable argument, and inspection of the exhibits, establishes that there was substantial evidence to support the findings and judgment of the trial court. Hence, it is elementary law that it becomes the duty of this court to affirm the judgment.

In passing it must be observed that this case presents an exaggerated example of a fundamental weakness of the appellate system in the State of California. Surely counsel, with the forensic ability to argue a case for five weeks, were equipped to condense a reporter's transcript of over 2,000 pages into a bill of exceptions, which should have been not more than 100 pages. Review of this case has taken weeks of reading of argument in the reporter's transcript, and reviewing of voluminous exhibits, in order to conscientiously pass upon the questions involved. This causes unnecessary delay in deciding other cases on appeal, and is unfair to litigants generally.

[5] Maguire contends that the judgment which it consented to against itself is not binding in this case, because it was thereafter reversed by the District Court of Appeal. Coates v. Maguire Oil & Refining Corp., 47 Cal.App.2d 275, 117 P.2d 898.

However, the judgment which was reversed by the District Court of Appeal was against another defendant in the same action. No appeal was perfected by Maguire, and the two judgments are separate. Code of Civil Procedure, sec. 579. Therefore, the judgment against Maguire was not considered by the District Court of Appeal, and remained final despite the reversal of the judgment as to the other defendant. Lake v. Superior Court, 187 Cal. 116, 200 P. 1041; Smith v. Anglo-California Trust Co., 205 Cal. 496, 271 P. 898.

[6] Even if the judgment against Maguire may not stand, the trial court found that that Company was estopped to question the rights of Five C, and there is substantial evidence in the record to support this finding.

[7, 8] Appellants attack the agreement conveying the bankrupt estate to Silver Wing. This agreement was made under the provisions of Section 27 of the Bankruptcy Act, 11 U.S.C.A. § 50, and was authorized and approved by all of the parties having any interest in the bankrupt estate. Moreover, there is substantial evidence to support the finding of the trial court that neither Neill nor his predecessor, Hawn, may equitably question this sale.

The judgment is affirmed.

YORK, P. J., and WHITE, J., concur.

LEONI v. DELANY.*

Civ. 13154.

District Court of Appeal, First District,
Division 2, California.
April 30, 1947.

Rehearing Granted May 29, 1947.

1. Witnesses 🔑133

Claimant was incompetent under statute to testify in support of her claim against decedent's estate based on alleged oral agreement with decedent. Code Civ.Proc. § 1880, subd. 3.

2. Work and labor 🔑1

One who receives a benefit at the expense or detriment of another should compensate the latter to the extent of the reasonable value of the benefit received.

3. Frauds, statute of 🔑138(4)
Limitation of actions 🔑28(1)

When continuous personal services are performed under express agreement for compensation upon termination thereof, which agreement is unenforceable because not in writing, the reasonable value of the services may be recovered and statute of limitations does not commence to run until termination of the services.

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* Subsequent opinion 188 P.2d 765.

4. Action ⚷48(3)

Where a reasonable doubt exists as to whether one seeking recovery for services rendered is entitled to recover upon an express or implied contract, he may plead a claim upon each and recover according to the proof.

5. Action ⚷45(1)

Different causes of action may be stated to meet such phases of the evidence as may be fairly and reasonably anticipated.

6. Frauds, statute of ⚷138(4)

Unenforceability of oral contract to leave property to plaintiff and make her beneficiary of life policy in consideration of promise to marry and services rendered and to be rendered would not preclude recovery against decedent's estate on common count for reasonable value of services rendered pursuant to such contract.

7. Pleading ⚷380
Trial ⚷139(4), 382

Where two or more counts are pleaded, plaintiff is entitled to introduce evidence upon each, and, after hearing all the evidence, the decision as to which cause of action is sustained is for judge or jury.

8. Appeal and error ⚷1026

Where two or more counts are pleaded and one count is not affected by error and a verdict with respect to it is supported by substantial evidence, commission of errors in connection with another count or insufficiency of evidence to sustain a verdict as to such other count is immaterial.

9. Appeal and error ⚷1001(1)

A verdict supported by substantial evidence will not be disturbed on appeal on ground of insufficiency of evidence, since weighing the evidence is not the function of appellate court.

10. Evidence ⚷597

Evidence which is not inherently improbable and is of such probative force as to create a substantial conflict with that opposed to it is ordinarily sufficient to sustain a judgment.

11. Executors and administrators ⚷221(5)

Evidence sustained verdict against decedent's estate on common count for reasonable value of services rendered by claimant in sheltering, nursing, and caring for decedent during latter years of his life.

◆

Appeal from Superior Court, City and County of San Francisco; Melvyn I. Cronin, Judge.

Action by Genevieve B. Leoni against Elmer P. Delany, as administrator of the estate of Baltasar Corral, deceased, to recover upon a claim against decedent's estate. Verdict and judgment for plaintiff, and defendant appeals.

Judgment affirmed.

James A. Himmel, of San Francisco, for appellant.

Phillip Barnett and R. L. Dreyfus, both of San Francisco, for respondent.

JONES, Justice pro tem.

This is an action brought to recover upon a creditor's claim against the estate of one Baltasar Corral. In accordance with the provisions of the Probate Code, the plaintiff filed a claim for $5,000 against the estate in the office of the County Clerk of the City and County of San Francisco on March 17, 1944. This claim was never approved nor rejected by the administrator, and on April 20, 1944, the plaintiff commenced an action to recover on the claim. The case went to trial before a jury which found for the plaintiff in the sum of $4,000, and from the judgment entered on the verdict the defendant has appealed.

The claim recites: "That on or about the 3d day of December, 1940, claimant and decedent, in his lifetime, entered into an oral agreement that, in consideration of the promise of claimant to marry said decedent at a future date when legally entitled to do so, and in consideration of services rendered, and to be rendered by said claimant, said decedent promised and agreed that, instead of paying claimant in cash for said services current wages, he would leave to claimant all of his property as compensation for the performance of said services, and that he would make claimant the beneficiary of a life insurance policy on his life, in the principal sum of $5,000.00, designating said claimant as beneficiary; that said promises were reiterated and restated by said decedent many times thereafter and that in consideration of said promises, said claimant accepted said offer of marriage aforesaid and agreed to perform certain services on behalf of said decedent, consisting of housekeeping, nursing care and attention, and that said claimant entered upon the performance of said services on or about December 3, 1940, pursuant to said agreement, and performed the same continuously up to the time of the death of said decedent, which occurred about October 13, 1943, and that said services so performed are of the reasonable value of $5,000.00."

The complaint sets up two causes of action. In the first cause of action it is alleged that on December 3, 1940, an oral agreement was entered into between the plaintiff and the decedent embodying the details set out in the creditor's claim. Full performance on the part of the plaintiff is alleged. It is also alleged that the decedent, who at the time of his death was Third Assistant Engineer on the S. S. Susana, did designate the plaintiff as beneficiary under a life insurance policy of the War Shipping Administration.

The second cause of action is in the form of a common count to recover the reasonable value of services rendered in the sum of $5,000.

[1] Under the provisions of subdivision 3 of section 1880 of the Code of Civil Procedure, the plaintiff could not be a witness in support of her claim. Nevertheless, it appears from the testimony of other persons called as witnesses on her behalf that at the time of the transaction in question she was a woman about forty-five years of age, living with her two grown sons in San Francisco. The decedent had a room of his own next to that of her son in the house which they occupied. He had his meals at the family table and generally made his home with the family. The plaintiff did all of his washing, ironing and mending. He was by occupation a seaman. During the period covered by the claim he sustained a severe back injury in his occupation and was without money. He was sheltered by the plaintiff during this time, and she bought clothes for him and supplied him with money. She also nursed and cared for him while this illness was on him and until he was well enough to go to work again.

The appellant urges as grounds for reversal that the complaint does not state facts sufficient to constitute a cause of action; that the evidence is not sufficient to sustain the verdict; and that the trial court erred in giving and refusing to give certain instructions.

[2, 3] As to the sufficiency of the complaint to state a cause of action, the contention is made that the first count fails to state a cause of action because it alleges a contract which the law requires to be in writing, and that since the scond count is based upon the same state of facts, it must fall with the first count. In support of his position the appellant has cited Rose v. Ames, 53 Cal.App.2d 583, 128 P.2d 65, and Hays v. Temple, 23 Cal.App.2d 690, 73 P.2d 1248. These cases hold that it is proper to sustain a general demurrer to a common count separately pleaded in a complaint where the recovery sought on such count is obviously based on the set of facts specifically pleaded in another count but which other count fails to state a cause of action. There is a distinction between a count which fails to state facts sufficient to establish the existence of a contract and one which pleads a contract which is unenforceable because it is not in writing. It is the unenforceability of an otherwise valid contract because it is not in writing that gives rise to the right of relief through the medium of a common count. The law contemplates that one who receives a benefit at the expense or detriment of another should compensate the latter to the extent of the reasonable value of the benefit received. As is said in Winder v. Winder, 18 Cal.2d 123, 127, 114 P.2d 347, 350, 144 A.L.R. 935: "It is the settled law of this state that when continuous personal services are performed under an express agreement for compensation upon termination

thereof, which agreement is unenforceable because not in writing (§ 1624, Civ.Code; § 1973, Code Civ. Proc.), the reasonable value of the services may be recovered, and that the statute of limitations does not commence to run until the termination of the services, which, in such cases, is usually upon the death of the promisor. Long v. Rumsey, 12 Cal.2d 334, 94 P.2d 146; Zeller v. Wassman, 184 Cal. 80, 193 P. 84; Morrison v. Land, 169 Cal. 580, 147 P. 259; Estate of Hohrer, 160 Cal. 574, 117 P. 672, Ann.Cas.1913A, 479; De Mattos v. McGovern, 25 Cal.App.2d 429, 77 P.2d 522; Burr v. Floyd, 137 Cal.App. 692, 696, 31 P. 2d 402; Warder v. Hutchison, 69 Cal.App. 291, 231 P. 563; Mayborne v. Citizens' Trust & Savings Bank, 46 Cal.App. 178, 188 P. 1034." To the same effect is Reeves v. Vallow, 16 Cal.2d 95, 104 P.2d 1017. In the cases of Hays v. Temple and Rose v. Ames, supra, relied upon by the appellant, the common counts were based upon the same facts relied on by the plaintiffs to make out a contract. In each case it was held that the count relied upon to establish a contract was fatally defective in that it failed to state sufficient facts to show a contractual relation, and that the common count based upon the same facts must also fall. No claim is made here that the contract could not be enforced if it were written and properly subscribed instead of being oral as alleged.

Contrary to the contention of the appellant, the respondent takes the position that the first count states a good cause of action because she has pleaded the contract out of the statute of frauds by alleging that she has performed everything required by her to be done under the alleged agreement. The import of this allegation has apparently escaped the appellant.

[4-6] It is well settled that where a person seeks to recover for services rendered and there is a fair and reasonable doubt as to whether he is entitled to recover upon an express or implied contract, he is entitled to plead a claim upon each and to recover according to the proof. This right to state different causes of action to meet such phases of the evidence as may be fairly and reasonably anticipated is recognized in Wilson v. Smith, 61 Cal. 209, where the plaintiff was in doubt as to whether he was entitled to recover upon a common count for the reasonable value of services rendered or whether his rights were fixed by an express contract. He pleaded two causes of action, one upon an express contract and the other upon a common count. The court permitted the case to go to the jury upon both counts, and a judgment for the plaintiff was affirmed on appeal. In Tanforan v. Tanforan, 173 Cal. 270, 273, 159 P. 709, 711, it is said: "But when for any reason the pleader thinks it desirable so to do, as where the exact nature of the facts is in doubt, or where the exact legal nature of plaintiff's right and defendant's liability depend on facts not well known to the plaintiff, his pleading may set forth the same cause of action in varied and inconsistent counts with strict legal propriety." See Wilkerson v. Seib, 20 Cal.2d 556, 563, 127 P.2d 904; Goldwater v. Oltman, 210 Cal. 408, 423, 292 P. 624, 71 A.L.R. 871; Cowan v. Abbott, 92 Cal. 100, 28 P.2d 213; Weintraub v. Soronow, 115 Cal.App. 145, 1 P.2d 28; Van Lue v. Wahrlich-Cornett Co., 12 Cal.App. 749, 108 P. 717. A plaintiff who is not permitted to be a witness in her own behalf under the provisions of subdivision 3 of section 1880 of the Code of Civil Procedure may well be doubtful as to what course the litigation may take, and is entitled to plead her case in as many counts as she may reasonably expect the evidence to support.

[7-11] Where two or more counts are so pleaded the plaintiff is entitled to introduce evidence upon each and all of his causes of action and, after hearing all of the evidence, the decision as to which of them is sustained is a matter for the judge or jury. Tanforan v. Tanforan, supra. If one count is not affected by error and there is substantial evidence to support a verdict with respect to it, it is immaterial that there may have been errors committed in connection with another count or that there is not sufficient evidence to sustain a verdict as to such other count. Shields v. Oxnard Harbor Dist., 46 Cal.App.2d 477, 491, 116 P.2d 121; King v. Schumacher, 32 Cal. App.2d 172, 179, 89 P.2d 466; Mitchell v. Towne, 31 Cal.App.2d 259, 87 P.2d 908; Hume v. Fresno Irr. Dist., 21 Cal.App.2d

348, 356, 69 P.2d 483. The errors complained of by the appellant all go to the first count except as to the sufficiency of the evidence to sustain a judgment on the second count. When insufficiency of the evidence is made the basis of an appeal, it is not the function of the appellate court to weigh the evidence. If there is substantial evidence to support a verdict it will not be disturbed. McCray v. Reese, 209 Cal. 453, 288 P. 72; McKean v. Alliance Land Co., 200 Cal. 396, 253 P. 134. Evidence is ordinarily deemed sufficient to sustain a judgment when it is not inherently improbable and is of such probative force as to create a substantial conflict with that opposed to it. Noland v. Noland, 44 Cal. App.2d 780, 113 P.2d 11. The evidence produced by the plaintiff is not inherently improbable, and it is of such character as to weigh heavily against any opposed to it. In so far as the sufficiency of the evidence to sustain it goes, the second cause of action is also free from error.

The judgment is affirmed.

NOURSE, P. J., and GOODELL, J., concur.

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79 Cal.App.2d 195

SWEET v. LOS ANGELES RY. CO.

Civ. 15568.

District Court of Appeal, Second District, Division 1, California.

April 17, 1947.

1. Appeal and error 🔑994(3)

In action tried before court sitting without jury, credibility of witnesses was for trial judge. Code Civ. Proc. §§ 1847, 2061.

2. Appeal and error 🔑994(3)

Reviewing judges are in no position to determine credit which should be ascribed to witnesses or to weigh their testimony.

3. Carriers 🔑318(4)

In action against bus carrier for injuries sustained by standing passenger when bus suddenly stopped, evidence sustained finding that bus driver gave required attention to driving to insure safety of passenger and was not guilty of negligence in talking to other passengers.

4. Carriers 🔑331(2)

Where all seats of motor bus were occupied at time plaintiff boarded bus, it was incumbent on plaintiff, in exercise of due care, to take greater precautions for her own safety than if she were seated. Civ. Code, §§ 483, 2102, 2184, 2185.

5. Carriers 🔑296

Where motor carrier accepts passenger's fare with knowledge of increased danger of position of passenger because all of seats are occupied, carrier is under obligation to use greater precaution in operation of bus for protection of standing passengers than would be necessary if all were seated. Civ. Code, §§ 483, 2102, 2184, 2185.

6. Carriers 🔑305(4)

Even if bus passenger did not waive statutory contractual right to seat and did not assume risk ordinarily incident to standing position, violation of statute imposing duty on carrier of providing every passenger with seat was immaterial unless it was proximate cause of injury to passenger. Civ. Code, §§ 483, 2102, 2184, 2185

7. Negligence 🔑56(1)

An action for damages may not be founded on negligence occasioned by failure of any person to perform duty imposed by law unless such negligence directly contributed to the injury.

8. Appeal and error 🔑1010(1)

In action tried to court sitting without jury, court's findings supported by substantial evidence are conclusive on appeal.

9. Carriers 🔑318(4)

In action against bus carrier for injuries sustained by standing passenger when bus stopped suddenly, evidence sustained finding that overcrowded condition of bus which required plaintiff to stand was not proximate cause of accident but that intervening negligence of motorist in turning automobile without warning into path of bus was sole proximate cause of accident.

10. Negligence ⚷136(25)

The issue of proximate cause is essentially one of fact.

11. Appeal and error ⚷1010(1)

In action against bus carrier for personal injuries, where trial court's finding that overcrowded condition of bus was not proximate cause of accident was supported by evidence, appellate court could not disturb judgment irrespective of how appellate court might have decided issues had appellate court weighed evidence in first instance.

◆

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Personal injury action by Ella F. Sweet against Los Angeles Railway Company (now the Los Angeles Transit Lines). Judgment for defendant and plaintiff appeals.

Affirmed.

W. W. Comstock, of Los Angeles, for appellant.

Gibson, Dunn & Crutcher, of Los Angeles (Sherman Welpton, Jr., of Los Angeles, of counsel), for respondent.

WHITE, Justice.

Plaintiff instituted this action to recover damages for injuries which she sustained while riding as a passenger on a motor bus operated by defendant. The cause was tried before the court sitting without a jury, resulting in a judgment for defendant, from which plaintiff prosecutes this appeal. Plaintiff also attempts to appeal from "the ruling on the motion to re-open the trial, entered the 25th day of January, 1946", but has apparently abandoned the same.

Plaintiff testified that on the morning of October 3, 1944, she boarded the bus; that there were no vacant seats, which compelled her to stand in the aisle at a point beteween the front and center of the bus, where she was holding onto an upright rod for support. That while she was in this position the operator started the bus, attaining a speed of approximately 40 miles per hour; that suddenly the bus stopped, throwing her to the floor thereof, her head striking on "what I thought was the coin box". Plaintiff also testified that the bus operator "was conversing with a girl that stood right behind him, and she also had her back like this, hanging on, and he conversed with her, and there was two or three men standing on the steps at the front end, and the driver was having quite a conversation".

Margaret Takacs, a witness for the plaintiff, testified that she was also a passenger on the bus at the time of the accident; that she saw plaintiff fall, observed that the bus stopped "very suddenly" but did not see what "occasioned the driver to stop the bus".

Bernard Mills, called as a witness for the defendant, testified that he was the operator of the bus in question; that at the time plaintiff boarded the same it "was loaded to a seated capacity then, and there were a few standing when she got on"; that after starting from the last loading zone preceding the accident "I had a seat load and approximately ten or fifteen people standing". With reference to what occurred after starting the bus at such last-named loading zone, the operator testified that after the bus started up an automobile made a turn in front of the bus without giving any signal and with the bus only five or six feet away; that the bus had gone about one bus length or 35 to 40 feet, from the time it last started up; that when the automobile turned to the left in front of the bus he applied the brakes, at which time he was traveling five to seven miles per hour; that the bus was stopped within four or five feet after application of the brakes; that as he glanced at his mirror he observed plaintiff falling and striking her head on the fare box. That the bus came to a stop within three or four feet of the aforesaid automobile which had also stopped in front of the bus. The bus operator also testified that from the time he started up after the last stop made preceding the accident until its occurrence he had not talked to any passengers. The witness did, however, testify that he would "pass the time of day" with passengers with whom he was acquainted; that he "did feel pretty well acquainted" with some passengers who frequently traveled on the bus and enjoyed "visiting with them".

Julia Slaughter, a witness produced by the defendant, testified that she was a passenger on the bus, was seated on the right-hand side in the front seat which faces the aisle and that she was faced toward the driver's side. The witness corroborated the testimony of the bus operator concerning an automobile making a "U"-turn in front of the bus without giving any signal; that to her the driver appeared to be looking straight ahead when he first applied the brakes to avoid striking the automobile.

By her complaint plaintiff alleged that defendant was guilty of negligence in failing and refusing to provide her with a seat and thereby requiring her to stand in the aisle of said motor coach and also in operating the motor coach so negligently and carelessly as to cause it to "come to an unusually and extremely rapid and sudden stop". All allegations of negligence were specifically denied by defendant in its answer, which also, as a separate and affirmative defense, alleged contributory negligence on the part of plaintiff.

The trial court found that on the occasion in question, plaintiff was a passenger on the bus operated by defendant, and "fell to the floor of said bus, but that the fall of said plaintiff and the resulting injuries and damages, if any, to plaintiff were in no way occasioned by the carelessness, recklessness or negligence of said defendant or of any of its agents or employees".

As grounds for reversal, appellant first contends that respondent was guilty of negligence consisting of "the careless operation of the bus by the driver while visiting with a lady passenger and not giving the required attention to his driving to insure safety for the passengers".

The evidence on this issue was in direct conflict. The bus driver testified that at no time after he left the last loading zone prior to the accident was he in conversation with any of the passengers. And in this he was corroborated by the witness Julia Slaughter, a passenger on the bus who testified "he had his eyes pointed toward the road. I mean his head was straight ahead. I would think he was looking straight down San Fernando Road".

[1-3] The Legislature of this state has ordained that triers of fact are the exclusive judges of the *credibility* of witnesses (Code Civ.Proc., sec. 1847), and are the judges of the *effect* and *value* of evidence addressed to them, except in those instances where it is declared by the law that it shall be conclusive proof of the fact to which it relates. Code Civ.Proc., sec. 2061. Therefore, as a necessary corollary of the aforesaid rules it follows that the trial judge in the case was authorized, if he conscientiously felt warranted in so doing, after full and fair consideration thereof, to reject any testimony which might have been in contradiction to that of witnesses who testified that the driver was not conversing with a passenger or passengers and thereby distracted from giving full, prudent and adequate attention to his duties as the driver of such bus. Reviewing judges are, obviously, in no position to determine the credit which should be ascribed to witnesses or to weigh their testimony.

Finally, appellant earnestly urges that the overcrowding of the bus was in violation of the laws of this state and therefore amounted to negligence as a matter of law. In this regard appellant relies on the following sections of the Civil Code:

Section 2185, which provides: "A common carrier of persons must provide every passenger with a seat. He must not overload his vehicle by receiving and carrying more passengers than its rated capacity allows."

Section 483, reading: "Every railroad corporation must furnish, on the inside of its passenger-cars, sufficient room and accommodations for all pasenegers to whom tickets are sold for any one trip, and for all persons presenting tickets entitling them to travel thereon."

Appellant relies also upon sections 2102 and 2184 of the Civil Code.

[4, 5] The testimony is without contradiction that at the time appellant boarded the motor coach, all of the seats were occupied. In this state it has been held that under such circumstances "a new contract and relationship spring up" between the motor coach company and a passenger. Kelly v. Santa Barbara Consol. R. Co., 171 Cal. 415, 418, 153 P. 903, 904, Ann.Cas.1917C, 67. The same case is authority for the statement that under such contract "The passenger, in voluntarily taking a position of greater peril, assumes the natural, obvious risks attending such peril"; that it is incumbent upon such a passenger, in the exercise of the due care always exacted by the law, to take greater precautions for his own safety than if he were seated in the conveyance. It is of course also true that the carrier when it accepts the passenger's fare, "with knowledge of the increased danger of his position, is under obligation to use greater precautions in the operation of the car for the protection of such passengers than would be necessary if all were seated". Kelly v. Santa Barbara Consol. R. Co., supra, 171 Cal. at page 419, 153 P. at page 905, Ann.Cas.1917C, 67; see also 19 Cal.Jur., p. 589, Negligence, sec. 30.

The reasonableness and common sense attaching to such a construction of the statutory contractual duty of a common carrier to provide every passenger with a seat, based as it is on well-established principles of law pertaining to waiver and assumption of risk is thus commented upon in the case of Kelly v. Santa Barbara Consol. R. Co., supra, 171 Cal. at page 418, 153 P. at page 904, Ann.Cas.1917C, 67: "The congested travel upon street and interurban railways at certain hours of the day and upon holidays, upon the one hand, makes it difficult, if not impossible, for the common carrier to provide suitable accommodations for every passenger who desires to ride, and, upon the other hand, compels many of the traveling public to make the journey under strained conditions or forego it altogether." Added to this is the all-too-apparent fact that were the rule otherwise there would not be sufficient space on the streets of a metropolitan city for enough cars or busses to give every passenger a seat during rush hours. It would require long waiting periods by passengers, with all the attendent crowding and pushing at loading zones, while enough busses and street cars threaded through the streets, each vehicle loading only as many passengers as they had seats to accommodate. The economic waste of carrier space would place a far greater financial burden on the public to maintain such a transportation system, and the confusion in maintaining no more than a seated load would be a monumental task quite impossible of practical accomplishment.

[6-9] However, though it be assumed that appellant as a passenger on the bus did not waive her statutory contractual right to a seat and did not assume the risks ordinarily incident to such a position, nevertheless the violation of the code provisions is immaterial unless it was the proximate cause of the accident. No action for damages may be founded upon negligence occasioned by failure of any person to perform a duty imposed by law unless such negligence directly contributed to the injury. Therefore, if the trial court's finding and judgment that the sole proximate cause of the accident was the negligence of a third party in turning an automobile without warning into the path of the bus, causing the operator thereof to stop quickly to avoid a collision, is supported by substantial evidence it is conclusive on appeal. While it is true that appellant by appropriate allegations in her complaint predicated negligence on the overcrowded condition of the bus and the claimed neglect of respondent to conform with statutory requirements and furnish her with a seat, nevertheless in order to avail appellant the claimed negligence must have some direct and causal connection with the injury complained of. While it was proper to show the crowded condition of the bus as one of the conditions of the accident, the testimony is undisputed that a third party suddenly and without warning or signal turned his automobile directly into the path of the bus when such bus was but a few feet away and it was this intervening action on the part of such third party that occasioned the sudden application of the brakes, as a result of which appellant was thrown to the floor. While the overcrowded condition of

the bus which required appellant to stand may have been a condition in the order of causation by which her injury was brought about, there was substantial evidence to warrant the conclusion of the trial judge that such condition was not the proximate cause of the accident, but that the intervening negligence of the third party driver of the aforesaid automobile was the sole proximate cause. Cary v. Los Angeles R. Co., 157 Cal. 599, 604, 605, 108 P. 682, 27 L.R.A.,N.S., 764, 21 Ann.Cas.1329; Fresno Traction Co. v. Atchison, T. & S. F. Ry. Co., 175 Cal. 358, 360, 165 P. 1013; Holahan v. McGrew, 111 Cal.App. 430, 442, 295 P. 1054; Royal Ins. Co. v. Mazzei, 50 Cal. App.2d 549, 557, 123 P.2d 586. As was said in Hayden v. Paramount Productions, Inc. 33 Cal.App.2d 287, 293, 91 P.2d 231, 236, quoting from 45 Cor.Jur. 931: "A prior or remote cause cannot be made the basis of an action if such remote cause did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible, if there intervened between such prior or remote cause and the injury a distinct, successive, unrelated, and efficient cause of the injury, even though such injury would not have happened but for such condition or occasion. *If no danger existed in the condition except because of the independent cause, such condition was not the proximate cause.* * * *" (Emphasis added.)

And again, in Klarquist v. Chamberlain & Proctor, 124 Cal.App. 398, 401, 12 P.2d 664, 665, we find the following quoted with approval from Storey v. City of New York, 29 App.Div. 316, 51 N.Y.S. 580, where a pedestrian was compelled to walk into the street, around a mound of earth which extended from the curb to a car track, and in so doing was injured by a passing vehicle:

"'It is urged with much force that in the present case there were two efficient causes,—the presence of the mound of earth, which prevented the boy from seeing the horse and cart; and the other, the horse and cart themselves,—and that both were proximate causes of the accident. As we have already said, if the boy had tripped and fallen *because of the* mound, and then had been run over, this reasoning would be sound. But the mere presence of the mound, and the fact that it compelled the boy to pass around it, *without the intervention of some other cause, would not have produced the accident. We must be careful to avoid confusing two things which are separate and distinct, namely, that which causes the injury, and that without which the injury would not have happened.* For the former a defendant may be liable; *for the latter he will not.* This is well expressed by Kelly, C.B., in Lord Bailiffs, etc., v. Trinity House, 39 Law J. Exch. 163: "In order to make the defendant liable, his negligence must be the causa causans, and not merely a causa sine qua non." And as said in Robertson v. [The] Mayor [of City of New York], 7 Misc. [645,] 648, 28 N.Y.S. 13, 15: "The negligence of the defendant, if any there be, was not the proximate or efficient cause of the injury. If, after the *cause in question* has been in operation, *some independent force comes in and produces an injury, not its natural or probable effect, the author of the cause is not responsible.*"' Other decisions of like import are in harmony with the foregoing. Jones v. City of Ft. Dodge, 185 Iowa, 600, 171 N.W. 16; Setter v. City of Maysville, 114 Ky. 60, 69 S.W. 1074; Lambel v. City of Florence, 115 Kan. 111, 222 P. 64."

[10, 11] The issue of proximate cause is essentially one of fact and since there was substantial evidence to support the trial court's finding that the overcrowded condition of the bus was not the proximate cause of the accident, and that no danger existed in such condition except because of the gross and intervening negligence of the driver of the automobile involved, which could not have been reasonably anticipated by the bus driver, this court is without authority to disturb the judgment, irrespective of how we might have decided the issues had this tribunal been weighing the evidence in the first instance. 2 McK.Dig., Appeal and Error, secs. 1268–1294, inclusive.

For the foregoing reasons the attempted appeal "from the ruling on the motion to re-open the trial, entered on the 25th day of January, 1946" is dismissed, and the judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

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79 Cal.App.2d 518

In re MEYER'S GUARDIANSHIP.

Civ. 7379.

Sac. 5829.

District Court of Appeal, Third District, California.

May 7, 1947.

Appeal and error ⚷333

Where incompetent died while her appeal was pending from order appointing a guardian of her estate, motion by incompetent's counsel to dismiss the appeal without prejudice was granted, since the issue as to incompetent's competency became moot.

◆

Appeal from Superior Court, Sonoma County; Lilburn Gibson, Judge.

Proceeding in the matter of the guardianship of the person and estate of Alice M. Meyer, an incompetent. From an order appointing a guardian of the incompetent's estate, the incompetent appealed and the incompetent's counsel moves to dismiss the appeal without prejudice because of the incompetent's death.

Motion to dismiss appeal without prejudice granted.

Sullivan, Roche, Johnson, & Farraher, of San Francisco, for appellant.

Lounibos & Lounibos, of Petaluma, for respondent.

PER CURIAM.

This is a motion by counsel for appellant to dismiss, without prejudice, the appeal filed by Alice M. Meyer, the above-named alleged incompetent person, from the order appointing a guardian of her estate. The affidavit filed in support of the motion shows that appellant died on February 17, 1947, and that, therefore, the issue as to appellant's competency has become moot.

The motion to dismiss the appeal without prejudice is granted.

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79 Cal.App.2d 489

LEWIS v. SILVEIRA.

Civ. 7320.

Sac. 5797.

District Court of Appeal, Third District, California.

May 6, 1947.

1. **Appeal and error** ⚷931(1)

Before an appellate tribunal is justified in reversing a judgment on ground of insufficiency of evidence, it must appear from record that, accepting the full force of evidence adduced, together with every inference favorable to prevailing party that may be reasonably drawn therefrom, the law precludes the prevailing party from recovering a judgment.

2. **Appeal and error** ⚷931(1), 989

On appeal from judgment on ground of insufficiency of evidence, evidence must be construed most strongly against losing party, and prevailing party's evidence must ordinarily be accepted as true, and evidence contradicting it must be disregarded.

3. **Limitation of actions** ⚷50(1)

Notes containing a provision renewing the notes from year to year, were not barred by limitations.

4. **Appeal and error** ⚷1012(1)

In suit by administratrix to have title to realty and personalty quieted, wherein defendant filed a cross-complaint seeking determination that he had a mortgage on the realty and for foreclosure, weight of defendant's testimony, which was not inherently improbable, was for the trial court as trier of facts.

5. Appeal and error ⚷1011(1)

An appellate tribunal is not concerned with mere conflicts in the evidence.

6. Mortgages ⚷38(1)

In suit by administratrix against deceased's brother to have title to realty and personalty quieted, wherein brother filed cross-complaint for determination that he held a mortgage on realty and for foreclosure of such mortgage, evidence sustained finding that conveyances of realty to brother had been made for purpose of securing deceased's indebtedness to brother.

◆

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by Anna Mary Lewis, as administratrix of the estate of Manuel Lewis, also known as Manuel Silveira, also known as Manuel Lewis Silva, deceased, against Antone Lewis Silveira, to have plaintiff's title as administratrix to realty and personalty quieted and to establish a partnership in a bar and cafe business, and to require defendant to render an accounting thereof and to liquidate such business, wherein the defendant filed a cross-complaint. From a judgment in favor of the defendant, the plaintiff appeals.

Judgment affirmed.

Ralph H. Lewis, of Sacramento, for appellant.

Henry & Bedeau, of Sacramento, for respondent.

SCHOTTKY, Justice pro tem.

Plaintiff and appellant, as administratrix of the Estate of Manuel Lewis, deceased, commenced an action against defendant and respondent, setting forth four causes of action in her complaint. In the first she alleged that defendant was holding certain real property on P Street in Sacramento in trust for decedent upon the promise of defendant to reconvey upon demand, which she alleged defendant refused to do. The second cause of action is identical with the first except that certain real property on Second Street is the property involved. The third cause of action is to quiet title to certain personal property at 1121 Second Street in Sacramento. In the fourth cause of action plaintiff and appellant claimed that the bar and cafe business at 1121 Second Street was at the time of the death of decedent on December 30, 1943, a partnership in which decedent owned a one-half interest. In the prayer of her complaint plaintiff asked to have her title as administratrix to the real and personal property quieted and to establish a partnership in the bar and cafe business and to require defendant to render an accounting thereof and to liquidate said business.

Defendant's answer denied the material allegations of each cause of action. In addition, he filed a cross-complaint in which he alleged that on April 19, 1926 decedent and plaintiff had executed and delivered to him their promissory note in the sum of $14,000, and that on April 23, 1927, decedent had executed and delivered to him his promissory note in the sum of $1,325; that the two parcels of property had been placed in his name at the request of decedent and as security for the indebtedness owing on said promissory notes, upon which no principal or interest had been paid, and that he held the real property as security for the payment of the notes. He prayed that the court determine that he had a mortgage on the real property for the amount due and that the same be foreclosed.

The answer of plaintiff and appellant to the cross-complaint denied that the real property had been conveyed to defendant as security for the notes, or that a mortgage existed or that no payments had been made. However, plaintiff and appellant did not deny the genuineness and due execution of the notes.

The trial court found in favor of defendant on all issues except as to the ownership of certain personal property described as a front bar, back bar, 3 pictures and 12 cups. Judgment in accordance with the findings was entered establishing a mortgage on the two parcels of real property to secure an indebtedness of $33,560, and directing that said mortgage be foreclosed. Judgment was also entered that defendant was the sole owner of the cafe and bar business and the personal property therein except the aforementioned front bar, back bar, 3 pictures and 12 cups, and quieting his title thereto. Plaintiff's motion for a new trial was denied and this appeal is from the judgment.

Appellant does not attack the portions of the judgment relating to the cafe and bar business and personal property, but does make a vigorous attack upon the sufficiency of the evidence to support the findings that the conveyances of the real properties were made to secure an indebtedness of decedent and that an indebtedness existed between decedent and defendant at the time of decedent's death.

[1, 2] Before an appellate tribunal is justified in reversing a judgment upon the ground of the insufficiency of the evidence, it must appear from the record that, accepting the full force of the evidence adduced, together with every inference favorable to the prevailing party which may be reasonably drawn therefrom, it still appears that the law precludes the prevailing party from recovering a judgment. The evidence must be construed most strongly against the losing party. Every favorable inference which may fairly be deduced from the evidence should be resolved in favor of the prevailing party. The prevailing party's evidence must ordinarily be accepted as true, and evidence which contradicts it must be disregarded. Bearing in mind this familiar rule, which, we are constrained to state, is too often disregarded by counsel in arguing conflicting evidence before an appellate court, we shall give a brief summary of the evidence.

Appellant and plaintiff is the widow of Manuel Lewis, who died December 30, 1943. Manuel and the respondent, Antone Lewis Silveira, were brothers. Both were born in the Azores Islands and migrated to California in 1901. Manuel's name was Manuel Lewis Silveira but about 1924 he had it changed to Manuel Lewis.

Subsequent to the death of Manuel, his estate was probated in Sacramento County and appellant was appointed administratrix. At the time of Manuel's death two parcels of real property situated in Sacramento County stood of record in Antone's name—one parcel is described as the west one-half of Lot 7 in the block bounded by 10th and 11th and "O" and "P" Streets (hereinafter referred to as the P Street property), and the other is described as the south one-half of Lot 8 in the block bounded by Second and Third and "K" and "L" Streets (hereinafter referred to as the Second Street property). Manuel at one time had been a man of considerable means, owning five or more parcels of real property, including the P and Second Streets properties. He also caused the Lewis Apartments at 13th and N Streets in Sacramento to be constructed, but lost it to the Pacific States Savings and Loan Association about 1931.

Manuel also lost the P and Second Streets properties in 1936 to California Trust and Savings Bank (then in liquidation) which had a deed of trust thereon. After title had been vested in the bank, Manuel decided to repurchase the properties—the Second Street property for $10,000 and the P Street property for $6,500. He made a down payment of $2,500 on the Second Street property and $1,625 on the P Street property. Concurrently therewith and on July 17, 1936, contracts of purchase and sale for each of these properties were executed by the bank and at Manuel's request and direction Antone was named as purchaser. The contract for the Second Street property called for monthly installment payments of $75 on principal plus 6% interest, and the contract for the P Street property called for monthly installment payments of $50 on principal plus 6% interest. Manuel paid the installments on the contracts from rentals he received from the Second Street property (the P Street property was not rented but was occupied by Manuel's family). On February 27, 1939, the bank, at Manuel's request and direction, executed and delivered a deed to the Second Street property, conveying the same to Antone. At the same time and at Manuel's request, respondent borrowed $4,575 on this property which was used to pay the bank on the contract. Antone executed a note for that amount and a deed of trust on the property to secure the note. Payments were made on this note by Manuel from the rentals. By September 23, 1943, the debt had been paid and a deed of reconveyance was recorded on that day. The contract on the P Street property was not paid in full until September 15, 1943, at which time, at Manuel's request and direction, a deed to that property conveying the same to Antone, was executed and delivered. Both deeds were recorded at Manuel's request.

[3] On April 19, 1926, Manuel and the appellant, Anna, borrowed from Antone $14,000 and gave him a note executed by them for that amount dated April 19, 1926, payable five years after date. On April 23, 1927, Manuel borrowed an additional $1,325 from Antone and gave him a note for that amount dated April 23, 1927, payable on or before one year after date. This money was borrowed to aid Manuel in the construction and completion of the Lewis Apartments, which he was then building. Both notes provided for 6% interest payable annually and each contained a provision renewing the notes from year to year and hence were not barred by the statute of limitations. (Hasman v. Canman, 136 Cal. App. 91, 28 P.2d 372.) At all times since execution, the notes remained in Antone's possession. On April 19, 1931, the day that the $14,000 note matured, Manuel and Anna executed and delivered to Antone another note for $19,156.25, but for which Antone advanced no money. Antone held this note in his possession until the trial. It is a fair inference that this note was an acknowledgment of the indebtedness represented by the 1926 and 1927 notes.

[4] Defendant and respondent testified several times during the course of the trial that the parcels of real property were placed in his name to secure the indebtedness owing him by his brother and also that nothing had been paid on either principal or interest of said notes. Appellant attacks the testimony of respondent as being so conflicting and contradictory that it is worthless and unbelievable. It is apparent from the record that respondent was an old man who was quite illiterate and ignorant. He had to speak through an interpreter and it is apparent that he sometimes failed to understand the questions. There is nothing inherently improbable in his testimony and it was for the trial court to judge its weight. The following statements of the learned judge in the opinion filed by him are fully supported by the record:

"Why were the contracts made in the name of Antone, and why did he not convey them to his brother Manuel after they were paid in full and before Manuel passed away, Antone claims the reason was because it was understood that he was to hold the property as security for the notes owing to him.

"His claim is substantiated to some extent by the fact that (a) the notes were never paid; (b) The property must have been taken in the name of Antone for some reason, and it would be plausible to assume that Manuel owing his brother sums, a large amount, wished to protect him; (c) No demand was ever made by Manuel for conveyance; (d) While there are many contradictions in Antone's testimony, still he has been corroborated by a number of witnesses as to admissions made by Manuel as to the existence of an indebtedness owing from Manuel to him, and also the testimony of several witnesses indicated that Manuel recognized that Antone was holding the property for protection for the indebtedness owing by the former to Antone. Thus, John Silva testified that Manuel told him his brother had loaned him large sums of money on some notes years ago, which had never been paid, and stated that the property did not belong to him, but to his brother. To Joe Silva Manuel stated that his brother had a mortgage for $17,000 on his property on second street. The witness Mary Soares stated that Manuel said he owed his brother Tony a lot of money he hadn't been able to pay, so he had everything in his name; that his money was well protected. Other witnesses were generally to the same effect."

[5, 6] There was, of course, some evidence upon which contrary findings could be based, but an appellate tribunal is not concerned with mere conflicts in evidence. It is a sufficient answer to the contentions of appellant to say that there is ample evidence in the record to support the conclusion reached by the trial court.

The only errors urged by appellant being that the evidence does not support the findings and judgment, it follows that the judgment should be affirmed.

Judgment affirmed.

PEEK, and THOMPSON, JJ., concur.

79 Cal.App.2d 467

In re LYSHOLM'S ESTATE.

SECURITY FIRST NAT. BANK OF LOS ANGELES v. THOMPSON et al.

Civ. 15713.

District Court of Appeal, Second District,
Division 1, California.
May 2, 1947.

1. Descent and distribution 🔑63

Husband who was convicted of manslaughter for killing his wife was not barred from taking his share of wife's estate consisting of proceeds of benefit certificate as her heir. Probate Code, § 258.

2. Descent and distribution 🔑63

Husband who was convicted of manslaughter for killing his wife was not precluded from receiving proceeds of wife's mutual benefit certificate which provided that if beneficiary should cause death of insured he forfeited right to receive the benefits, where so far as facts showed, death might have been caused by accident so that there would be no forfeiture, or if there was a forfeiture, money having been paid to estate of wife, husband was not as matter of law precluded from sharing as wife's heir.

◆

Appeal from Superior Court, Los Angeles County, John Gee Clark, Judge.

Proceeding in the matter of the estate of Tessie Lysholm, also known as Theresa Lysholm, deceased. From an order in favor of Security First National Bank of Los Angeles, Eva Thompson and another appeal.

Affirmed.

George I. Devor and Jacob Swartz, both of Los Angeles, for appellants.

Lawrence Paul Scherb, of Culver City, for respondent.

DRAPEAU, Justice pro tem.

The facts in this case are either stipulated or admitted. The Probate Court made its decree distributing to the surviving husband of the decedent one-half of her separate property and the whole of the community property, and the remaining one-half of the separate property to two surviving sisters of the decedent. Included within the husband's portion of the separate property was one-half of the proceeds of an insurance benefit fund which his wife had carried on her life for many years as a member of a mutual benefit association.

Appellants, the two surviving sisters, object to this distribution upon the ground that the husband killed his wife, and therefore he may not take any portion of the insurance. The husband was charged with murder, tried in the Superior Court, convicted of manslaughter, and given probation with a county jail sentence.

That part of the benefit agreement which is applicable to this controversy is as follows:

"Death of Member Caused by Beneficiary—Subdiv. 1. If a benefit member shall be murdered by any beneficiary named in the contract of insurance, or by one who may claim benefits thereunder, or if any beneficiary named in a member's contract or who may claim benefits thereunder shall cause the death of the member, provided, that this condition will not apply in case of accidental death, then the right of such beneficiary to receive any benefits under contract held by such member shall be forfeited, and the amount which would otherwise have been paid to said beneficiary, through whose actions or agency the death of the member was brought about, shall be paid to the minor children of said member. If no minor children survive, then said amount shall be payable to the estate of the member."

The insurance money was paid to the estate of the decedent. The husband being entitled to one-half of the estate as heir of the wife, the decree of distribution is proper unless there is some theory which would prohibit the husband taking any part of the insurance money.

Probate Code Section 258 provides that no person convicted of murder shall succeed to any portion of the estate of his victim. This section is substantially the same as Civil Code Section 1409, which it superseded. Construing the section, it has been held that there must have been an actual conviction of the heir for murder of the ancestor. Estate of Agoure, 165 Cal. 427, 132 P. 587; 9 Cal.Jur. 468. If there be a conviction of murder, then neither the murderer nor his heirs have any right to the insurance money. West Coast Life Insurance v. Crawford, 58 Cal.App.2d 771, 138 P.2d 384. Conviction of the crime of manslaughter does not destroy the right of the heir to take. Estate of Kirby, 162 Cal. 91, 121 P. 370, 39 L.R.A.,N.S., 1088, Ann. Cas.1913C, 928. When the death is the result of accident, or even when caused by such gross negligence on the part of the beneficiary, that he was guilty of involuntary manslaughter, the beneficiary may still recover. Throop v. Western Indemnity Co., 49 Cal.App. 322, 193 P. 263; 29 Am. Jur. 979; 45 C.J. 226.

[1] Appellants contend that the insurance was forfeited by the terms of the benefit agreement, and thus became earmarked for distribution to the sisters only. This contention is based upon arguments of public policy. However, the cases just cited, define the limits of the public policy involved. Under the stipulated facts in this case neither this Court nor the Probate Court may go further than to infer that the death of the insured was because of conduct on her husband's part which was involuntary manslaughter. Therefore he is not barred from taking his share of her estate as her heir.

[2] The benefit certificate does not prohibit the husband taking as heir. True the contract states that if the beneficiary shall cause the death of the insured then he forfeits the right to receive the benefits. But, again, from the stipulated facts of this case, this death may have been caused by accident, and there was therefore no forfeiture. Or, if there were a forfeiture, the money having been paid to the estate of the wife, the husband is not as a matter of law precluded from sharing as her heir.

The order is affirmed.

YORK, P. J., and WHITE, J., concur.

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79 Cal.App.2d 414

CLARKE v. HERNANDEZ et al. (two cases).
Civ. 7329, 7330.

District Court of Appeal, Third District, California.

April 30, 1947.

Rehearing Denied May 31, 1947.

Hearing Denied June 26, 1947.

1. Automobiles 🔑**193(3)**

Where contract hauler was engaged to haul onions to defendant's place of business for an agreed compensation, he was an "independent contractor", rather than an "employee" and defendants were not liable for his negligence in operation of motor truck. Labor Code, § 3353.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee" and "Independent Contractor".

2. Master and servant 🔑**5**

A material and often conclusive factor in determining whether status of individual is that of employee or independent contractor is right of employer to exercise complete and authoritative control of mode and manner in which work is performed, and the existence of such right of control and not extent of its exercise gives rise to employer-employee relationship.

3. Master and servant 🔑**6**

Strong evidentiary support of employment relationship is right of employer to end service whenever he sees fit to do so.

4. Master and servant ⟹1

Factors to be considered in determining whether employer-employee relationship exists are whether employee has distinct occupation or business, whether work is usually done under direction or without supervision, skill required, who supplies tools and place of work, length of time required, method of payment, whether work is part of principal's regular business and whether parties believe they are creating such relationship.

5. Automobiles ⟹244(26)

In action for injuries sustained in collision, evidence was insufficient to sustain implied finding of jury that driver of truck was defendants' employee.

◆

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Personal injury actions by Eda Johnson Clarke and by Herbert C. O. Clarke against John Alvarez Hernandez, Jess Gonzales and Louis Giovannini, Palmer Powell and W. W. Kelly, individually and as copartners doing business under the firm name and style of Sunrise Produce Company. The actions were consolidated for trial. The trial resulted in a nonsuit in favor of defendant Gonzales. From an adverse judgment Louis Giovannini, Palmer Powell and W. W. Kelly, individually and as copartners doing business under the firm name and style of Sunrise Produce Company, appeal.

Reversed.

Ray W. Hays, of Fresno, and John Langer and J. C. Simpson, both of San Francisco, for appellants.

C. Ray Robinson, Samuel V. Cornell and Margaret A. Flynn, all of Merced, for respondent.

SCHOTTKY, Justice pro tem.

Appellants appeal from adverse judgments in two personal injury actions that were consolidated for trial.

In one of the actions the plaintiff was Eda Johnson Clarke. In the other action the plaintiff was her husband, Herbert C. O. Clarke. Defendants in both actions were these appellants and John Alvarez Hernandez and Jess Gonzales. Each complaint alleged that on May 4, 1944, and at a point on Highway 99 approximately 250 yards south of Grapevine Station in Kern County, defendant Hernandez negligently drove a northbound truck and semi-trailer into collision with a northbound automobile in which plaintiff was riding. Each complaint alleged that at the time of the collision defendant Hernandez was operating the truck and semi-trailer as agent and employee of the other defendants, within the scope of his agency and employment, and with their consent. Mrs. Clarke alleged that all defendants owned the truck and semi-trailer, whereas Mr. Clarke alleged that only defendant Hernandez was the owner thereof.

The answer filed in each action by these appellants was the equivalent of a general denial, with special defenses invoking the doctrines of independent contractor, independent negligence, contributory negligence, and unavoidable accident. The defendants Hernandez and Gonzales were represented by separate counsel, and their answers do not appear in the transcript on this appeal.

The two actions were consolidated for trial. The trial resulted in a nonsuit in favor of defendant Gonzales and a verdict in each action against the other defendants. Mrs. Clarke was awarded damages in the sum of $20,00, and Mr. Clarke was awarded damages in the sum of $40,000, and judgment was entered on each verdict. A motion for new trial was made in each action on the usual statutory grounds, and denied. Notice of appeal was filed by Louis Giovannini, Palmer Powell and W. W. Kelly, individually and as copartners doing business under the firm name and style of Sunrise Produce Company, in each action. Defendant Hernandez has not appealed from the judgment against him.

As reasons for the reversal of the judgments, appellants urge that: 1. The evidence is insufficient as a matter of law to support the judgments for respondents; 2. The jury was misdirected to the prejudice of appellants; and 3. The damage awards are excessive as a matter of law.

Before proceeding to discuss these contentions we shall give a brief summary of the factual situation as shown by the record.

On May 4, 1944, about 6:30 p. m., the plaintiffs were occupants of a Buick automobile which plaintiff Herbert Clarke was driving north on Highway 99 from Los Angeles. It was a clear bright afternoon. Visibility was perfect. The highway was dry. As the automobile was descending the grade toward Grapevine Station in Kern County at a proper rate of speed and in a proper position on its proper side of the highway, a northbound truck and semi-trailer owned and driven by defendant Hernandez and loaded with six hundred 50-pound sacks of onions belonging to appellants crashed into the rear of the automobile and plaintiffs were injured. The explanation of the accident given by Hernandez was that the brakes would not hold as he was descending the grade and he lost control of the truck and semi-trailer.

The record shows that appellants were wholesale produce dealers who maintained a place of business at San Francisco, and who also maintained a packing shed at Coachella in San Bernardino County under the supervision of appellant Kelly. They did not own any trucks and their produce was hauled from Coachella or other points in the Imperial Valley to San Francisco or other points. For over three years prior to May 4, 1944, defendant Jess Gonzales, a contract hauler, who owned a fleet of trucks and operated them from Coachella, did most of the hauling of produce for appellants, but he also performed trucking services for thirty or more other people. Gonzales was a licensed truck operator who hauled on "Railroad Commission basis." On May 3, 1944, appellant Kelly asked Gonzales to haul 600 sacks of onions from Coachella to San Francisco. Gonzales informed Kelly that he did not have an adequate truck available but that Hernandez, who had three trucks and had been helping Gonzales haul produce to market, had a big truck available and he would send Hernandez to see him. Defendant Hernandez testified that he was advised by Gonzales, as to whom a nonsuit was granted, that appellant Kelly was looking for someone to haul a load of onions to San Francisco, whereupon he called upon appellant Kelly and made an oral contract with him to haul the 600 sacks of onions from Coachella to San Francisco for the agreed sum of 75¢ per sack, payable when he returned to Coachella after delivering the onions. Hernandez testified further that Kelly "gave me directions where to go and I went out there and picked the load up."

"Q. [Mr. Robinson] And you followed the directions that he gave you? A. Yes, sir.

"Q. Now, he told you where to take those onions to, didn't he? A. Yes, sir.

"Q. Where did he tell you to take them? A. San Francisco.

"Q. To where? A. Sunrise.

"Q. And by Sunrise, you mean the Sunrise Produce Company? A. Yes.

"Q. And did he tell you where that place was? A. Yes, sir.

"Q. Did he draw you a map? A. Yes, sir.

"Q. And he told you just exactly how to get there, didn't he? A. Yes, sir.

"Q. How did he, draw you a map and tell you just exactly how to get to the place where the onions were? A. Yes, sir.

"Q. And you went there and followed his instructions and directions, got the onions and were then doing, going ahead to San Francisco to finish up with the instructions and directions he gave you, weren't you? A. Yes, sir.

* * * * * *

"Q. Now that was on the fourth day of May, 1944, and at that time you had fifteen tons of onions that belonged to the Sunrise Produce Company that you had picked up pursuant to their instructions and directions and were taking to San Francisco to deliver, pursuant to their instructions and directions, weren't you? A. Yes, sir.

* * * * * *

"[Mr. Simpson] Q. He didn't designate what route you should follow in getting to San Francisco? A. No, I told him I been going to San Francisco for several times.

* * * * * *

"Q. Mr. Kelly didn't instruct you as to who was going to drive your truck? A. No, he knew I was the driver.

"Q. He didn't tell you what speed to follow, did he? A. Oh, no.

"[Mr. Simpson] Q. You were engaged in business as a truck operator? A. That's right.

* * * * * *

"Q. Did you have a license to operate as a truck operator in May, 1944? A. Oh, yes.

* * * * * *

"Q. You were to receive a flat seventy-five cents a sack? A. That's right.

"Q. You never worked for Sunrise Produce Company on a regular salary or wage? A. Never did.

"Q. The only connections you ever had with Sunrise was this one load to San Francisco? A. Yes, sir.

* * * * * *

"[Mr. Robinson] 2. There was no written contract between you at all? A. No sir.

"Q. He just told you where to go and what to do? A. Yes.

"Q. And how to do it and you did it? A. That's right."

Defendant Hernandez testified that he went to the ranch where the onions were located about a mile outside of Coachella and his employees loaded the onions on the truck and semi-trailer. He left Coachella around 6 p. m. of May 3d, arriving at San Bernardino around 10:30 p. m., and at Los Angeles around midnight. En route he obtained gasoline and had a spare tire fixed and the brakes checked. He left Los Angeles for San Francisco around 6:30 a. m. on May 4th, and was driving north on Highway 99 toward Bakersfield when the accident happened.

Appellant Kelly in his testimony denied that he had any conversation with Hernandez prior to the accident and maintained that he had engaged defendant Gonzales to haul the load of onions involved and that Gonzales had made the arrangement with Hernandez. Defendant Gonzales testified that appellant Kelly had endeavored to get him to sign a statement that he had contracted to haul the load but that thereafter he "contacted John Hernandez and contracted this load to him," and defendant testified further that he refused to sign any such statement for Kelly "because I didn't have no contract with him, not either with Hernandez. I didn't have no contract with both of them." In view of the verdict of the jury it must be assumed that the jury believed the testimony of Hernandez and Gonzales in such respects and not the testimony of appellant Kelly.

Appellants' first contention is that the record does not contain substantial evidence that defendant Hernandez was an employee of appellants and that, therefore, the judgments against appellants, based upon the doctrine of respondeat superior, lack evidentiary support. They do not question the sufficiency of the evidence to support a finding that defendant Hernandez negligently drove the truck and semi-trailer into the rear of the automobile in which respondents were riding, but argue most earnestly that the only reasonable conclusion to be drawn from the evidence is that Hernandez was an independent contractor for whose negligence appellants are not liable. They cite Pire v. Gladding McBean & Co., 55 Cal.App.2d 108, 130 P.2d 143, 981, as being decisive upon this proposition. In that case the court said, 55 Cal. App.2d at pages 113 and 114, 130 P.2d at page 145:

"Plaintiffs contend that the trial court erred in directing a verdict in favor of defendant Gene Morrison. It is plaintiffs' theory that there was sufficient evidence to sustain a finding that defendant Hickey was an employee of defendant Morrison rather than an independent contractor.

"Defendant Morrison had been engaged in business for many years as a buyer, licensed by the department of agriculture. For several years he had also engaged in the trucking business as a 'contract hauler,' under the name of Associated Transportation Company. Defendant Hickey was also engaged in the trucking business as a 'contract hauler.' The latter owned a fleet of four trucks and was licensed to haul goods anywhere in this state.

"During the peak of the season when Morrison was purchasing fruit and contracting for the hauling of the fruit to the canneries, he frequently found that his own equipment was insufficient and that he needed to obtain the services of other contract haulers. He therefore obtained such services on a tonnage basis for specified trips or in other words on a 'load-to-load basis'. At the time of the accident, defendant Hickey was hauling peaches on such basis, under a contract with defendant Morrison, from a point near Yuba City to San Jose.

"We find no evidence in the record which would have sustained a finding that defendant Hickey was an employee of defendant Morrison. The uncontradicted evidence shows that defendant Hickey was a licensed contract hauler, operating a fleet of trucks; that he paid the cost of maintenance and repair thereof; that he received no salary or wages from defendant Morrison; that he contracted with defendant Morrison solely for the result of his work and on a specified tonnage basis; that defendant Hickey alone had the right to hire and dismiss the drivers of his trucks and to select the driver who was to operate any particular truck on any particular haul; that he was free to select the route and could leave at any time after the truck was loaded provided he arrived at the cannery at any time during the next canning day; that he was never directed what to do or how to do it after the trucks had been loaded; and that there was no reservation by defendant Morrison of any right to give such directions. All of the evidence shows that defendant Hickey's status was essentially that of an independent contractor (13 Cal.Jur.1014) and we find no evidence from which the jury might have found that defendant Morrison had the right of complete or unqualified control, the existence of which right is an essential characteristic of the employer-employee relationship. Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 159 P. 721; Billig v. Southern Pacific Co., 189 Cal. 477, 209 P. 241. The trial court therefore properly directed a verdict in favor of defendant Morrison."

Appellants also cite Stephens v. Industrial Accident Commission, 191 Cal. 261, at pages 262, 263, 215 P. 1025, in which our Supreme Court said:

"The issue involved is whether or not Westlake was an employee or an independent contractor.

"The undisputed facts in the case appear to be that Westlake, the applicant for compensation, had for many years been the owner of wagons of different capacities, and a number of horses. Stephens, one of the petitioners, was a bridge contractor, and had undertaken to construct a bridge at French Gulch. He arranged with Westlake for the latter to haul the required amount of sand from a designated place to the bridge, to be paid for upon the basis of $1.50 per cubic yard for the amount hauled. Westlake testified before the Commission that Stephens had given him 'the whole job' of hauling sand, but later told him he wanted another party to haul part of it. Westlake pursued his own course in hauling the sand. Stephens gave him no directions other than to show him the place from which it was to be taken and where delivered. Westlake was free to come and go as he pleased, using as many or as few wagons as he chose. No supervision, direction, or control of any character was exercised over his movements. He was left to do the work in his own way, by his own methods, and with his own teams. Under these facts, concerning which there is no dispute, Westlake was unquestionably an independent contractor. Freiden v. Industrial Acc. Comm., 190 Cal. 48, 210 P. 420; Pryor v. Industrial Acc. Comm., 186 Cal. 169, 198 P. 1045; Fidelity & Deposit Co. of Maryland v. Brush, 176 Cal. 448, 168 P. 890; Donlon Bros. v. Industrial Acc. Comm., 173 Cal. 250, 159 P. 715."

Appellants rely also on Flickenger v. Industrial Accident Commission, 181 Cal. 425, 184 P. 851, 19 A.L.R. 1150, and Luckie v. Diamond Coal Co., 41 Cal.App. 468, 183 P. 178. In the Flickenger case the court said, 181 Cal. at pages 431, 432, 184 P. at page 853, 19 A.L.R. 1150: "Applying the principles of the foregoing authorities to the instant case, it becomes apparent that

Reeves was an independent contractor and not an employe. As we have seen he was engaged in the 'truck business,' which is an independent occupation, and not only had his own patronage, but had taken over Ferguson's as well. He had his own truck and was doing a general hauling business. Flickenger merely told him what he desired to have hauled and Reeves loaded his truck in his own way at times suited to his own convenience; he never reported before going to work or after; no one controlled his actions at any time, except that he was expected to do a full day's work. Reeves was obliged to furnish his own appliances and pay all expenses in the operation of the truck and was not subject to any 'authoritative control' at any time. In other words, Flickenger was interested only in the result to be attained, but not in the means by which it was to be accomplished."

And in Luckie v. Diamond Coal Co. supra, 41 Cal.App.2d at pages 480, 481, 183 P. at page 183, the court said: "Foulks exercised an independent occupation. He was, to use his own words, in the transfer and delivery business. There was evidence that defendant did not exercise, or assume the right to exercise, any authoritative control over Foulks as to how his truck should haul the loads. Foulks determined what route the deliveries should take. Terry and Cunningham were his servants. Defendant exercised no control over them or the truck, so far as the driving or method of taking the loads to their destination, or the general care of the truck and its equipment, were concerned; nor did it assume to exercise any. It did not hire the driver or helper, and had no power to discharge them. The driver and his helper were paid by Foulks with his money, though it seems that at times the money for one or the other of these men was furnished by defendant; but the evidence shows that this was done as a matter of accommodation to Foulks. We think there is ample evidence to sustain a finding that Foulks represented defendant only as to the result of the work his truck did—the delivery of the loads at their respective destinations—and not as to the manner of the performance of the work. The driver of the truck and his helper, by delivering the loads, caused them to be dumped in heaps at their respective destinations. This, in its essence, was a 'result,' as much as if, being a building contractor, Foulks had orderly arranged steel, brick, and mortar so as to produce a stately structure. Upon the facts as above stated, Foulks was not the servant of defendant, but an independent contractor, for whose negligence defendant was not responsible."

Respondents in reply argue that none of the cases cited by appellants militates against respondents' position that the evidence was sufficient to support a finding that defendant Hernandez was an employee of appellants. Respondents argue that some of the salient features established by the testimony are: that the oral contract of hire is more indicative of an employment relationship than that of independent contractor; that defendant Hernandez performed services for the benefit of appellants, pursuant to the oral contract of hire; that there was a promise of stipulated compensation for such services; that appellants were the owners of the load which was being hauled by defendant Hernandez at their request; that appellants had the right to order icing of the load; that they gave directions and instructions to Hernandez; that they had the right to change the orders and directions; and the right to discharge defendant Hernandez.

[1] However, under the facts as shown by the record as hereinbefore summarized, and in the light of the foregoing decisions, we can reach no other conclusion than that defendant Hernandez was not an employee of appellants but was an independent contractor. The evidence shows, without conflict, that Hernandez was a contract hauler licensed by the Railroad Commission and operating his own trucks under the Highway Carriers Act; that he was engaged to haul 600 sacks of onions from Coachella to San Francisco for an agreed compensation of 75¢ per sack; that he was told to pick up the onions at a certain farm near Coachella; that he was not familiar with the location of this farm and appellants furnished him with a rough map showing its location; that he was told to deliver the onions to appellants' place of business in San Francisco and was also given a

rough map showing the location of said business; that he thereupon went to the said ranch, loaded the onions upon his truck and proceeded through San Bernardino and Los Angeles and onto Highway 99 toward San Francisco where the accident happened near Grapevine Station in Kern County. We are unable to find any evidence in the record from which it can be inferred reasonably that defendant Hernandez was anything other than an independent contractor.

[2-4] An independent contractor is one "who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished." Labor Code, sec. 3353. The distinction between the status of an independent contractor and that of an employee rests upon several important considerations. A material and often conclusive factor is the right of an employer to exercise complete and authoritative control of the mode and manner in which the work is performed. The existence of such right of control, and not the extent of its exercise, gives rise to the employer-employee relationship. S. A. Gerrard Co. v. Industrial Acc. Comm., 17 Cal.2d 411, 413, 414, 110 P.2d 377; Riskin v. Industrial Acc. Comm., 23 Cal.2d 248, 253, 144 P.2d 16; Industrial Indemnity Exchange v. Industrial Acc. Comm., 26 Cal.2d 130, 135, 156 P.2d 926. Strong evidentiary support of the employment relationship is "the right of the employer to end the service whenever he sees fit to do so." Press Publishing Co. v. Industrial Acc. Comm., 190 Cal. 114, 120, 210 P. 820, 823; see, also, Hillen v. Industrial Acc. Comm., 199 Cal. 577, 582, 250 P. 570; Riskin v. Industrial Acc. Comm., supra, 23 Cal. 2d 248, 253, 144 P.2d 16; California Employment Comm. v. Los Angeles, etc., News Corporation, 24 Cal.2d 421, 425, 150 P.2d 186; Yucaipa Farmers etc. Ass'n v. Industrial Acc. Comm., 55 Cal.App.2d 234, 237, 130 P.2d 146. "An employee may quit, but an independent contractor is legally obligated to complete his contract." Baugh v. Rogers, 24 Cal.2d 200, 206, 207, 148 P.2d 633, 637, 152 A.L.R. 1043; Los Flores School Dist. v. Industrial Acc. Comm., 13 Cal.App.2d 180, 183, 56 P.2d 581. There are other factors to be taken into consideration, as stated in Empire Star Mines Co. v. California Employment Commission, 28 Cal.2d 33, at page 43, 168 P.2d 686: (a) whether or not the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee. Rest., Agency, sec. 220; Cal.Ann.sec. 220.

[5] It is clear from the evidence in the instant case that defendant Hernandez "rendered service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished." It is also clear from the evidence that appellants had no right to exercise complete and authoritative control of the mode and manner in which the work was performed. Nor is there any evidence from which it may reasonably be inferred that appellants had the right to terminate the service of defendant Hernandez, once the agreement for hauling the onions was entered into, without being liable for breach of contract. We are convinced that the judgments in the instant case, based, as they are, upon the implied finding of the jury that defendant Hernandez was an employee of appellants, lacks sufficient support in the evidence.

Appellants contend further that the court erred in giving certain instructions relating to the doctrines of respondeat superior and independent contractor, and also that the court erred in refusing to give certain instructions offered by appellants bearing on these doctrines. However, in view of our conclusion that the judgments must be reversed because of the insufficiency of the evidence it is unnecessary to consider these alleged errors.

For the same reason it is unnecessary to consider the contention of appellants that the award of damages in each case was excessive as a matter of law.

In view of the foregoing, the judgments against appellants are reversed.

ADAMS, P. J., and PEEK, J., concur.

Hearing denied; CARTER, J., dissenting.

79 Cal.App.2d 380

HAGER v. GODDARD.

Civ. 7314.

District Court of Appeal, Third District, California.

April 29, 1947.

1. Master and servant 🔑80(9)

Plaintiff seeking to recover balance allegedly due under contract whereby he served as manager of defendant's shoe store had burden of proving allegation by evidence which clearly established proof of the allegations.

2. Evidence 🔑98

If existence of essential fact upon which party relies is left in doubt, party upon whom burden rests to establish that fact should suffer, and not his adversary.

3. Evidence 🔑597

Judgment cannot be based on guesses or conjectures, and a finding of fact must be an inference drawn from evidence rather than a mere speculation as to probabilities without evidence.

4. Appeal and error 🔑989

Where a judgment is attacked as being unsupported by evidence, power of the appellate court begins and ends with a determination whether there is any substantial evidence, contradicted or uncontradicted, which will support trial court's conclusion.

5. Master and servant 🔑80(10)

Evidence supported finding that plaintiff had been fully compensated under terms of his agreement to serve as manager of defendant's shoe store.

◆

Appeal from Superior Court, Lassen County; Ben V. Curler, Judge.

Action by A. A. Hager against J. W. Goddard to recover salary allegedly due plaintiff for services performed as manager of defendant's shoe store. From a judgment for defendant, the plaintiff appeals.

Affirmed.

Grover C. Julian, of Susanville, for appellant.

Arthur J. Anderson, of Susanville, for respondent.

SCHOTTKY, Justice pro tem.

Plaintiff and appellant commenced an action against defendant and respondent, alleging that plaintiff performed services as the manager of defendant's shoe store at Susanville, that defendant agreed to pay plaintiff a weekly salary, one-third of all net profits, and "a further commission on gross sales, where goods were sold on a mark up of over forty per cent," and that the balance unpaid from defendant to plaintiff is the sum of $1,498.97. Following the filing of defendant's answer denying the allegations of the complaint, the cause was tried by the court, sitting without a jury, and the court made the following findings of fact:

"First: That during the year 1943, plaintiff A. A. Hager worked for defendant J. W. Goddard, as manager of a shoe store in Susanville, California, for a period of six months.

"Second: That plaintiff was to receive for his services $40.00 per week, plus one-third of the profits of said store.

"Third: That plaintiff has received from the defendant the sum of $40.00 per week for his services, plus one-third of the profits of said store, and has been paid in full, under the terms of said contract.

"Fourth: That each and all of the allegations set forth in plaintiff's complaint herein not consistent with the findings herein set forth, are untrue."

Judgment was entered in favor of defendant in accordance with said findings, and this appeal is from said judgment.

The principal, and, in fact, the only contention of appellant is that the judgment is contrary to the evidence. We shall, therefore, give a brief summary of the evidence.

Respondent owned a shoe store at Susanville, California, and also one at Grant's Pass, Oregon, where he resided. He evidently desired to have appellant manage the Susanville store, and on March 5, 1943, appellant telegraphed respondent as follows: "Offer acceptable, would like written agreement of Forty weekly draw plus third profits for time employed as we discussed. * * * Answer Western Union collect if accepted." To which respondent replied on March 6, 1943: "Wire received. Written agreement OK. Salary OK. Look for you Thursday." Appellant thereupon went to Susanville and took charge of respondent's shoe store and continued in said employment until about the middle of September, 1943, a period of approximately six months. He drew the sum of $40 per week. Upon the termination of appellant's employment there was some discussion between appellant and respondent as to what was due appellant. Appellant introduced into evidence what he and his counsel referred to as a "tentative" or "estimated" settlement which was in respondent's handwriting and read as follows:

"Sales	$18746.27	
Est Profit Gross at 40%		7498.50
Less Expense		4925.04
		1/3/ 2573.46
		$ 857.82"

Respondent thereupon paid appellant the sum of $857.82 which together with the sum of $171.56 withholding tax made a total payment to appellant of $1,028.38. Appellant evidently claimed that he was entitled to more money, and on September 14, 1943, after the termination of said employment, respondent gave appellant a statement reading: "Will pay any increase of markup over 40% on Sales of $18,746 Jan 1944".

[1-3] Appellant argues that he was entitled to receive any and all increase of markup over 40% on individual sales and that the markup ran from 45% to 50%. Respondent argues, and the evidence introduced by him tends to show, that the average markup was from 38% to 40%. We have read the record carefully and it must be stated that it is not very clear just what the situation was, but, in our opinion, the evidence preponderates in favor of the position of respondent and the findings of the trial court. The burden of proof was upon appellant to prove the allegations of his complaint by evidence which clearly established the truth of said allegations. The following language of our Supreme Court in Reese v. Smith, 9 Cal.2d 324, at page 328, 70 P.2d 933, 935, is singularly applicable to the record in the instant case: "'In that connection it should be noted that upon the issues raised by the pleadings, the plaintiff was bound to assume the burden of proof and in the end prevail by a preponderance of the evidence. If the existence of an essential fact upon which a party relies is left in doubt or uncertainty, the party upon whom the burden rests to establish that fact should suffer, and not his adversary. Patterson v. San Francisco [& S. M. Electric] Ry. Co., 147 Cal. 178, 81 P. 531. A judgment cannot be based on guesses or conjectures. Puckhaber v. Southern Pac. Co., 132 Cal. 363, 64 P.2d 480. And, also, "A finding of fact must be an inference drawn from evidence rather than on a mere speculation as to probabilities without evidence. A majority of chances never can suffice alone to establish a proposition of fact, since the slightest real evidence would outweigh all contrary probabilities."' 23 Cor.Jur., § 1750, p. 18."

[4, 5] It is a rule too well established to require the citation of authority that when

a judgment is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the court. Bearing in mind this familiar rule, we are convinced that there is ample evidence in the record to sustain the determination of the trial court that appellant had been fully compensated under the terms of his agreement with respondent.

The judgment is affirmed.

PEEK and THOMPSON, JJ., concur.

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79 Cal.App.2d 226

PEOPLE v. EMERY et al.

Cr. 4072.

District Court of Appeal, Second District, Division 1, California.

April 18, 1947.

Hearing Denied May 15, 1947.

1. Criminal law 🔑507(6)

Woman on whom an abortion was performed was not an "accomplice" of persons performing abortion so as to require corroboration of her testimony by persons other than accomplices to warrant conviction of persons performing such abortion. Pen.Code, §§ 274, 275, 1108, 1111.

See Words and Phrases, Permanent Edition, for all other definitions of "Accomplice".

2. Criminal law 🔑511(3, 7)

Evidence corroborating an accomplice may consist of defendant's testimony and inferences therefrom as well as inferences from circumstances. Pen.Code, §§ 1108, 1111.

3. Criminal law 🔑511(1)

Corroborating evidence need not establish precise facts testified to by witness whose testimony it supports. Pen.Code, §§ 1108, 1111.

4. Abortion 🔑11

In abortion prosecution, testimony of prosecutrix as to use of instruments did not require special corroboration. Pen.Code, §§ 274, 1108.

5. Abortion 🔑11

In prosecution of physician for abortion, testimony of man with whom prosecutrix had cohabited and who brought her to defendant's office, paid for abortion and tried to keep prosecutrix quiet during operation constituted sufficient corroboration of prosecutrix' testimony to connect defendant with offense charged against him. Pen. Code, §§ 274, 1108, 1111.

6. Abortion 🔑6

Proof of pregnancy is not necessary to establish guilt of crime of abortion. Pen.Code, § 274.

7. Abortion 🔑11

In prosecution for abortion, direct testimony of prosecutrix that she was pregnant corroborated by testimony of man with whom she had cohabited and who took her to defendant's office for an abortion was sufficient to raise an inference that prosecutrix was pregnant at time. Pen.Code, § 274.

8. Abortion 🔑11

Uncontradicted evidence that prosecutrix was in good health except for pregnancy together with circumstances surrounding operation was sufficient to show that abortion was not necessary to preserve life. Pen.Code, § 274.

9. Criminal law 🔑568

Criminal intent is a question of fact which may be proved like any other fact by acts, conduct and circumstances connected with the offense.

10. Abortion 🔑11

Evidence that defendant used an instrument upon prosecutrix with intention of procuring a miscarriage was sufficient on question of criminal intent to support conviction of abortion. Pen.Code, § 274.

11. Criminal law 🔑419(4), 1169(2)

Testimony as to declaration by prosecutrix that she was pregnant was hearsay and inadmissible in prosecution for abortion, but admission of such testimony was not reversible error, where pregnancy was established by other competent evidence. Pen.Code, § 274.

◆

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Theodore Emery and Dr. Samuel D. Collins were jointly charged with crime of abortion and tried separately. From a judgment based on verdict finding him guilty as charged and from order denying his motion for a new trial, Dr. Samuel D. Collins appeals.

Judgment and order affirmed.

George Stahlman, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Henry A. Dietz, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

The defendants were jointly charged in an information filed by the district attorney of Los Angeles County with the crime of abortion and were tried separately. Defendant Collins was also charged with a prior conviction of a similar crime which he admitted.

From a judgment based on the verdict of the jury finding him guilty as charged in the information, and from an order denying his motion for a new trial, defendant Collins prosecutes this appeal, contending that the verdict is contrary to the law and the evidence, and that the evidence is insufficient to sustain the verdict and the judgment.

Two witnesses only testified at the trial, the prosecutrix and defendant Emery, the latter having theretofore been convicted of abortion. The prosecutrix testified that she met Emery in Nicaragua, where they cohabited as husband and wife; that she came to Pasadena, California, on June 6, 1944, met said Emery and continued the relationship; that she was living with him in December, 1944, which was the last time she menstruated; that in April, 1945, she was pregnant and in good health; that in said month of April, Emery took her to appellant Collins' home "so I would be operated on"; that Emery introduced himself and "Dr. Collins asked Emery who told him that he did this kind of operation, and Emery mentioned some name * * * and the Doctor asked him if he knew how much the operation cost, and he said '$200.00'. And Emery said, 'Yes, $200.-00,' and he gave him the $200.00. * * * Emery told him to be very careful when he operated on me, because other doctors had refused to do the operation." That appellant conducted them to the second floor of his home, where prosecutrix disrobed and was placed on an operating table with her legs spread and raised, whereupon appellant using certain instruments inserted in the private parts of prosecutrix a red rubber tube and "a wad of cotton", with instructions to remove the same within 24 hours; that about a week later, prosecutrix believing that "the child was dead", returned with Emery to appellant's office and was placed on an operating table with her ankles in stirrups, at which time appellant inserted a speculum and "started the operation. * * * He was using something like a pair of scissors * * * The pain was very severe and I feel like there is something cutting"; that while appellant was performing the operation, Emery put his hand over her mouth to keep her from screaming; that thereafter she observed "little pieces in the pan that looked like flesh"; that subsequently she took some medicine which Mrs. Collins had given to Emery and after a few days "the child came". In answer to the question, "Did you freely and voluntarily have that operation done?", the prosecutrix stated: "No." This witness also testified that she did not see appellant again until the day of the preliminary hearing in the instant cause, at which time he said to her: "Do you want to send me to jail? Shame on you." And she answered: "You not only killed my son, you also killed me, too."

Defendant Emery testified that he and prosecutrix cohabited as husband and wife in Nicaragua and also in California; that in April of 1945, he and prosecutrix went to appellant's office "for an operation for abortion"; that "I introduced myself, said there had been an appointment made, and he seemed to know who I was." The trial court asked the witness: "Were you informed by her that she was pregnant?", to which he answered "Yes", over the objection of appellant's counsel that the question called "for a conclusion of the witness and hearsay." Said witness further testified that he paid appellant $200.00 and that he accompanied appellant and prosecutrix to a room on the second floor containing "tables, operating table, instruments and so forth", where prosecutrix disrobed and was placed on an operating table with her legs raised in stirrups and a speculum inserted in her private parts; that his back was to appellant and he did not see what he did; that prosecutrix was making a lot of noise and he was trying to keep her quiet; that appellant told him "if she did not start flowing within a week to call him or come back over"; that sometime later he took the prosecutrix back to appellant's office, where she was placed on the operating table in the same position as before, but that he did not watch the operation because he was trying to keep the prosecutrix quiet; that prior to these two visits to appellant, the witness had taken prosecutrix to three other doctors.

It was stipulated by counsel that "If Thad Brown, a Los Angeles police officer, were called as a witness he would testify that in August, 1945, the instruments that have been introduced in evidence, the speculum and the catheter, and the instrument for holding cotton, were obtained from Dr. Collins' office in August, 1945, and that the photographs introduced in evidence were taken in Dr. Collins' office."

Appellant was prosecuted under section 274 of the Penal Code, to-wit: "Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than two nor more than five years."

It is here contended that (a) the evidence is insufficient to sustain a verdict convicting appellant of abortion; (b) the evidence fails to show that an operation was not necessary to preserve the life of prosecutrix; (c) the required criminal intent was not proved; (d) the prosecutrix was not adequately corroborated; (e) the court erred in admitting evidence over appellant's objection.

[1] As hereinbefore stated, other than the prosecutrix only one witness testified at the trial herein: the defendant Emery, an accomplice of appellant and who was also convicted of the crime of abortion; therefore, the question of corroboration becomes material, because section 1108 of the Penal Code specifically provides that defendant on trial for procuring an abortion "cannot be convicted upon the testimony of the woman upon * * * whom the offense was committed, unless she is corroborated by other evidence." However, under the rule enunciated in the cases of People v. Wilson, 25 Cal.2d 341, 153 P.2d 720, and People v. Clapp, 24 Cal.2d 835, 151 P.2d 237, prosecutrix' testimony was subject to corroboration by the evidence of defendant Emery.

In the Clapp case it was held that the person submitting to an abortion, being subject to prosecution under Penal Code Section 275, is not an accomplice of the person performing the operation within Penal Code section 1111, as amended in 1915, and her testimony, although it must be corroborated under section 1108 of the Penal Code, may be corroborated by testimony of an accomplice. The court there stated: (24 Cal.2d at page 839, 151 P.2d at page 240) "The requirement of corroboration under section 1108 of the Penal Code relates to the testimony of any woman on whom an abortion was performed, whether she voluntarily submitted to the operation or was induced to do so by force or fraud. The section is designed to protect the defendant against possible injustice where his statement and that of the woman conflict. See, 7 Wigmore, Evidence (1940), § 2061, p. 346. Since this section has no bearing on the question whether the woman is an accomplice, its requirement of corroborating testimony cannot be construed as excluding the testimony of an accomplice for the corroboration of the woman's testimony."

[2-4] In People v. Wilson, supra, it was contended that the testimony of Mrs. Anderson, the prosecutrix, and her husband, who accompanied her to the doctor's office and played an active part in the transaction, was not sufficiently corroborated. The court there held (25 Cal.2d at page 346, 153 P.2d at page 723): "Mr. and Mrs. Anderson could corroborate each other's testimony. Mrs. Anderson, as the woman on whom the crime of abortion was committed was subject to prosecution, not under section 274 of the Penal Code prescribing punishment for abortion, but only under section 275 of the Penal Code, and was therefore not an accomplice of defendant or the husband, who were subject to prosecution under section 274. People v. Clapp, supra. The wife's testimony adequately corroborated that of her husband. His testimony was also sufficient to corroborate hers even if it be assumed that the corroborating evidence required by section 1108 must, like that required by section 1111 with respect to accomplices, tend to connect the defendant with the offense. So long as corroborating evidence creates more than a suspicion of guilt, it is sufficient even though it 'be slight and, when standing itself, entitled to but little consideration.' People v. Negra, 208 Cal. 64, 69, 280 P. 354, 356; People v. Dorrance, 65 Cal. App.2d 125, 130, 150 P.2d 10; People v. Shaw, supra, 17 Cal.2d [778], at page 802, 112 P.2d 241. It may consist of testimony of the defendant and inferences therefrom as well as inferences from the circumstances surrounding the criminal transaction (People v. Negra, supra; People v. Garner, 60 Cal.App.2d 63, 140 P.2d 146; People v. Dorrance, supra; Commonwealth v. Follansbee, 155 Mass. 274, 29 N.E. 471; Commonwealth v. Fenno, 134 Mass. 217; see 1 C.J.S., Abortion, § 35, p. 338), and it need not establish the precise facts testified to by the witness whose testimony it supports. People v. Negra, supra; People v. Lee, 81 Cal.App. 49, 53, 252 P. 763; People v. Dorrance, supra. * * * Mrs. Anderson's testimony as to the use of instruments does not need special corroboration. People v. Smitherman, 58 Cal.App.2d 121, 123, 135 P.2d 674; People v. Lorraine, 28 Cal.App.2d 50, 53, 81 P.2d 1004; People v. Thompson, 16 Cal.App. 748, 750, 117 P. 1033."

[5] Applying the foregoing principles to the evidence hereinbefore recited, there was sufficient corroboration of the testimony of prosecutrix by the defendant Emery to connect appellant with the offense charged against him.

In connection with his first point, appellant submits that it is not shown by the evidence that the prosecutrix was pregnant when she called at his office.

[6] In Rinker v. State Board of Medical Examiners, 59 Cal.App.2d 222, 224, 138 P.2d 403, 404 the court, analyzed the 1935 amendment to section 274 of the Penal Code which deleted therefrom the word "pregnant" and held that: "After the adoption of the amendment proof of pregnancy was not required to establish guilt of the crime commonly called abortion. Such has been the ruling in a number of jurisdictions where the statutes are similar to the present statute in California. State v. Russell, 1916, 90 Wash. 474, 156 P. 565; People v. Axelsen, 1918, 223 N.Y. 650, 119 N.E. 708; Commonwealth v. Tibbetts, 1893, 157 Mass. 519, 32 N.E. 910."

[7] In the instant case, however, prosecutrix testified directly that she was pregnant at the time she visited appellant, and her statements in that regard were corroborated by defendant Emery who stated that he and prosecutrix went to appellant's office "for an operation for abortion"; that he paid appellant $200 for such operation but was not given a receipt therefor; that prosecutrix disrobed and was placed on an operating table by appellant, who then proceeded with the operation using various instruments, while said witness attempted to keep prosecutrix quiet. This evidence was amply sufficient to raise an inference that prosecutrix was pregnant at the time in question.

Appellant urges that the evidence fails to show that an operation was not necessary to preserve the life of the prosecutrix.

Prosecutrix testified that when she called on appellant in April of 1945 she was pregnant and that her "health was very good", and the record herein discloses no evidence controverting this fact. In People v. Knowles, 7 Cal.App.2d 398, 401, 46 P.2d 788, 789, where the same contention was made, the court stated: "Appellant next contends that the evidence does not show that the operation was not necessary to preserve life. As above stated, the deceased was in normal health except for a pregnant condition. Assuming that the burden was on the prosecution to show that the operation was not necessary to preserve life, the proof upon this point was amply sufficient to show that the operation was resorted to for no such benign purpose. People v. Brewer, 19 Cal.App. 742, 127 P. 808."

[8] In passing upon the same question, the court in People v. Brewer, supra, 19 Cal. App. at page 746, 127 P. at page 810, stated: "There is no merit in this contention. It is not at all clear that the proof of such matter devolves upon the people. Underhill Crim.Ev. 347; People v. Balkwell, 143 Cal. 259, 76 P. 1017. But conceding, for the purpose of this opinion only, that the fact must be established by the people, the proof upon this point was ample. The evidence shows that Mrs. Enrick was 39 years of age and was the mother of three children; that she went to the residence of the defendant in Berkeley from her residence in East Oakland, and at that time was apparently in perfect health except for the usual symptoms of pregnancy. There being not a word in the evidence to the contrary, this was ample to support the negative proposition that the operation was not necessary to preserve life. It is a matter of common knowledge that it is the rare exception that such an operation is necessary to preserve life, and all the circumstances surrounding and attending the operation performed in this case show without doubt that it was resorted to for no such benign purpose." Likewise here, the evidence is sufficient to support the negative proposition that the operation was not necessary to preserve the life of prosecutrix.

[9] Appellant contends that the required criminal intent was not proved. Intent is a question of fact which may be proved like any other fact "by acts, conduct, and circumstances connected with the offense." People v. Fewkes, 214 Cal. 142, 148, 4 P.2d 538, 540. See, also, People v. Richardson, 161 Cal. 552, 120 P. 20; People v. Browning, 132 Cal.App. 136, 22 P.2d 784.

[10] The facts established at the trial herein amply support the implied finding of the jury that appellant used an instrument upon prosecutrix with the intention of procuring a miscarriage. Therefore, the judgment is sufficiently supported by the evidence.

[11] Appellant's final contention is that the trial court erred in the admission of certain testimony given by defendant Emery of a declaration by the prosecutrix that she was pregnant. The basis for this contention is that pregnancy is an essential element to be proven by the prosecution and that the evidence objected to was hearsay and prejudicial in assisting to establish pregnancy. While the statement was doubtless hearsay and inadmissible as such, it was not of such a prejudicial character as to warrant a reversal, for the reason that the pregnant condition of prosecutrix was established by other competent evidence.

Since the evidence sustains the jury's verdict of appellant's guilt beyond a reasonable doubt and no prejudicial error appears in the record, the judgment must be sustained.

The judgment and order appealed from are, and each of them is, affirmed.

DORAN and WHITE, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

79 Cal.App.2d 507

MITCHELL v. LOCURTO.

Civ. 13345.

District Court of Appeal, First District, Division 1, California.

May 7, 1947.

Hearing Denied June 30, 1947.

1. Frauds, statute of 🔑143(1)

The invalidity of agreement for purchase of realty because agent's authority to purchase was not in writing may not be raised if principal does not object. Civ. Code § 1624, subd. 4, § 2309.

2. Corporations 🔑432(12)

In action to recover real estate broker's commission, evidence that person who made tender of purchase price to vendor was a member of a firm on monthly retainer with corporate purchaser and that such person received an express oral authorization from corporation's representative to act for the corporation in purchase of vendor's property sustained finding that corporation's representative "duly appointed and authorized" the agent to act for corporation.

3. Brokers 🔑49(3)

A vendor could not deny liability for broker's commission because purchaser procured by broker acted as undisclosed principal, where vendor never stated that he would not sell to undisclosed principal.

4. Brokers 🔑86(5)

Evidence that broker produced a person who acted as agent for undisclosed principal who offered to purchase the property according to terms of broker's authorization sustained finding that broker procured the undisclosed principal "as a purchaser ready, willing and able to purchase".

5. Fraud 🔑16

The word "conceal" pertains to affirmative action likely to prevent or intended to prevent knowledge of a fact and refers to some advantage to concealing party or disadvantage to some interested party from whom fact is withheld.

See Words and Phrases, Permanent Edition, for all other definitions of "Conceal".

6. Brokers 🔑65(1)

Where broker failed to disclose identity of undisclosed principal who acted as purchaser of the property and vendor failed to ask who undisclosed principal was, trial court properly found that broker was not guilty of concealment so as to preclude recovery of commission.

7. Brokers 🔑61(3)

Where undisclosed principal's agent was brought to vendor by broker and agent told vendor that agent was there to purchase the property according to terms of broker's authorization and agent tendered amount of deposit required by such authorization, but vendor refused to sell because of refusal of his wife to consent to such sale, vendor was liable to broker for his commission.

◆

Appeal from Superior Court, Santa Clara County; Wm. F. James, Judge.

Action by Thomas Leon Mitchell, doing business as Thos. L. Mitchell & Company against Joe Locurto to recover real estate broker's commission. From a judgment for plaintiff, defendant appeals.

Affirmed.

O. H. Speciale, of San Jose, for appellant.

Rea, Free, Jacka & Frasse, of San Jose, for respondent.

WARD, Justice.

This is an appeal from a judgment in favor of plaintiff, doing business as Thos. L. Mitchell & Company, in the sum of $2,250 as a real estate broker's commission.

Plaintiff Mitchell, a licensed real estate broker, was employed by defendant December 3, 1945 in San Jose, California, under an authorization of sale providing in part: "In consideration of the services of Thos. L. Mitchell & Co. hereinafter called the agent, I hereby list with said agent, exclusively and irrevocably, for a period of *15* days from the date hereof, the following described property, situate in the County of Santa Clara, State of California, to-wit: Property known as 58–60 N. First Street, San Jose, Calif. and I hereby grant said agent the exclusive and irrevocable right to sell the same within said time for Forty-Seven Thousand Two Hundred Fifty and No/100 * * * ($47,250.00) Dollars and to accept a deposit thereon. To be payable as follows: $13,000.00 on or before December 29, 1945; $8750.00 on January 4, 1946; $6500.00 on the fourth day of January, 1947; $6500.00 on the fourth day of January of each year thereafter until the whole of the purchase price has been paid. Interest on deferred payments at the rate of 3% per annum payable annually. I hereby agree to pay said agent as commission $2250.00. * * * That the evidence of title is to be in the form of a Policy of Title Insurance, issued through California Pacific Title Insurance Company, to be furnished and paid for by the Seller." The authorization was duly signed by the respective parties.

In the complaint two causes of action were alleged, both of which were based on the aforesaid authorization. Paragraph IV of the first cause of action alleged: "That plaintiff negotiated a sale of said land, and within the time specified in said authorization to sell obtained a purchaser ready, willing and able to purchase said property upon the terms and conditions set forth in said authorization to sell, as is evidenced by a letter executed by the California Pacific Title Insurance Company * * *" The letter referred to reads as follows: "California Pacific Title Insurance Company (Letterhead) Thos. L. Mitchell & Co. 97 East Santa Clara Street San Jose, California In Re: S.C. No. 79449 Gentlemen: You advised me the other day that you had an exclusive listing on the Locurto property adjoining our property on the South, for the sum of $47,250.00, $13,000 payable on or before December 29, 1945 and balance to be paid in accordance with the terms therein set forth. We are enclosing herewith the sum of $13,000.00 and request that you purchase for our account in the name of E. M. Evans, the property above referred to. As soon as the Deed is deposited in Escrow, this Company or its nominee will execute a Note and Deed of Trust in Accordance with the terms set forth in the listing. Very truly yours, /s/ Geo. B. Myren Geo. B. Myren Manager."

Paragraph IV further alleged, "that on the 18th day of December, 1945, said corporation delivered the sum of $13,000.00 cash to I. A. Frasse, one of its attorneys, and [in]structed him on said date to tender said sum of money to defendant as a part payment of the purchase price of the real property * * * and to inform defendant that said property had been sold in accordance with the terms of said written authorization * * * and that upon defendant placing in escrow a Deed to said property conveying title to E. M. Evans, a note and Deed of Trust for the balance of the purchase price, in accordance with the terms of said written authorization, would be placed in escrow by the purchaser; that pursuant to said authorization and instructions of said California Pacific Title Insurance Company and on said 18th day of December, 1945, plaintiff and said I. A. Frasse, who was then and there acting as attorney, agent, and representative for said California Pacific Title Insurance Company, a corporation, in the City of San Jose, County of Santa Clara, State of California, went to defendant; that said I. A. Frasse thereupon at said time and place read and handed to defendant a letter signed by plaintiff, a true and correct copy of which is attached hereto * * *; that said I. A. Frasse at said time and place had in his possession the said sum of $13,000.00 cash, which he thereupon tendered to defendant, but defendant refused to accept said sum of money, or any part thereof, and told plaintiff and said I. A. Frasse that he, the said defendant, could not get his wife to agree to sell the property, and that she would not join in a Deed to the property, and for that reason he was not going to sell and would not accept any part of the money."

The second cause of action alleges the same facts in the form of a count for services rendered. In each count $2,250 was fixed as the reasonable or agreed value of the services rendered.

The signing of the authorization was admitted but the allegation of the production of a ready, able and willing purchaser was denied in the answer, which further alleged "That plaintiff has concealed, and did not at any time disclose to defendant that California Pacific Title Insurance Company was interested in the purchase of defendant's real property. * * * That plaintiff did not bring California Pacific Title Insurance Company and defendant together. That California Pacific Title Insurance Company did not enter into a written contract to purchase, and did not make any offer to defendant to do so."

The evidence introduced by plaintiff established that December 18, 1945, was the last day of the authorization to sell. I. A. Frasse, a member of a firm having a monthly retainer with the California Pacific Title Insurance Company, testified that on that date he was told by George Myren, the local manager of California Pacific Title Insurance Company, "that they wished to buy this property and that the authorization of the agent called for a down-payment of $13,000.00, and he said that he wanted me to go over and make this payment to Mr. Locurto, and he then counted out to me $13,000.00 in United States currency in Mr. Mitchell's presence, and Mr. Mitchell and I recounted it to be sure it was correct, and placed it in an envelope; and Mr. Myren then told me to go with Mr. Mitchell to Mr. Locurto * * * and make him this payment for the purchase of this property and tell him to place his deed in escrow, and the note and deed of trust for the balance would be placed in escrow * * * Mr. Myren said they wished to take title to the property in the name of Evans rather than California Pacific Title Insurance Company." Myren testified that the reason for using the name of Evans was that "there was a little doubt in my mind whether the company could execute a note and trust deed * * * being the insurance company—without a special resolution."

Frasse further testified that he told defendant he "was there to accept the offer" and read him a letter, a portion of which provided: "In accordance with the written authorization to sell given by you on December 3, 1945, to the undersigned, Thos. L. Mitchell & Co., we have sold the property known as 58-60 North First Street, San Jose, California, to E. M. Evans, for $47,250.00, $13,000.00 in cash of which is handed you herewith." He then produced the envelope containing $13,000.00 and "said, 'Here's the down-payment on the property.' I said 'If you will put the deed in escrow the note and deed of trust will be placed there,' and Mr. Locurto then said, 'It is no use'—or words to that effect—'my wife won't let me go through with the sale, so I am not going through with it'; and I said, 'Well, here's the money; are you refusing to accept it?' and he said 'Yes'; and then I said to Mr. Locurto, 'Well, you realize that you have signed a binding agreement to sell this property, and that we are accepting it and you are bound thereby, and legal consequences may come from this action', and he said, 'Well, I will have to see my attorney about that.' I said, 'Then you are refusing to go through with this sale and refusing to accept this money?' He said, 'I am,—Mr. Frasse' * * *"

Frasse's testimony that he did not say that he was attorney for the California Pacific Title Insurance Company agreed with defendant's testimony. As to whether or not Frasse read plaintiff's letter to defendant or not, defendant testified "I don't think he did." Said letter was left "on top of a box in the North San Pedro Street house." Defendant's version of the conversation of December 18th is as follows: "Mr. Mitchell introduced him to me—he says 'This is Mr. Frasse.' I says, 'What can I do for you, gentlemen?' He says, 'We have come here to close the deal.' I said, 'I am not just ready to close the deal at the present time', so he says, 'Well, here's the money here.' 'Well,' I says, 'I can't close the deal without consulting my wife.' 'Well,' he says, 'you don't need to if that's the way you feel.' 'Well then' I said, 'if you don't give me no time to consult my wife, let me get my attorney', and he says, 'Who is your attorney?' I says, 'I have several of them', and I says, 'I don't know which one to pick.'" The money was not counted. Defendant testified that he was afraid to accept the money on North San Pedro Street as "It is a tough neighborhood." Frasse testified that it was still within banking hours when the tender was made to defendant "if he had wished to go to the bank and he could have accompanied us."

[1] Before considering the findings which are attacked as not supported by the evidence, consideration must be given to the court's finding "that at all of the times mentioned in said second amended complaint I. A. Frasse was the *duly appointed and authorized agent,* attorney and representative of California Pacific Title Insurance Company." (Italics added.) Civil Code section 2309 requires that where an agent is given authority to enter into a contract required by law to be in writing, such authority can only be given by an instrument in writing. An agreement for the sale of real property is required by Civil Code section 1624 to be in writing. Furthermore, subdivision 4 thereof specifically provides that "such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent is in writing, subscribed by the party sought to be charged." Such invalidity, however, may not be raised if the principal, in this case California Pacific Title Insurance Company, does not object. In Wood Estate Co. v. Chanslor, 209 Cal. 241, 250, 251, 286 P. 1001, 1004, it is held: "Appellants' objection is that the authority of the agent must be in writing under our statute of frauds. Just how a third party to such a contract can attack it, when the two principals do not object, is not made to appear. It would seem to be the rule that third parties cannot avail themselves of the defense of the statute if the two principals acquiesce. 12 Cal.Jur. 925; 25 R.C.L. 736." See, also, Nelson v. Colton, 36 Cal.App. 69, 171 P. 701; Scott v. Glenn, 87 Cal. 221, 25 P. 405.

[2] Since the record indicates not only that Frasse is a member of a firm on a monthly retainer with the California Pacific Title Insurance Company, but that he received an express oral authorization from Myren to act for the California Pacific Title Insurance Company in the purchase of defendant's property, the finding that the latter "duly appointed and authorized" Frasse to act as their agent is suported by the evidence. Similarly, findings III, V and VII challenged by defendant, are supported by the evidence.

[3, 4] Finding III is to the effect that "plaintiff procured the California Pacific Title Insurance Company, a corporation, as a purchaser ready, willing and able to purchase the real property * * *" Having "duly appointed and authorized" Frasse as their agent, California Pacific Title Insurance Company played the role of an undisclosed principal in the transaction with defendant. Restatement of the Law, Agency, sec. 186; and see 1 Cal.Jur., secs. 131–136, pp. 854–861. Defendant does not contend that he ever stated that he would not sell to an undisclosed principal or to California Pacific Title Insurance Company; hence there is nothing to indicate that defendant could not have held California Pacific Title Insurance Company had the contract been completed. Restatement of the Law, Agency, secs. 188, 189, 193; see, also, Coulter v. Howard, 203 Cal. 17, 262 P. 751. Evidence that Frasse was produced by plaintiff before defendant and there offered to purchase the property according to the terms of plaintiff's authorization suffices to sustain the finding that plaintiff procured the California Pacific Title Insurance Company "as a purchaser ready, willing and able to purchase."

By its fifth finding, the trial court found "that it is not true that the plaintiff concealed that the California Pacific Title Insurance Company was interested in the purchase of defendant's real property; that it is true that plaintiff did not at any time disclose to the defendant that California Pacific Title Insurance Company was interested in the purchase of defendant's real property; that defendant at no time asked plaintiff for the name of the prospective purchaser, and defendant at no time asked the plaintiff if the California Pacific Title Insurance Company was interested in the purchase of defendant's real property."

[5, 6] The word "conceal" pertains to affirmative action likely to prevent or intended to prevent knowledge of a fact. Restatement of the Law, Contracts, sec. 471, p. 891 et seq.; Restatement of the Law, Restitution, sec. 8, p. 32 et seq.; 8 Words and Phrases, Perm.Ed., 328–341. It has reference to some advantage to the concealing party or a disadvantage to some in-

terested party from whom the fact is withheld. Here there is merely a failure to disclose and a failure to ask. The trial court correctly found that plaintiff was guilty of no concealment.

The case does not involve a sale by a broker to himself or to one of his employees, as it is conceded that E. M. Evans, plaintiff's bookkeeper, was merely a dummy. Hence the rule illustrated by Langford v. Thomas, 200 Cal. 192, 252 P. 602; Calmon v. Sarraille, 142 Cal. 638, 76 P. 486; Burke v. Bours, 92 Cal. 108, 28 P. 57 and Firestone v. O'Brien, 97 Cal.App. 43, 274 P. 1006, that a broker in such a situation must make a complete disclosure of all the surrounding facts to his principal is not in point. Here the purchaser is Frasse's undisclosed principal, California Pacific Title Insurance Company.

To support his contention that plaintiff is not entitled to recover a commission as he did not disclose the name of the proposed buyer, defendant cites Barrios v. Foley, 83 Cal.App. 105, 256 P. 573; Jolton v. Minster, Graf & Co., 53 Cal.App.2d 516, 128 P.2d 101 and Baird v. Madsen, 57 Cal. App.2d 465, 134 P.2d 885. Language as to good faith found in the Barrios opinion is not relevant since that case turned on the fact that the proposed buyer was financially unable to buy; furthermore, the memorandum of sale upon which the broker relied provided that the goods must meet the buyer's approval. The basis of the Jolton case was that the agents actually found a purchaser, but delayed consummating the sale until the principal's option to purchase the property had expired, causing the principal to lose the profit he would have made had the sale been concluded during the lifetime of the option. In the Baird case the agent failed to produce the required buyer within the lifetime of his exclusive agency and failed to plead an extension of said agency; moreover, the agent dismissed the proposed purchaser and practiced trickery.

[7] Finding VII is the crux of the case. It reads: "That it is true that California Pacific Title Insurance Company did not enter into a written contract of purchase and did not make any offer to defendant to do so, but said California Pacific Title Insurance Company at the time and place of meeting with the defendant on the 18th day of December, 1945, was willing, ready and able to enter into such a written contract of purchase if defendant had so desired it to do so, and at said time and place said California Pacific Title Insurance Company orally offered to defendant to perform all of the terms and conditions of said written authorization of sale, tendered defendant $13,000 in cash, and offered to place in escrow a note and deed of trust for the balance of the purchase price * * *; that at said time and place defendant did not wish said California Pacific Title Insurance Company to enter into a written contract of purchase, and defendant told said California Pacific Title Insurance Company that he would not sell the property, and he refused to accept said tender of $13,000.00 or any part thereof." As in the case of finding III, this finding is correct in that California Pacific Title Insurance Company played the role of an undisclosed principal in the transaction with defendant.

As to the fact that California Pacific Title Insurance Company did not enter into a written contract of purchase, the leading case of Gunn v. Bank of California, 99 Cal. 349, 353, 33 P. 1105, 1107, states that there are alternative ways by which a broker may earn his commission: "The contract of the broker is to negotiate a sale; that is, to procure a valid contract to purchase, which can be enforced by the vendor if his title is perfect, or if he does not procure such contract, to bring the vendor and the proposed purchaser together, that the vendor may secure such a contract, unless he is willing to trust to an oral agreement." Accord, Twogood v. Monnette, 191 Cal. 103, 215 P. 542; Ramsdell v. Krehmke, 95 Cal. App. 195, 272 P. 333; Williams v. Freeman, 35 Cal.App.2d 104, 94 P.2d 817.

When Frasse as agent of California Pacific Title Insurance Company was brought by plaintiff to defendant, plaintiff brought the "vendor and the proposed purchaser together" in compliance with the rule of the Gunn case. This very fact serves to distinguish the present case from Mattingly v. Pennie, 105 Cal. 514, 39 P. 200, 45 Am.St. Rep. 87; Massie v. Chatom, 163 Cal. 772, 127 P. 56; Sprague v. Dolan, 70 Cal.App.

330, 233 P. 84 and Metcalf v. Guercio, 74 Cal.App. 637, 241 P. 576. This is not a case where all that is involved is a letter from the proposed purchaser, California Pacific Title Insurance Company, asking the agent who seeks his commission, plaintiff herein, to purchase the seller's property.

Here an undisclosed principal's duly authorized agent was brought to the seller. Frasse told defendant he was there to purchase the property according to the terms of the plaintiff's authorization. Hence Mott v. Minor, 11 Cal.App. 774, 106 P. 244, is distinguishable, for there the complaint alleged that one Friant "was then and there able, ready and willing to purchase" whereas the evidence showed that he was acting for an undisclosed principal.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

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79 Cal.App.2d 539

KHATCHADOURIAN v. DAVIDIAN.

Civ. 3561.

District Court of Appeal, Fourth District, California.

May 7, 1947.

1. Crops ⚷2

A party in possession of land under a claim of right is entitled to crops produced on land until such time as a conveyance has been made to other party or a judgment entered in his favor, and the other party, if successful in his efforts to obtain possession of property, is then limited to a right of action for value of use and occupation of land during such time as possession had erroneously been withheld from him.

2. Specific performance ⚷109

Where only issue involved, in action by purchaser for specific performance of contract for sale of land, was right of purchaser to receive deed on paying certain money and giving certain security and vendor was contesting that right and holding land under claim of right, purchaser was not entitled to appointment of receiver to take possession of harvested and unharvested crops before entry of judgment. Code Civ.Proc. § 564, subd. 3.

◆

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action by George Khatchadourian against Rachel T. Davidian for specific performance of a contract for the sale of real property. From an ex parte order appointing a receiver, the defendant appeals.

Reversed.

Van E. McCarty, of Kingsburg, and David E. Peckinpah and L. N. Barber, both of Fresno, for appellant.

Lawrence W. Young and Harry Sarkisian, both of Fresno, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an ex parte order appointing a receiver.

The action was brought by the purchaser for the specific performance of a contract for the sale of real property. The contract, dated January 3, 1946, is in the form of escrow instructions and calls for the payment of $13,000 in cash by the purchaser and the giving of a trust deed securing a note for $10,000 upon delivery of a deed, together with a policy of title insurance.

The complaint, filed on January 28, 1946, alleges ownership of the property in the defendant; the making of the above mentioned contract; that the agreed purchase price was the fair and reasonable value of the property; that the plaintiff was, and is, able, ready and willing to perform; and that the defendant refuses to perform. The prayer is that she be compelled to specifically perform the terms of the agreement and in the event she refuses so to do that a commissioner be appointed for that purpose. The answer denied the allegation of the complaint as to the value of the property and set up, as a separate defense, that the defendant had been induced to enter into the contract through misrepresentations made by the plaintiff with respect to the value of the property.

After trial, but before judgment, and on August 21, 1946, plaintiff filed a petition for the appointment of a receiver which led to the order here appealed from, which was entered on the same day. In this petition it is alleged that this action for specific performance had been tried; that a minute order had been entered on August 16, 1946, ordering judgment for the plaintiff; that the findings of fact, conclusions of law and formal judgment were in course of preparation; that the defendant was in possession of the property; that she had sold certain crops on the vines and was in the process of harvesting or would shortly proceed to harvest the same; that she had harvested certain peaches and was then drying the same away from the property in question; and that in order to protect the plaintiff and to carry into effect the judgment it would be necessary to appoint a receiver to take possession of the property, to harvest all crops thereon, and to recover possession of the peaches which had been removed from the real property in question, and which were being dried elsewhere. The order appointing the receiver directed the receiver to immediately take possession of the real property, to harvest and sell all crops growing thereon, and to take immediate possession of the peaches then being dried and which had been removed from the premises in question.

Findings of fact in favor of the plaintiff were filed on September 11, 1946. These findings did not mention the crops grown or growing on the land. In the conclusions of law, it was found that the defendant should account to the plaintiff for the rents, issues and profits of the land from January 3, 1946, and that she should be restrained from removing any crops growing or grown thereon from that date. Judgment was entered on the same day, providing that the defendant convey the property to the plaintiff upon his paying $13,000, furnishing a trust deed securing a note for $10,000, as provided for in the contract; and further providing that in the event the plaintiff failed to pay this amount and to deliver this note and trust deed his right to specific performance should be forever barred and the agreement should be cancelled.

On September 13, 1946, the defendant appealed from the order of August 21, 1946, appointing a receiver.

[1, 2] There is nothing in the allegations in the complaint, or in the petition for appointment of a receiver, which justifies or supports the appointment of a receiver. The only issue involved in the action was the right of the plaintiff to receive a deed to the land upon his paying certain money and giving certain security. The defendant was contesting that right in court and was certainly holding the property under a claim of right until that issue should be decided. It is well settled in this state that the party in possession, under such circumstances, is entitled to the crops produced on the land in controversy until such time as a conveyance has been made or a judgment entered, and that the other party, if successful in his efforts to obtain possession of the property, would then be limited to a right of action for the value of the use and occupation of the property during such time as such possession had erroneously been withheld from him.

The principles set forth in California Delta Farms, Inc. v. Chinese American Farms, 204 Cal. 524, 269 P. 443, 445, are controlling here. In that case the court said:

"This right of action, however, falls far short of title to or interest in the usufruct. In fact, it negatives any claim of the true owner to it. As against such adverse claimant, the owner is not entitled to sue in trover or detinue for the crop as a chattel. Johnston v. Fish, supra, [105 Cal. 420, 38 P. 979, 45 Am.St.Rep. 53]; Groome v. Almstead, supra, [101 Cal. 425, 35 P. 1021]; Phillips v. Keysaw, 7 Okl. 674, 56 P. 695. In Page v. Fowler, 39 Cal. 412, 416–417, 2 Am.Rep. 462, it is said: 'The very fact that he may recover the rents and profits of the land, shows that he cannot recover the crops; for, as was well said in the case of Stockwell v. Phelps, 34 N.Y. 363, 90 Am. Dec. 710, the owner of the land, in such cases, does not recover the value of the crops raised and harvested, but the value of the use and occupation of the land; and the annual crops of grain and grass, which contain both the value of the use of the land and the labor of the farmer, do not, under such circumstances, belong to the owner of the land. It would be an oppressive rule to require everyone who, after years of litigation perhaps, may be found to have a bad title, to pay the gross value of all the crops he has raised; and it would be an inconvenience to the public if the bad title of the farmer to his land attached to the crops he offered for sale, and rendered it necessary to have an abstract of his title to make it safe to purchase his produce.'"

The court then said: "The simple fact is that such a crop in the hands of a bona fide adverse claimant is not the property of the true owner, but is the property of such claimant; and this is true, whether the crop be severed or growing. Grossman v. Yip Wing, 62 Cal.App. 121, 216 P. 634." It was then further pointed out that under such circumstances even in an action in ejectment the appointment of a receiver could not be sustained, and that the court was in no position to administer or distribute the fund arising from a receivership, since the plaintiff had no interest therein.

The cases cited by the plaintiff are not in point, since he is, in effect, relying on the contention that the defendant was a trespasser and not acting under a claim of right. The plaintiff might be entitled to the crops growing on the land when he paid and secured the purchase price and received a deed, or possibly when judgment was entered, but he was not entitled to possession of the crops which had been previously harvested (Rector v. Lewis, 46 Cal. App. 168, 188 P. 1018), and he was not entitled to the appointment of a receiver to take possession of such harvested and unharvested crops at the time the order here appealed from was made. Title to the crops was not in issue in this action, and subd. 3 of section 564 of the Code of Civil Procedure was not applicable, among other reasons, because no judgment had then been entered.

The order appealed from is reversed.

MARKS and GRIFFIN, JJ., concur.

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79 Cal.App.2d 494

JENSEN v. FRIEDMAN.

No. 13334.

District Court of Appeal, First District, Division 1, California.

May 7, 1947.

Hearing Denied June 30, 1947.

1. Mortgages ⚿32(2, 6)

Whether a deed absolute in form is a mortgage is a question of intention to be inferred from all the circumstances of the transaction in which deed was executed, taken in connection with conduct of the parties after its execution.

2. Mortgages ⚿37(2)

A deed absolute on its face may in equity cases be shown by parol evidence to have been intended as security for a debt or obligation.

3. Assignments for benefit of creditors ⚿357
Mortgages ⚿138

An "assignment for benefit of creditors" involves a complete divestiture of grantor's title to property conveyed, he having no right to redeem by paying the debts, and having merely a resulting trust as to any surplus which may possibly remain after debts are paid, while a conveyance in trust made merely for purpose of security does not divest grantor or mortgagor of right of an owner, he having still a right to redeem by paying the indebtedness.

See Words and Phrases, Permanent Edition, for all other definitions of "Assignment for Benefit of Creditors".

4. Mortgages ⚿32(5)

Fact that relationship of debtor and creditor continued to exist between defendant and plaintiff after execution of deed absolute on its face by defendant to plaintiff was proof that deed was intended to be a mortgage.

5. Mortgages ⚿21

Provision in instrument granting power to sell does not prevent instrument from being a mortgage.

6. Mortgages ⚿21

Fact that instrument sought to be declared a mortgage gave plaintiff right to sell did not take instrument out of category of only as a "security", within statute providing that every transfer of an interest in property, other than in trust, made only as a security for performance of another act is to be deemed a mortgage. Civ.Code, § 2924.

See Words and Phrases, Permanent Edition, for all other definitions of "Security".

7. Mortgages 🔑8

The fact that by agreement grantee was given power to sell lands and apply proceeds to debt did not establish that the transaction amounted to a declaration of trust instead of a mortgage. Civ.Code, § 2924.

8. Mortgages 🔑15

A mortgage can be given as security for a debt already due and it can be given for a note payable at a definite time in the future and provide for foreclosure at mortgagee's will before due date of note. Civ. Code, § 2924.

9. Mortgages 🔑38(2)

To convert a deed absolute into a mortgage, evidence should be so clear as to leave no substantial doubt that real intention of parties was to execute a mortgage. Civ.Code, § 2924.

10. Mortgages 🔑608½

Party seeking to have deed absolute on its face declared a mortgage was not required to allege or prove that value of property at time deed was executed was in excess of admitted indebtedness.

11. Mortgages 🔑38(5)

Although question of possession accompanying delivery of a deed is one of circumstances usually considered in determining whether transaction is a mortgage or otherwise, it is not a conclusive circumstance.

12. Appeal and error 🔑996

Trial court's inference that instrument conveying real property to plaintiff constituted a mortgage rather than a trust, being a reasonable one, was required to be accepted. Civ.Code, § 2924.

13. Mortgages 🔑38(1)

Evidence supported finding that instrument conveying real property to plaintiff constituted a mortgage given to secure note executed by plaintiff, so that action for unpaid balance of note after the property had been sold by plaintiff under power of sale contained in the instrument was barred by statute as it existed at time instrument was executed, prohibiting a deficiency judgment upon a note secured by deed of trust or mortgage upon real property in any case in which real property has been sold under power of sale contained in such mortgage or deed of trust. Code Civ. Proc. § 580c, Civ.Code, § 2924.

14. Mortgages 🔑38(1), 375

Evidence supported finding that a mortgage with power of sale had been given as security for note sued upon and that action to recover unpaid balance on note was not brought within three months after sale under the mortgage so that action was barred by statute. Code Civ.Proc. § 580a; Civ.Code, § 2924.

◆

Appeal from Superior Court, City and County of San Francisco; Samuel F. Finley, Judge.

Action by E. Jensen against Beatrice Friedman to recover balance allegedly due on a note. From a judgment for defendant, the plaintiff appeals.

Affirmed.

Mueller & Westover, of San Francisco, for appellant.

Sullivan, Roche, Johnson & Farraher, of San Francisco, for respondent.

BRAY, Justice.

Appeal from judgment for defendant holding that a deed absolute in form was in fact an equitable mortgage.

The defendant and her late husband, Aaron Friedman, who died November 29, 1940, were indebted to Louis Stoff (plaintiff's assignor for collection, who for convenience will be hereafter referred to as plaintiff) in the sum of $14,250. While so indebted, defendant and her husband executed the following documents:

(1) Promissory note to plaintiff dated May 14, 1940, in the sum of $10,750 payable in monthly installments with interest, all unpaid balance to become due May 14, 1943.

(2) Promissory note to plaintiff, dated May 15, 1940, in the sum of $3500 due two years from date.

(3) An assignment to plaintiff of the rents of certain real property herein referred to as the Oak Street property, to secure the payment of the above $3500 note.

(4) A first deed of trust to Bank of America of the Oak Street property and a chattel mortgage of the furniture, to secure a promissory note made by defendant and her husband to the bank in the sum of $15,000.

(5) A second deed of trust of the Oak Street property to trustees for plaintiff to secure the payment of the $3500 note above mentioned.

(6) A deed of the Oak Street property subject to the above mentioned liens to the City Title Insurance Company to hold the property for plaintiff, to be conveyed to him or his nominee, upon his request.

(7) An agreement between plaintiff and his wife (for convenience all documents will be treated as if made by or to plaintiff alone), and defendant and her husband, which after reciting the execution of the deed last mentioned and the fact that it conveyed the real property to the City Title Insurance Company under a "holding agreement," "for the account of" plaintiff, stated: "Whereas, it is the intention of the parties hereto that said property be held for the account of the said first parties until such time as said first parties elect to sell said property. Now, therefore, in consideration of the premises, the parties hereto agree as follows: That the first parties may sell or cause to be sold said real property whenever they may elect so to do; that upon the sale of said real property any moneys derived from said sale over and above the unpaid balance of the encumbrances now on said property will be applied towards the payment of principal and interest of that certain unsecured promissory note dated May 14, 1940, made by Aaron Friedman and Beatrice Friedman, his wife, to Louis D. Stoff in the amount of $10,750."

At plaintiff's request and pursuant to said agreement, the City Title Insurance Company on December 30, 1940, deeded the property to plaintiff. On February 17, 1943, pursuant to the power of sale in said agreement, plaintiff sold the property for $22,500. Out of this sum he paid $15,000 to the Bank of America in payment of the note and deed of trust hereinbefore mentioned under (4), and $3500 to the payment of the note hereinbefore mentioned under (2), and the deed of trust mentioned under (5). The balance of $4000 he paid himself on the $10,750 note hereinbefore mentioned under (1), leaving a balance due on that note of $6750. Seven months after the sale plaintiff (through his assignee) brought this action to recover the balance.

Defendant, by her amended answer, set up the defense that the deed to the City Title Insurance Company and the power of sale in the agreement were given as security for the payment of this promissory note and that, therefore, the action is barred by the provisions of section 580a and 580c of the Code of Civil Procedure, as they existed at the time of the execution of the various instruments (1) to (7) hereinbefore mentioned.

At that time, section 580a provided that whenever a money judgment was sought for the balance due upon an obligation for the payment of which a deed of trust or mortgage with power of sale on real property or any interest therein was given as security, such action must be brought within three months of the time of sale under such deed of trust or mortgage. Section 580c provided: "No judgment shall be rendered for any deficiency upon a note secured by a deed of trust or mortgage upon real property hereafter executed in any case in which the real property has been sold by the mortgagor [mortgagee] or trustee under power of sale contained in such mortgage or deed of trust."

The trial court held that the deed was intended as a mortgage with power to sell, given as security for the payment of the

$10,750 note, and hence this action to recover the deficiency is barred by the code provisions above mentioned.

The main question in the case is, was the conveyance of the real property, although absolute in form, a mortgage?

Section 2924 of the Civil Code provides: "Every transfer of an interest in property, *other than in trust,* made *only* as a security for the performance of another act, is to be deemed a mortgage * * *". (Emphasis added.)

Appellant contends that the conveyance is not a mortgage within the meaning of that section because, first, it comes within the exception "other than in trust" because it is an assignment for the benefit of creditors, and secondly, if given as security, it was not given *only* for that purpose.

[1, 2] At the start, it will be well to dispose of appellant's contention that the determination of these questions is a question of law to be determined solely from an examination of the documents, and that parol evidence cannot be considered in this connection. Appellant cites some general authorities on the interpretation of language in instruments, and Union Oil Co. v. Union Sugar Co., — Cal.App.2d —, 173 P.2d 700, (hearing granted in Supreme Court), which are not in point. If this were the law, then no deed absolute on its face could ever be construed to be a mortgage. It is not the law. "Whether a deed absolute in form be a mortgage, is a question of intention to be inferred from all the facts and circumstances of the transaction in which the deed was executed, taken in connection with the conduct of the parties after its execution." Montgomery v. Spect, 55 Cal. 352, 353. "The rule is established in California and elsewhere that a deed absolute on its face may in equity cases be shown by parol evidence to have been intended as security for a debt or obligation." 17 Cal.Jur. 776, and a long list of cases set forth in note 20. Beeler v. American Trust Co., 24 Cal.2d 1, 147 P.2d 583, shows how far the courts have gone on this subject. In that case the debtor gave the bank a deed absolute in form, and, in addition, an affidavit to the effect that the deed was an absolute conveyance, reserving to the grantor only a lease and option to purchase. The court held that it was proper to admit parol evidence to show that in spite of the terms of the affidavit, the deed was actually a mortgage.

Two of the cases cited by appellant on this point (Sheehan v. Sullivan, 126 Cal. 189, 58 P. 543; Davis v. Stewart, 31 Cal. App.2d 574, 88 P.2d 734) do not support appellant's position. They hold just the contrary, that parol evidence is admissible for this purpose.

[3] The difference between an assignment for the benefit of creditors and a mortgage is set forth in Tiffany on Real Property, 3rd Ed., vol. 5, page 275, as follows: "A conveyance made to a trustee to secure a debt or debts is to be distinguished from one made to a trustee for the purpose of effecting the payment of debts. A conveyance of the latter character, ordinarily known as an assignment for the benefit of creditors, involves a complete divestiture of the grantor's title to the property conveyed, he having no right to redeem by paying the debts, and having merely a resulting trust as to any surplus which may possibly remain after the debts are paid, while a conveyance in trust made merely for purposes of security does not, any more than does a mortgage in ordinary form, divest the grantor or mortgagor of the rights of an owner, he having still a right to redeem by paying the indebtedness."

The arrangements under which the various instruments herein set forth were made, were between Aaron Friedman, now deceased, and plaintiff. Plaintiff testified that it was his understanding that had the $10,750 note been paid off at any time prior to when he sold the property, he would not have sold the property but would have returned it to the Friedmans; that any balance left over from the sale of the property and the application of the proceeds would have been returned to the Friedmans. Had the prior indebtedness to the bank and the $3500 debt to plaintiff been paid off, plaintiff testified that he would not have returned the property until the $10,750 note was satisfied. From the testimony of plaintiff it is clear that the conveyance of the title was not absolute, that the Friedmans reserved an interest in the property, and that the deed was given only as security.

In the case of Heath v. Wilson, 139 Cal. 362, 73 P. 182, 185, under facts apparently much more strongly indicating an assignment for benefit of creditors than in our case, the court held the deed to be a mortgage. There the deed was absolute in form. Contemporaneously with the execution of the deed, the grantor and grantee verbally agreed that the property should be held in trust for certain uses and purposes which were subsequently set forth in an instrument of even date with the deed. This provided that the grantee was to lease the property and receive the rents, issues and profits thereof, to sell it, or any part of it, to exchange it for other property, to mortgage it, and to apply the rents, income, profits and proceeds, after payment of taxes, etc., and the expenses of the trust, to the payment of all liens and charges of every kind on the property; then to the payment of certain debts of the grantor enumerated in a certain schedule; the income from the balance to be invested and reinvested and the profits thereof to be paid to the grantor for the term of her natural life, and in case of her death, the balance to go to her children. The court held that the transaction constituted a mortgage. "While it [the deed] transferred the legal title, it transferred it as security for the creditors" named in the schedule. "* * * [it] [the conveyance] was not intended as an absolute disposition of his property * * *" Nor was the conveyance in our case. The case then goes on to distinguish the facts from those in the case of Sabichi v. Chase, 108 Cal. 81, 86, 41 P. 29, a case strongly relied upon by the appellant here. The court said: "It is claimed that this case falls within the rule laid down in Sabichi v. Chase, 108 Cal. [81,] 86, 41 P. 29, in which case the instrument was declared to be an assignment for the benefit of creditors. The case here, however, is very different from the facts in Sabichi v. Chase. There the conveyance to the trustees was of all the property of the debtors, for the benefit of certain preferred creditors. One of the conditions was that the debtors should be released from all liability to the creditors named. The trustees were authorized to carry on the business of the partnership firm, call a meeting of creditors every six months, and report their proceedings to such meeting. It is plain that the conveyance in that case was an assignment of all the property of the assignees for the benefit of creditors. It is true, the instrument provided that the surplus, if any, was to be returned to the assignor, but this would follow as a matter of law in case of any assignment, whether stated in the instrument or not. The court, in the opinion in the above-cited case, adopted the definition given in Cadwell's Bank v. Crittenden, 66 Iowa, [237]; 240, 23 N.W. 646: 'If the intention of the debtor is merely to secure his debt to one or more of his creditors, and the conveyance is not intended as an absolute disposition of his property, but he reserves to himself a right therein, the conveyance will be treated as a mortgage, even though the debtor is insolvent at the time, and it covers all his property, and but a portion of his debts are secured by it.' The case at bar falls within the above definition"; and ours does also.

In this case the fact that the conveyance was to the City Title Insurance Company to hold "for the account of" plaintiff to convey to him on demand and the power of sale given in the agreement (No. 7) to plaintiff does not change the character of the transaction. City Title Insurance Company was a mere depository of the title, and the agent of plaintiff to deliver it to whom and when instructed so to do by plaintiff. The company had no power over the title nor the property other than to transfer it as directed by plaintiff.

[4] The relationship of debtor and creditor continued to exist after the execution of the deed. That definitely proves it to be a mortgage. Beeler v. American Trust Company, supra, 24 Cal.2d 1, 147 P.2d 583. "In such cases, the central fact to be found is, the existence of an indebtedness at the time of the transaction, and a continuation of the relation of debtor and creditor." Montgomery v. Spect, supra, 55 Cal. 352, 353. That the debt continued on is attested, among other things, by this very action which is brought for the unpaid balance of the

$10,750 note. If the conveyance were in trust, or as an assignment for the benefit of creditors, or any other sort of trust, it would not have been necessary for plaintiff to execute the assignment of rents hereinbefore mentioned (No. 3) or the deed of trust given to secure the $3500 note (No. 5).

[5, 6] Appellant contends that because of the right given plaintiff to sell, the conveyance was given for more than security; that this right to sell accompanying the security feature takes it out of the category of "only as a security," provided for in section 2924 of the Civil Code. This reasoning is a little hard to follow, because it would entirely eliminate any mortgage with power to sell. The power to sell is only the remedy for the foreclosure of the lien given as security, and as said in 25 Cal.Jur. 30, referring to deeds of trust (obviously the same would be true of mortgages): "Power to sell does not change the character of the instrument" nor prevent it from being a mortgage. Heath v. Wilson, supra, 139 Cal. 362, 73 P. 182; Hillwig v. Boyer, 81 Cal.App. 763, 254 P. 662.

Appellant cites Cardoza v. White, 219 Cal. 474, 27 P.2d 639, 640, as authority for his proposition that the power of sale here provides for something more than "only as a security." In that case, the owner executed a deed to one Callaghan to secure a loan from the First National Bank of Livermore, "stating that, if anything should happen to him, the property was to go to his daughter." After the indebtedness was paid off, the grantor instructed Callaghan to convey the property to the daughter, which he did. In an action to quiet title brought by the daughter against a creditor of the grantor who had levied execution on the property, the court held that the deed was not a mortgage but a trust because it had not been given solely for security, in that the conveyance was made wtih the intention that the grantee should subsequently convey the title to another. The court held that it was only those transfers made as security for an act (other than transfers in trust) which were mortgages (Civil Code, sec. 2924), and as it was contemplated between parties that an act should be done by defendant in relation to the real property, which act could not lawfully have been performed by him if he were not the holder and owner of the legal title, it must follow that the conveyance was what it purported to be on its face, a deed either absolute or in trust for the indicated purposes. There was, of course, no such feature in the case at bar.

[7] On his contention that the conveyance constituted a trust, appellant relies upon Vance v. Lincoln, 38 Cal. 586, a case decided before the enactment into statute of the language used in the first part of section 2924, Civil Code. In that case a deed absolute was given as security for an indebtedness, the grantee to sell so much of the property as was necessary to pay off the obligation and endorse on the note from time to time as such sales were made the proceeds thereof, and when full payment was thereby made to re-deed the property remaining to the grantor. The grantor brought an action to litigate the title against third parties in the name of the grantee, claiming that the conveyance passed title, and when defeated in that action brought another action in his own name against the same defendants, claiming that the transaction was a mortgage, the title never left him, and the previous action therefore was not a bar to the later action. The court held that the transaction was a declaration of trust since it was intended that the grantee should sell so much of the land as should be necessary to pay his note. "That he could not sell and convey the title, if he held only a mortgage, they were bound to know; but as trustee for his own benefit he could; hence, the transaction was intended to take, and was made to take, the latter form." Crockett, J., concurring specially, concurred, not only for the reasons stated in the majority opinion, but on the further ground that even if the transaction was intended as a mortgage, estoppel would operate to defeat the plaintiff.

This case is more in the nature of a trust than the one in question. The grantee apparently had the power to subdivide and sell portions of the property deeded as he saw fit, applying the proceeds to the note, and it was contemplated that there would be, and in fact there was, a residue left over after payment in full. The residue would have been held by the grantee in trust for the grantor. The court, however, merely emphasized the fact that it was intended that the grantee convey title and it therefore could not be a mortgage. On that basis there seems to be no reason why this could not have been a mortgage with a power of sale as such a transaction was known and in use at the time (1869). See Fogarty v. Sawyer, 1861, 17 Cal. 589. There is no reference in the case to mortgages with power of sale. In any event, although there have been many subsequent cases in California discussing the difference between a deed absolute which constituted a trust and that which constituted a mortgage, not once has the Vance case been followed or even referred to. It is not in accord with the other cases in this state.

17 Cal. Jur. p. 746 seems to support appellant's contention, for it says: "If by agreement the grantee is given power to sell the lands and apply the proceeds to the debt, the transaction is not merely a mortgage, but amounts to a declaration of trust." The authority for this statement is Vance v. Lincoln, supra, 38 Cal. 586, which as before pointed out is not the law today, and Adams v. Lambard, 80 Cal. 426, 22 P. 180. In the latter case there was no question of the original conveyance of a mine constituting a mortgage. The court says at page 434 of 80 Cal. at page 182 of 22 P.: "It is conceded by all parties that the transaction * * * was not a mortgage, but that the deed conveyed the legal title * * *." It was agreed that the grantees should work the mine if they so desired, pay off the indebtedness, and then convey a one-third interest in the mine to one of the grantors, who at the time of the original conveyance owned a two-thirds interest. The grantee could sell and pay off the indebtedness, rather than work the mine, if he so chose. After working the mine and paying off the indebtedness, the grantee refused to convey the one-third interest as promised. The court held at page 435 of 80 Cal., at page 183 of 22 P.: "* * * considering the *confidential relations of the parties,* and the nature of the transaction" it was a trust. The trust had been fully executed and "the contingency had arisen under which Lambard had promised to reconvey. Under such circumstances, a court of equity will enforce the trust." Neither the Vance case nor the Adams case are support for, or justify the above quoted statement in Cal. Jur. A mere reading of it discloses that it is erroneous, because if it were true there could be no such thing as a mortgagee with power of sale.

Appellant also cites Renton v. Gibson, 148 Cal. 650, 84 P. 186, which, however, is easily distinguishable from the case at bar, as can be seen from the following excerpt from the decision at page 655 of 148 Cal., at page 187 of 84 P.: "We say, therefore, that the complaint itself, taken with the plaintiff's evidence in support of it, establishes that the instrument was something more than a mere mortgage, and that it did convey, and must of necessity have conveyed, the legal title to the property to defendant Gibson, for the purposes contemplated—the commencement and prosecution by Gibson of a suit to quiet title to the land in question, and the procuring a decree of the court to that effect. So far as these purposes were concerned the transfer could not have been a mortgage."

[8] While plaintiff could sell at any time, it could be only for the purpose of applying the proceeds in payment of the debt. Appellant argues that because plaintiff had the power to sell without waiting for default, the conveyance could not have been a mortgage. This does not follow. He is confusing the time of payment with the fact of security. A mortgage can be given as security for a debt already due; also, it can be given for a note payable a definite time in the future and provide for foreclosure at the mortgagee's will before the due date.

The latter portion of section 2924, Civil Code, reads: "Where, by a mortgage * * a power of sale is conferred upon the mortgagee * * * to be exercised after a breach of the obligation for which such mortgage * * * is a security, such power shall not be exercised" until a certain notice is given. Appellant argues that as the agreement provided that the power of sale could be exercised whenever plaintiff elected, rather than "after a breach of the obligation" the transaction could not come under section 2924. That would be too literal an interpretation of the section. "After a breach of the obligation" really means after the time the mortgagor has agreed that the sale or foreclosure might take place. The breach of the obligation might conceivably take place before the deed was executed. Such would be the case where a mortgage was given to secure a debt already due. In Montgomery v. Spect. supra, 55 Cal. 352, the court held a deed absolute to be a mortgage, although the grantor gave no note or memorandum for the payment of the debt, nor any promise to pay.

While it is true that plaintiff testified when asked the question directly that the $10,750 note was unsecured, the agreement (No. 7) provides otherwise. Moreover, plaintiff in other parts of his testimony admits, in effect, that this note was secured by the conveyance because he testified that had the note been paid, he would have transferred the property back to the Friedmans and that any moneys he received on the sale of the property over the liens would have been applied on this note.

Both parties agree that the conveyance did not constitute a deed of trust. See First Federal Trust Co. v. Sanders, 192 Cal. 194, 219 P. 440, for an excellent discussion of the differences between a deed of trust and a mortgage.

[9] Concerning the facts of the case, appellant contends that having in mind that the rule is that "to convert a deed absolute into a mortgage, the evidence should be so clear as to leave no substantial doubt that the real intention of the parties was to execute a mortgage" (Sheehan v. Sullivan, supra, 126 Cal. 189, 58 P. 543, 544), defendant has failed to offer such proof for the following reasons:

1. She did not allege in her answer that the transfer was intended to be a mortgage. In her amended answer, the pleading on which the case was tried, she alleged affirmatively that to secure the promissory note set forth in plaintiff's complaint she and her husband executed the deed to the City Title Insurance Company. She then set up the deed from it to plaintiff and the sale by plaintiff of the property to third persons and alleged the bar of sections 580a and 580c, Code of Civil Procedure. While she did not characterize the transaction, she did allege that the deed was given as security. She set up the facts rather than the legal conclusion. The plaintiff did not demur to the amended answer.

2. She did not testify that the conveyance was a mortgage. She apparently stood upon plaintiff's testimony in that respect. Moreover, the original transactions were handled by plaintiff and her husband.

3. She did not allege or prove fraud, mistake, or accident. This contention is based upon plaintiff's theory that parol evidence is not admissible to show a deed absolute to be a mortgage except where it is shown that because of fraud, mistake or accident a deed was executed instead of a mortgage. That this is not the law is shown by the authorities hereinbefore set forth.

[10] 4. She did not allege or prove that the value of the property was in excess of the admitted indebtedness; also, that the use in the agreement (No. 7) of the words "apply towards" the payment of the note, shows that the "agreement was not intended to secure the note of $10,750.00, but was intended only as a transfer for the benefit of a creditor, to enable him, if the real estate market improved, to obtain some payment *on account* of his unsecured note." This is a rather specious argument, and if carried to its logical conclusion would mean that there could be no lien given for security unless the value of that lien equals or exceeds the amount of the debt, and that, of course, is not the law.

Appellant connects with this argument plaintiff's testimony that to the best of his knowledge the property at the time of the execution of the instruments in question was worth only $18,500, which equalled the amount of the two prior encumbrances—(No. 4), the deed of trust to the bank and the deed of trust to plaintiff (No. 5). Presumably, the parties contemplated either that the property was worth more than that, that its value was uncertain, or that those two loans might be reduced in amount by the time of sale, for the agreement provided that plaintiff was to apply on the $10,750 note any proceeds from the sale over and above the "unpaid balance of the encumbrances."

[11] 5. Defendant did not allege or prove non-transfer of possession of the property. While the question of possession accompanying the delivery of a deed is one of the circumstances usually considered in determining whether the transaction is a mortgage or otherwise, it is not a conclusive circumstance. Even had possession been given plaintiff, that would not necessarily prove that the conveyance was not intended by both parties as a mortgage. Possession can accompany a mortgage without affecting its character as such. Therefore, the failure of defendant to prove non-transfer of possession is not important. Had there been a delivery of possession, plaintiff would, no doubt, have shown it.

[12] 6. Defendant relied solely upon the terms of the written instruments. This is not correct. Defendant also relied upon plaintiff's testimony as to the understanding of the parties. But even without the addition of plaintiff's testimony, the agreement (No. 7) itself raises the very reasonable inference that the transaction was a mortgage rather than a trust. That is the inference the trial court drew, and being a reasonable one, it is therefore the inference this court must draw. Cauhape v. Security Savings Bank, 118 Cal. 82, 50 P. 310.

[13, 14] The evidence fully supports the conclusion that the conveyance here constituted a mortgage given to secure the $10,750 note. Therefore this action is one brought for the "deficiency upon a note secured by a * * * mortgage upon real property" in a "case in which the real property has been sold by the mortgagor [mortgagee] * * * under power of sale contained in such mortgage" and barred by the provisions of section 580c of the Code of Civil Procedure. It is also barred by the provisions of section 580a, Code of Civil Procedure, as it is a money judgment sought "for the balance due upon an obligation for the payment of which a * * * mortgage with power of sale upon real property * * * was given as security, following the exercise of the power of sale in such * * * mortgage" which "action must be brought within three months of the time of sale." (The references to these code sections are, of course, as they existed in 1940, at the time of the execution of the instruments in question here.)

The judgment is affirmed.

PETERS, P. J., and WARD, J., concur.

79 Cal.App.2d 301

In re SCHWARTZ'S ESTATE.
SCHWARTZ v. SCHWARTZ.
Civ. 15694.

District Court of Appeal, Second District, Division 1, California.
April 22, 1947.

1. Executors and administrators ⇨21(2)

Where widow and surviving son of deceased each filed a petition to be appointed administrator with the will annexed, antenuptial agreement wherein widow had released her interest in husband's property was competent on question whether she relinquished right to administer estate. Probate Code, §§ 409, 422 (1, 2), 442.

2. Executors and administrators ⇨21(2)

Petitions filed by widow and by surviving son of deceased for appointment as administrator with will annexed constituted a contest for letters of administration with will annexed and court had duty to determine which of the two contesting parties was entitled to the letters. Probate Code, §§ 409, 422(1, 2), 442.

3. Executors and administrators ⚿21(1)

Court, in appointing an administrator with will annexed under section 409, was required to follow, as to priority, the procedure enunciated in section 422 relating to order of priority of right to letters. Probate Code, §§ 409, 422.

4. Executors and administrators ⚿17(2)

Controlling qualification, as expressed in statute relating to order of priority of letters of administration, is that relatives of decedent are entitled to priority only when they are entitled to succeed to his personal estate or some portion thereof. Probate Code, § 422.

5. Husband and wife ⚿31(9)

Antenuptial agreement providing that should wife survive husband, she should receive $5,000 in place of all rights which as widow she might otherwise have, did not require provision for her in will but made her a creditor and she could enforce collection in the same manner as other creditors.

6. Executors and administrators ⚿21(1)

Widow who had, by antenuptial agreement, agreed to receive $5,000 instead of rights which as widow she might otherwise have as distributive share of husband's estate by operation of law, released all claims to property owned by husband at time of marriage and all interest at time of his death and was not entitled to "succeed to estate or some portion thereof" within statute relating to priority of right to letters of administration and widow was not entitled to letters of administration with will annexed as against son who in addition to taking under the law was a legatee in the will. Probate Code, § 422.

See Words and Phrases, Permanent Edition, for all other definitions of "Succeed to Estate or Some Portion Thereof".

7. Executors and administrators ⚿17(2)

Under section 422, providing that relatives of decedent are entitled to priority of right to letters of administration only when they are entitled to "succeed" to estate, only persons who take property by operation of law, by descent, by succession, are entitled to letters in view of section 200 defining succession. Probate Code, §§ 200, 422(7).

See Words and Phrases, Permanent Edition, for all other definitions of "Succeed".

8. Executors and administrators ⚿17(3)

That widow was, under will, to receive $10, where she had by antenuptial agreement released rights in husband's property, did not entitle her to "succeed" to any portion of estate within statute relating to priority of right to letters of administration, but merely constituted her a "legatee" under will. Probate Code, § 422.

See Words and Phrases, Permanent Edition, for all other definitions of "Legatee".

◆

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Petitions by Minnie K. Schwartz, widow, and by David Schwartz, son, for letters of administration with the will annexed of the estate of Louis Schwartz, deceased. From an order granting letters of administration with the will annexed to the widow and from a further order denying the son's petition for letters of administration with the will annexed, David Schwartz appeals. Appellant also presented a motion for diminution of the record.

Motion for diminution of the record denied and orders appealed from reversed and cause remanded with direction.

See also 79 Cal.App. 308, 179 P.2d 868.

Isador Gralla and Joe Wapner, both of Los Angeles, for appellant.

Baker & Kelleher, of Santa Monica, for respondent.

WHITE, Justice.

Louis Schwartz died testate on October 3, 1945. He was survived by his widow, respondent herein, and several children of a previous marriage. In his will decedent failed to name an executor. The widow and a son, David Schwartz, appellant herein, a son of the testator by the former marriage, each filed a petition for appointment as administrator with the will annexed. From an order granting letters of administration with the will annexed to the widow and from a further order denying his petition for letters of administration with the will annexed, the son prosecutes this appeal. Appellant also presents a motion for diminution of the record to include certain written objections allegedly filed during the hearing of the foregoing petitions and not presently included in the clerk's transcript. A reversal is sought upon the ground that the court erred in granting letters to the widow for the reason that by the terms of an antenuptial agreement she had waived all right or interest she might have as a wife or widow in the property of decedent.

The decedent and respondent were married October 10, 1929. On October 1, 1929, they entered into an agreement, the pertinent portions of which are as follows:

"Whereas, a marriage is contemplated between the parties hereto, and both parties are now the owners of real and personal property, and have fully informed themselves as to their financial situation, assets and income;

"And Whereas, the parties hereto desire to make a fair and reasonable provision for party of the second part (respondent widow), in lieu of the rights, which after the consummation of said marriage, said party of the second part might or could, have, as wife, or widow, or otherwise in said real and personal property which said party of the first part now has, or may hereafter own;

"Now Therefore, it is hereby mutually agreed as follows:

"1) That said party of the second part shall receive and accept from the estate of party of the first part, after his death, if she shall survive such party of the first part as his widow, the sum of Five Thousand ($5,000.00) Dollars, in place and instead of all rights, which, as widow of party of the first part, she might otherwise have, either as a homestead community interest or otherwise or as a distributive share of the estate by operation of law, under present or future laws of the State, to be enacted, or in force and effect now or hereafter;

"2) That both parties hereto shall have, keep and retain the sole ownership, control and enjoyment of, and, during their lives, or by last will and testament, shall have the exclusive right to dispose of, any and all property of whatsoever kind which they may own now or are possessed of, or hereafter may acquire or receive, as their own absolute property, without interference by or from either one and in like manner as if said marriage had never taken place * * *."

By his will decedent made bequests to his niece and his sister and left the remainder of his estate in equal shares to his children. With respect to the widow the will provided as follows:

"I hereby declare that all of the property, both real and personal, was and now is my sole and separate property and that my wife, Minnie Schwartz, has no interest in the same or any part thereof of any nature or description. * * *

"Because of the treatment accorded me by my present wife, Minnie Schwartz, and because of the amounts of money I have given her and expended for and on her behalf, which far exceeds the amount set forth in the Antenuptial Agreement, I hereby give, devise and bequeath to my present wife, Minnie Schwartz, the sum of Ten Dollars ($10.00), and no more, and hereby especially direct that she receive no part or parcel of my estate save and except the Ten Dollars ($10.00) herein mentioned."

The respective petitions of the widow and the son came on for hearing together. The trial court sustained respondent widow's objection to the introduction into evidence of the antenuptial agreement, upon the ground that it was irrelevant; that in the absence of written objections setting up the antenuptial agreement as a bar to the widow's petition, the only issues before the court were those raised by the respective petitions. During the course of the hearing appellant presented written objections raising the issue of the effect of the agreement. As to these objections the court ruled: "You may file them but the court will not consider them."

The first question to be determined on this appeal is whether the court erred in sustaining respondent's objection to the introduction into evidence of the foregoing antenuptial agreement executed by her. We are persuaded that the question must be answered in the affirmative.

Section 442 of the Probate Code reads as follows: "Any person interested may contest the petition by filing written grounds of opposition thereto, challenging the competency of the applicant or his right to letters, or may assert his own right to letters. In the latter case he must file a petition and give the notice required for an original petition, and the court must hear the two petitions together."

The foregoing language is clear and explicit. It gives "any person interested" the right to contest the petition on file by "challenging the competency of the applicant or his right to letters", or such contestant may "assert his own right to letters." Should the contestant choose the latter course, then "he must file a petition and give the notice required for an original petition, and the court must hear the two petitions together." The last-named procedure was followed in the instant case.

Section 409 of the Probate Code, so far as here pertinent, provides that "persons are entitled to appointment as administrators with the will annexed in the same order of priority as in the appointment of administrators * * *." Section 422 of the Probate Code, so far as applicable to the instant proceeding, reads:

"Administration of the estate of a person dying intestate must be granted to one or more of the following persons, who are entitled to letters in the following order, the relatives of the decedent being entitled to priority only when they are entitled to succeed to the estate or some portion thereof:

"(1) The surviving spouse, or some competent person whom he or she may request to have appointed.

"(2) The children. * * *."

[1] When the two petitions were filed herein, it became the duty of the court to ascertain and determine which of the two petitioners—the widow or the son of the testator—was entitled to be appointed administrator with the will annexed. In order to reach a proper conclusion upon that ultimate issue, the court not only had the power but the duty to decide and pass upon all necessary questions involved in the determination of such ultimate issue. Estate of Warner, 6 Cal.App. 361, 366, 92 P. 191. The aforesaid agreement executed by the wife of the testator was competent and material evidence to determine therefrom if thereby she relinquished all right and claim which she may have had in or to the estate of her husband because of her being wife or widow, and thereby relinquished her right to administer such estate. In re Davis' Estate, 106 Cal. 453, 456, 39 P. 756; Estate of Patterson, 46 Cal.App. 415, 416, 189 P. 483.

[2-4] The two petitions filed herein constituted no more or less than a contest for letters of administration with the will annexed, and the court was confronted with the duty of determining which of the two contesting parties was entitled to letters. Obviously, the court in making such determination was required to consider the agreement which purportedly relinquished the right of respondent widow to administer the estate of her deceased husband. Estate of Cover, 188 Cal. 133, 138, 204 P. 583. This we conclude because, under the mandate of the law, the court in appointing under section 409 of the Probate Code, was required to follow as to priority the procedure enunciated in section 422 of the same code. And as was said in Estate of Crites, 155 Cal. 392, 101 P. 316, 317: "This does not mean alone that it shall follow the order there laid down, but it shall follow that order with observance of the qualifications there expressed, * * *." And the controlling qualification, as expressed in the section, is that the relatives of the decedent are entitled to priority only "when they are entitled to succeed to his personal estate or some portion thereof."

[5, 6] The antenuptial agreement in question has been brought here on this appeal. By its terms respondent widow agreed, should she survive her husband, to "receive and accept" from his estate the sum of $5,000 "in place and instead of all rights which as widow of the party of the first part she might otherwise have

* * * as a distributive share of the estate by operation of law * * *." This provision of the agreement did not require the testator to provide for this sum in his will. The agreement made her a creditor, and she became entitled to such a sum as a creditor and could enforce collection of the same in the manner provided for creditors of the estate. Estate of Warner, 158 Cal. 441, 445, 446, 111 P. 352. Having by the foregoing agreement released all claim in and to the property owned by her husband at the time of the marriage and also all interest he might have at the time of his death, respondent widow was thereby not entitled "to succeed to the estate or some portion thereof," as required by section 422 of the Probate Code. Estate of Warner, 6 Cal.App. 361, 363, 92 P. 191; Estate of Edson, 143 Cal. 607, 608, 77 P. 451; Estate of Patterson, 46 Cal.App. 415, 189 P. 483; In re Davis' Estate supra, 106 Cal. at page 455, 39 P. 756; In re Somerville's Estate, 12 Cal.App.2d 430, 432, 55 P.2d 597. Having contracted away her inheritable interest in her husband's property, the right to administer upon his estate went with that relinquishment. Furthermore, it might here be observed that no prejudice could have ensued to respondent had the court admitted into evidence the antenuptial agreement. The due execution and validity of such agreement were conceded. There was no element of surprise or unfair advantage involved, such as might sometimes arise in a proceeding where one party might seek to inject a new defense or cause of action, or to introduce evidence as to issues not framed by the pleadings or properly raised at the trial. As heretofore pointed out, any evidence material to the question of which of the two petitioning parties was entitled to letters of administration was competent and admissible when the two petitions for appointment were before the court. The antenuptial agreement should therefore have been admitted into evidence and considered by the court.

[7, 8] Respondent, however, contends that because under the terms of the will she was to receive the sum of ten dollars, she possesses a prior right to letters of administration with the will annexed over a son who also takes property under the will. With this claim we cannot agree. Reference to the statutes of this state fortifies our view that but one conclusion can be arrived at as to the meaning of the clause contained in section 422 of the Probate Code, "entitled to succeed to the estate or some portion thereof," because we find section 200 of the same code declaring: "Succession is the acquisition of title to property of one who dies without disposing of it by will." We think it clear that what the lawmakers meant when they used the word "succeed" in section 422 of the Probate Code was persons who take property by operation of law—by descent—by succession. This conclusion is further fortified when we look at subdivision 7 of the just-mentioned Probate Code section, for that subdivision provides that the relatives of a previously deceased spouse are entitled to letters of administration only when such relatives are entitled to "succeed to some portion of the estate." Taking by devise or bequest, as does respondent widow herein, she does not "succeed" to it. And it is made plain by the very nature of the provisions of section 422 of the Probate Code that it contemplates cases wherein a party takes by succession. The provision of the will here under consideration, leaving to respondent widow the sum of ten dollars, does not entitle her to "succeed" to any portion of the estate, but merely constitutes her a legatee under the will. Estate of Wakefield, 136 Cal. 110, 112, 113, 68 P. 499; Estate of Cover, supra, 188 Cal. at page 137, 204 P. 583; Estate of Mahoney, 85 Cal.App. 675, 681, 259 P. 1014; 11A Cal.Jur. 302, sec. 210. Respondent relies strongly on the cases of Estate of Crites, supra, and Estate of Winbigler, 166 Cal. 434, 435, 137 P. 1. We find nothing in the two cases that militates against what we have herein enunciated. The holding in the cited cases may be epitomized by quoting from the Winbigler case, 166 Cal. at page 435, 137 P. at page 1, the following language, for which the Crites case is cited as authority: "It is settled that, in view of these provisions" (referring to sections 1350a and 1365 of the Code of Civil Procedure, now sections 406, 421 and 422 of the Probate Code), "an heir

at law of the deceased is not as such entitled to letters of administration with the will annexed, unless he takes under the will, i. e., of course, if the will effectually disposes of all the property of the deceased." In the proceeding now engaging our attention respondent widow had by written agreement relinquished her right to succeed, while appellant herein was not only clothed with the right to succeed to a portion of the decedent's estate, but also took under the will.

The motion for diminution of the record is denied. The orders appealed from are and each of them is reversed, and the cause remanded with direction to the court below to grant the petition of appellant David Schwartz for probate of the last will and testament of Louis Schwartz, deceased, and for the issuance to said appellant David Schwartz of letters of administration with the will annexed.

YORK, P. J., and DORAN, J., concur.

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79 Cal.App.2d 308

In re SCHWARTZ'S ESTATE.
SCHWARTZ v. SCHWARTZ.

Civ. 15668.

District Court of Appeal, Second District, Division 1, California.

April 22, 1947.

1. Executors and administrators 🔑185

In determining whether widow had waived right to family allowance by antenuptial agreement, the case must be determined in light of all the surrounding circumstances as disclosed by the record and the language in the agreement. Probate Code, § 680.

2. Executors and administrators 🔑185

Where spouses had lived together until husband's death under conditions that made him liable for wife's support until that time, widow's right to family allowance was not surrendered by an antenuptial agreement, except by clear and explicit language. Probate Code, § 680.

3. Executors and administrators 🔑185

Under antenuptial agreement whereby wife agreed to accept $5,000 instead of all rights which as widow she might otherwise have either as a homestead community interest or otherwise or as a distributive share of estate by operation of law, widow waived her right to family allowance. Probate Code, § 680.

◆

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Proceeding in the matter of the estate of Louis Schwartz. Minnie K. Schwartz filed a petition for a family allowance, opposed by David Schwartz. From an order denying the petition, petitioner appeals.

Affirmed.

Baker & Kelleher, of Santa Monica, for appellant.

Isadore Gralla and Joe Wapner, both of Los Angeles, for respondent.

WHITE, Justice.

This is a companion case to that of Estate of Schwartz, 79 Cal.App.2d 301, 179 P.2d 863. Minnie K. Schwartz, widow of decedent, appeals from an order denying her petition for a family allowance, such denial being based on the ground that by the terms of an antenuptial agreement she had waived her right to such allowance.

Section 680 of the Probate Code expressly relates to the support of the family of the decedent to which the widow and minor children become entitled upon his death and the probate of his will, irrespective of the interest which they or any of them may have had in the property of said decedent during his lifetime, and without regard to their heirship or right of inheritance therein. However, it is now settled law in this state that although under section 680 no more is required of one who petitions for a family allowance than that she be the testator's widow, nevertheless, it is not in every case where an applicant establishes that she is the decedent's widow that the section gives her an absolute statutory right to such an allowance. "An applicant may have waived her right to an allowance by an agreement to that effect * * * or may have lost that right by her conduct." Estate of Brooks, 28 Cal.2d 748, 750, 171 P.2d 724, 725.

In the instant case there is no contention that the widow lost her right to a family allowance by reason of her conduct. She was residing with the testator at the time of his death and as his wife was receiving maintenance and support from him.

[1, 2] A review of the cases involving antenuptial and separation agreements wherein it was urged that the widow had waived her right to a family allowance or a probate homestead, impresses us that each particular case must be determined in the light of all the surrounding circumstances as disclosed by the record and the language used in the particular agreement under consideration. We think it fair to say that in a case such as the one now before us, where the spouses had lived together until the husband's death under conditions that made him liable for her support until that time, the right should not be held to have been surrendered by an agreement between the spouses, " 'except by clear and explicit language.' " Estate of Whitney, 171 Cal. 750, 756, 154 P. 855, 857.

We are therefore confronted with the question of whether, in the agreement made by appellant wife, the words were such as to clearly import an intention to surrender the very right she afterwards claimed. In determining that question we are not particularly aided by decisions on the interpretation of instruments embodying different language than that contained in the document before us. Our interpretation must be made by viewing the particular agreement itself and from a study of the particular terms employed therein, read in the light of the underlying purpose of the transaction and the circumstances under which it was made, as reflected by the record.

In the case at bar, the due execution and validity of the antenuptial agreement is conceded. The husband appears therein as party of the first part and respondent widow as party of the second part. After reciting that a marriage was contemplated between the parties, the agreement provides as follows:

"And whereas, the parties hereto desire to make a fair and reasonable provision for party of the second part, *in lieu of the rights, which after the consummation of said marriage, said party of the second part might or could have, as wife, or widow, or otherwise in said real and personal property which said party of the first part now has, or may hereafter own;*

"Now therefore, it is hereby mutually agreed as follows: (1) That said party of the second part shall receive and accept from the estate of party of the first part, after his death, if she shall survive such party of the first part as his widow, the sum of Five Thousand ($5,000.00) Dollars *in place and instead of all rights, which, as widow of party of the first part, she might otherwise have, either as a homestead community interest or otherwise or as a distributive share of the estate, by operation* of law, under present or future laws of the State, to be enacted, or in force and effect now or hereafter; * * *." (Emphasis added.)

[3] Viewed in the light of the rules hereinbefore enunciated, we are persuaded that it must be held in the instant case that by the antenuptial agreement appellant intended to and did waive her right to a family allowance. The wording of the contract makes it clear that appellant and decedent intended to settle, for a consideration of $5,000 paid to the former, "all rights, which, as widow of party of the first part, she might otherwise have." The language of the court in Estate of Yoell, 164 Cal. 540, 550, 129 P. 999, 1003, which involved the question of whether a widow had waived her right to a family allowance, is cogently applicable to the cause now before us: "To establish such relinquishment of right, no more apt words could be chosen than those deliberately employed in

the agreement under consideration. True, it does not in terms and by name relinquish the right to a family allowance, but it does more than this. *The wife covenants that she has renounced and waived all claim which she has or may have as heir of the husband or as his surviving wife. It is only as heir and surviving wife that she could make her demand for a family allowance, a demand which she has solemnly renounced.*" (Emphasis added.) See also Estate of McCoy, 51 Cal.App.2d 483, 125 P.2d 71.

Application of the "clear and explicit language" test to the wording of the agreement with which we are here concerned convinces us that appellant thereby surrendered her right to a family allowance.

It will be of little interest or value to analyze the authorities cited by appellant and respondent touching other contracts somewhat similar to this one which have been considered by the courts. As heretofore pointed out, each agreement must be interpreted with reference to its own peculiar language, read in the light of the surrounding circumstances. This agreement we have attempted to so interpret, and in so doing we cannot find in the authorities cited any reason to adopt an interpretation other than the one adopted by the court below.

For the foregoing reasons, the order appealed from is affirmed.

YORK, P. J., and DORAN, J., concur.

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79 Cal.App.2d 370

PEOPLE v. DALE.

Cr. 2441.

District Court of Appeal, First District, Division 1, California.
April 29, 1947.

1. Criminal law ⇨223

A preliminary hearing before a magistrate is not required where accused has been indicted by grand jury. Const. art. 1, § 8.

2. Criminal law ⇨322
Indictment and information ⇨34(2)

An indictment was not defective for failure to show that 12 members of grand jury voted to indict, where indictment showed that "quorum" was present and was indorsed a "true bill" by foreman, since a quorum means that at least 12 grand jurors were present, and it would be presumed that foreman would not have signed if requisite 12 had not voted to find the indictment. Pen.Code, § 940.

See Words and Phrases, Permanent Edition, for all other definitions of "Quorum".

3. Indictment and information ⇨196(3)

Where indictment appeared regular on its face, accused who entered plea and failed to demur or move to set aside the indictment waived any objection which he might have urged as to any irregularities in organization of grand jury. Pen.Code, § 940.

4. Criminal law ⇨1144(2)

In absence of evidence to the contrary, it will be presumed that grand jury was legally selected, impaneled, organized, and sworn, and that their proceedings were lawful. Pen.Code, § 940.

5. Criminal law ⇨980(1)

That accused put in a guilty plea to offense charged in indictment removed necessity for hearing of any evidence in superior court.

6. Grand Jury ⇨35

One who is being investigated by grand jury is not entitled to be represented by counsel before that body. Pen.Code, § 920.

7. Indictment and information ⇨196(3)

The point that accused was committed without reasonable cause and on basis of fraud and false representation and perjured testimony before grand jury, which had not been raised by appropriate proceedings before his plea of guilty, could not be raised after conviction. Pen.Code, § 995.

8. Indictment and Information 🔑10

If there is some evidence to support indictment, court will not inquire into its sufficiency.

9. Indictment and Information 🔑159(1)

An indictment charging murder was properly amended to set up prior felony convictions. Pen.Code, § 969a.

10. Criminal law 🔑1035(1)

Where record did not disclose cause for delay of trial which was had some 80 days after indictment was returned, accused, who made no objection or motion to dismiss, consented to delay and could not complain thereof. Pen.Code, § 1382.

11. Habeas corpus 🔑30(1)
Indictment and information 🔑137(3)

While the law contemplates that only competent evidence will be received by grand jury, admission of incompetent evidence cannot be inquired into on writ of habeas corpus or on motion to set aside an indictment.

12. Criminal law 🔑1166(2)

Accused could not complain of admission of testimony of police officer before grand jury of accused's prior offenses, where there was sufficient evidence before grand jury to warrant indictment without considering objectionable testimony.

13. Criminal law 🔑273

Where accused pleads guilty to charge of murder, corpus delicti need not be proved, since a plea of guilty includes admission of every element entering into offense charged and does not raise any issue of fact.

14. Criminal law 🔑1035(2)

That accused did not receive a copy of grand jury proceedings until after his incarceration in penitentiary could not be raised for first time on appeal. Pen.Code, § 925.

15. Criminal law 🔑998

Accused, who was sentenced to life imprisonment upon his plea of guilty to charge of murder, was not entitled to set aside judgment of conviction so that he might be permitted to tell his version of the homicide in open court.

Appeal from Superior Court, City and County of San Francisco; William F. Traverse, Judge.

Amos Dale was convicted of murder, and, from an order denying his motion to vacate a judgment in form coram nobis, he appeals.

Affirmed.

Amos Dale, of Represa, in pro. per.

Fred N. Howser, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

BRAY, Justice.

Appeal by defendant from an order denying his "Motion to Annul, Vacate, Set Aside Judgment In The Form Coram Nobis (vobis)."

On June 23, 1944, defendant was indicted by the San Francisco grand jury for the crime of murder. At his arraignment the public defender was appointed to represent him, and at the latter's request the time to plead was continued to July 12th. On that day, he entered pleas of "Not Guilty and Not Guilty by Reason of Insanity." The cause was then continued to July 20th, to be set. On that date it was set for trial for September 11th. On September 8th the indictment was amended to allege four prior felony convictions and incarcerations thereunder. These defendant admitted. On the date set for trial, September 11th, defendant, accompanied by his counsel, as he had been on all occasions, appeared in court and requested permission to change his plea. Permission having been granted, he withdrew his previous pleas and then pleaded "Guilty." He waived time for sentence and was then sentenced by the court to life imprisonment.

In January, 1946, appellant filed a petition for habeas corpus in the Supreme Court of this state, which was denied. He then petitioned the United States Supreme Court for a similar writ, 327 U.S. 809, 66 S. Ct. 966, which petition was likewise denied. An application for habeas corpus in Division Two of this court was denied. He then petitioned the superior court for a writ of error coram nobis, and upon the denial thereof he filed this appeal.

Appellant appears in propria persona, and it is difficult to ascertain from his petition and brief just what points he is trying to make. Also he is mixing matters of appeal with those only cognizable on habeas corpus. In view of the whole situation it is probably better to pass upon the merits of all points raised (insofar as we can figure out what points he is attempting to raise), rather than to determine them on matters of pleading. Nor are we determining the effect of his habeas corpus applications in which he raised most of the questions raised here. For the same reason, we are assuming, without deciding, that all these points may be raised under coram nobis. To determine appellant's contentions it has been necessary to examine both his "Opening and Closing Brief" on this appeal and the points and authorities accompanying his petition in the lower court.

[1] Appellant's first point seems to be that although he was indicted by the grand jury, he was also entitled to a preliminary hearing before a committing magistrate. As support for this claim he cites Townsend v. Brooks, 5 Cal. 52. This was a civil case concerning whether an appeal from the justice's court in an action of forcible entry and detainer should be tried in the then county court or the then district court, and obviously is not in point. Appellant cites a number of cases considering situations where either no formal charge at all had been filed, or the proceedings were under an information. He has cited no case holding that where an indictment is found there must also be a preliminary hearing or examination before a committing magistrate. In his points and authorities he quotes from 8 R.C.L., p. 105, sec. 66, as follows: "An indictment cannot be found or an information filed in any capital case until the right to a preliminary examination has been accorded." However, that is a misquotation, as it is only a part of the sentence which reads "In some jurisdictions an indictment cannot be found," etc. That California is not one of those jurisdictions and that appellant is clearly wrong in his contention appears from an examination of our Constitution and the California cases. The Constitution, Article 1, section 8, provides: "Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment, as may be prescribed by law * * *" That a preliminary hearing before a magistrate is not required in the case of an indictment has long been held in California. People v. Goldenson, 76 Cal. 328, 345, 19 P. 161; Greenberg v. Superior Court, 19 Cal.2d 319, 321, 121 P.2d 713.

Appellant's second point is either that it requires nineteen members of the grand jury to vote an indictment, or that the indictment fails to show how many members voted his indictment. Appellant refers to "an Unconstitutional illegal unlawful body of grand jurors a quoram that had no Jurisdiction or vitality whatever," but does not point out what he claims caused the grand jury to be of that character. Assuming, first, that he is contending that it requires nineteen grand jurors to vote an indictment, he is answered by section 940 of the Penal Code, which provides: "An indictment cannot be found without the concurrence of at least twelve grand jurors. When so found it must be indorsed, 'A true bill,' and the endorsement must be signed by the foreman of the grand jury." See 14 Cal.Jur. 12 et seq., sec. 8. On this point he cites People v. Thurston, 5 Cal. 69, which held that a grand jury must consist of twenty-three persons and not twenty-four. The statutes then in effect have long since been superseded, among others by sections 192 and 242 of the Code of Civil Procedure, which provide that a grand jury shall consist of nineteen members.

[2] If appellant's position is that the indictment fails to show that twelve members of the grand jury voted to indict, he is likewise wrong. The indictment shows that a "quorum" was present, and is endorsed "a true bill," and the endorsement signed by the foreman. As section 940 of the Penal Code, above quoted, requires the concurrence of at least twelve grand jurors and "when so found" must be endorsed "A true bill" it must be presumed

that the foreman would not have signed it as "a true bill" if the requisite twelve jurors had not voted to find it. "It is presumed that the officers [of the grand jury] have performed their duty * * *." People v. Meraviglia, 73 Cal.App. 402, 406, 238 P. 794, 796. Moreover, a "quorum" means that at least twelve grand jurors were present. In 24 Am.Jur. 842, section 15, it is said that "the least number necessary to concur in an indictment will be sufficient for a quorum." In Snider v. Rinehart, 18 Colo. 18, 24, 31 P. 716, 718, it is said that a quorum is "such a number of the officers or members of any body as is competent by law or constitution to transact business." See also Bouvier's Law Dictionary, vol. 3, Rawle's 3rd Revision. In State v. Birbiglia, 149 La. 4, 88 So. 533, the court was called upon to interpret a Louisiana constitutional provision to the effect that the grand jury of each parish should consist of twelve members, nine of whom were required to concur in finding an indictment. The court held that nine grand jurors would constitute a quorum for finding an indictment, and interpreted "quorum" as meaning the number of grand jurors whose presence was required for transacting business. It would seem that under the authorities, the logical implication of the words "quorum of the grand jury" as indicating who were present at the indictment proceedings, is that as many were there as were required by law to join in finding the indictment—i. e., twelve.

[3, 4] Moreover, the indictment appears regular on its face and by appellant's plea and failure to demur or move to set aside the indictment, he has waived any objection which he might have urged as to any irregularities in the organization or impaneling of the grand jury. People v. Meraviglia, supra, 73 Cal.App. 402, 407, 238 P. 794; People v. Beesly, 119 Cal.App. 82, 62 P.2d 114, 970. This rule would apply if it be that the appellant is contending that the words "quorum present" on the indictment mean that there were no more than twelve members present. Besides "In the absence of evidence to the contrary, it will be presumed that the grand jury was regularly and legally selected, impaneled, organized, and sworn, and that their proceedings were lawful and regular." People v. Meraviglia, supra, 73 Cal.App. at page 407, 238 P. at page 796. People v. Murphy, 71 Cal.App. 176, 235 P. 51, is to the same effect. Appellant has indicated no evidence to the contrary here, apparently standing on his assumption that the indictment should show the actual number of persons present and voting rather than merely indicating the presence and concurrence of a "quorum."

[5] A third contention is that appellant "has never faced an accuser in Court of Law this matter." Of course, this contention is completely without merit. The fact that appellant put in a guilty plea to the offense charged in the indictment removed the necessity for the hearing of any evidence in the superior court; and, insofar as the grand jury hearing is concerned, it is specifically provided by Penal Code section 920 that the grand jury is not legally required to hear any evidence for the defendant.

[6] Appellant says that the record shows that he had "no one to defend him." The record shows, as before indicated, that each time appellant appeared in the superior court in this matter, he was accompanied by counsel. In view of such, it is assumed that appellant must mean that he had "no one to defend him" before the grand jury. It is clear that one who is being investigated by a grand jury is not entitled to be represented by counsel before that body.

Appellant next maintains that he has been committed without reasonable and probable cause and on the basis of fraud and false representation and perjured testimony before the grand jury. Section 995 of the Penal Code which sets forth the grounds upon which an indictment can be set aside does not provide fraud, false representation or perjured testimony as such ground. It must be stressed here that the appellant, although using the broad language that the indictment was obtained through fraud, false representations and perjury, does not point out what portion of the testimony comes within that category, or what witness committed it, or the slightest respect in which any testimony is untrue.

[7] Respondent claims that appellant cannot raise this question in this kind of a proceeding, that it would have to be raised (if it can be raised at all) by an application for a writ of prohibition. Again, we are not passing upon that question, because first, we find no specification of fraud or perjury, and secondly, having failed to raise the question by appropriate proceedings before his plea of "guilty" it cannot be raised now. It certainly would be a peculiar situation if a person charged by indictment of the commission of a crime, after pleading guilty thereto, were permitted to claim that the testimony on which the indictment is based was false and perjured. If it were so then the charge was untrue, yet the defendant said by his plea of guilty that it was true.

[8] Some language in appellant's brief would indicate that appellant claims that the evidence before the grand jury was not sufficient to warrant the finding of the indictment. In Penal Code section 921—which fixes the degree of evidence which will warrant the return of an indictment—it is provided: "The grand jury ought to find an indictment when all the evidence before them, taken together, if unexplained or uncontradicted, would, in their judgment, warrant a conviction by a trial jury." Davis v. Superior Court, 78 Cal.App.2d 25, 177 P.2d 314, 315, quotes and approves the following language in Greenberg v. Superior Court, supra, 19 Cal.2d 319, 121 P.2d 713: "If there is some evidence to support the indictment the courts will not inquire into its sufficiency (see cases collected in 59 A.L.R. 573) * * *." In our case, far from being a situation in which there is only "some evidence" to support the indictment, the situation is one in which an examination of the proceedings before the grand jury as produced by appellant causes the conclusion that the grand jury could not help but indict him for a cold-blooded, inexcusable crime. In view of appellant's plea of guilty, no purpose would be served in setting forth here the testimony before the grand jury.

Appellant intimates that there was some sort of collusion between the district attorney and appellant's own counsel, the assistant public defender. He gives no detail, and an examination of the record discloses no basis for the claim. Judging from the evidence before the grand jury, appellant's counsel did exceedingly well for him. Having in mind that appellant while admitting by his plea that he killed his victim "with malice aforethought," has given no reasonable explanation or excuse for his act, nor offered any circumstance which would take the crime out of the category of a deliberate, unjustified, cold-blooded killing of a woman with whom he apparently was intimate, and that he escaped the death penalty, one is forced to the conclusion that his attorney did a rather good job of representing him.

[9] Appellant apparently is complaining of the fact that the trial court permitted the indictment to be amended to set up the prior felony convictions. There was no error in this. People v. Hall, 220 Cal. 166, 30 P.2d 23, 996. Section 969a of the Penal Code provides: "Whenever it shall be discovered that a pending indictment or information does not charge all prior felonies of which the defendant has been convicted either in this state or elsewhere, said indictment or information *shall be forthwith amended* to charge such prior conviction or convictions, * * *." (Emphasis added.)

[10] Appellant also complains that he was not tried within sixty days of the finding of the indictment, and cites section 1382 of the Penal Code, which provides: "The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed * * * 2. If a defendant, whose trial has not been postponed upon his application, is not brought to trial within sixty days after finding of the indictment * * *." The indictment was presented in court June 23rd. The record does not show when defendant was arrested. On July 3rd defendant was brought into court for arraignment and at the request of his counsel the case was continued to July 12th to plead. After plea on that date the case was continued to July 20th to be set. The reason for this continuance does not appear, but no objection was made. On July 20th the case was set for trial for September 11th. On that day it was called for trial, but defendant pleaded guilty, thereby saving the necessity of the trial.

The date set was roughly about eighty days after the finding of the indictment. The record does not show the cause of the delay, whether at the request of defendant or because of congestion in the court. However, no objection was made by the defendant to the delay, and no motion made under section 1382 of the Penal Code to dismiss. Such a motion cannot now be made. Defendant, if he did not request, by his conduct consented to, the delay.

[11, 12] Appellant complains of the fact that at the proceedings before the grand jury a police officer told of appellant's prior offenses. While these had nothing to do with the crime with which the grand jury charged him, still they are not grounds for this appeal. As said in 13 Cal.Jur. 78, "While the law contemplates that only competent evidence will be received by a grand jury, the reception of incompetent evidence may not be inquired into upon a writ of habeas corpus, or on a motion to set aside the indictment found." In re Kennedy, 144 Cal. 634, 78 P. 34, 67 L.R.A. 406, 103 Am.St.Rep. 117, 1 Ann.Cas. 840, is to the same effect. Even the introduction of illegal evidence cannot be inquired into. Morehouse v. Superior Court, 124 Cal.App. 38, 12 P.2d 133. In any event, appellant is in no position to question this matter, as there was plenty of evidence before the grand jury to warrant the indictment without considering this particular evidence.

[13] Judging from some rather indefinite statements in his petition and his reference to the corpus delicti not having been proved, it would appear that appellant is under the erroneous impression that in spite of his plea of guilty, the trial court should have taken evidence and the crime should have been proved. This contention is unsupported by authorities, and is answered by the following statement of the law in 7 Cal.Jur. 998: "A plea of guilty includes an admission of every element entering into the offense charged and does not raise any issue of fact."

[14] Another point raised by appellant is that he at no time received a copy of the grand jury proceedings until after his incarceration in the penitentiary when, on writing to the clerk of the Supreme Court, a copy of the transcript was sent him. The meagre record sent up here is silent upon the subject. Assuming that he did not receive the transcript as required by section 925 of the Penal Code, it is too late to complain now. That section, after providing for the delivery of the transcript to the defendant by the clerk as soon as it is filed by the reporter, provides "that if the copy of the testimony shall not be served as herein provided the court shall on motion of the defendant continue the trial to such time as may be necessary to secure to the defendant receipt of a copy of such testimony ten days before such trial." The appellant made no such motion nor in any wise complained in the trial court of his failure to receive the transcript. It is too late to do it now.

Appellant contends that after his plea of guilty, the court took no testimony to fix the degree of the crime. Section 1192 of the Penal Code provides: "Upon a plea of guilty of a crime distinguished or divided into degrees, the court must, before passing sentence, determine the degree." People v. Paraskevopolis, 42 Cal.App. 325, 183 P. 585, contains an excellent review of the cases on this subject and holds that the section is mandatory and requires that the court must determine the degree in crimes divided into degrees. The record presented by appellant shows that the court did determine the degree as first degree murder. We have had the record augmented by a transcript of the oral proceedings at the time the appellant changed his pleas, and was sentenced. It there clearly appears that the court did take evidence from which it fixed the degree of the murder. Alvin Corrasa, an inspector of police assigned to the homicide detail, testified to the statements made to him by appellant in which appellant said that he had shot and killed the deceased, and gave as his reason for killing the woman that she had been "chasing with other men." Appellant's claim that "the record proves that there had been no testimony taken to set the degree as first degree murder" has no basis whatever.

[15] Apparently appellant is of the impression that he should be permitted to appear in open court and now tell his version

of the homicide. Just what he has in mind to tell is not apparent. Of course, such a procedure would neither be legal nor proper. Appellant has had his day in court. The proceedings were fair, proper and legal, and appellant has been legally and justly sentenced.

The order appealed from is affirmed.

PETERS, P. J., and WARD, J., concur.

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79 Cal.App.2d Supp. 875

PEOPLE v. DUFFY et al.

No. CRA 2231.

Appellate Department, Superior Court, Los Angeles County, California.

April 26, 1947.

1. Constitutional law 🔑62

Legislation which attempts to make the free trade in ideas depend upon that which, in so far as legislature speaks, may be an arbitrary decision of an official or official body is unconstitutional.

2. Constitutional law 🔑274

A city ordinance prohibiting the holding of a procession or parade on any public street without a permit from board of police commissioners, which ordinance did not set up a standard by which board is required to measure its decision is unconstitutional as denial of freedom of speech, since ordinance cannot leave it within power of any administrative board to issue or withhold a permit dependent upon board's approval or disapproval of purpose of those who seek it. U.S.C.A.Const. Amend. 14.

3. Constitutional law 🔑305

To constitute "due process of law" respecting taking of property, legislation should give interested parties some adequate remedy to vindicate their rights. U.S.C.A. Const.Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

4. Constitutional law 🔑309(1)

To constitute "due process of law" respecting taking of property, legislation itself must provide for notice of time and place to hear orderly presentment of issues. U.S.C.A.Const.Amend. 14.

5. Constitutional law 🔑309(1)

Regarding due process, defect for not requiring hearing or notice, actual or constructive, in legislation authorizing taking of property is not supplied by public officers' rules thereon.

6. Constitutional law 🔑305

Respecting legislation authorizing taking of property, extra-official, casual, or discretionary hearing is not substantial substitute for due process constitutionally required. U.S.C.A.Const.Amend. 14.

STEPHENS, J., dissenting.

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Appeal from Municipal Court of Los Angeles; Kenneth A. White, Judge.

Edward G. Duffy and others were charged in a complaint with violating the ordinance of Los Angeles Municipal Code by participating in and carrying on a parade and procession on the city streets without a permit from the Board of Police Commissioners. The defendants interposed a demurrer, and from a judgment of dismissal after sustaining the demurrer the People of the State of California appeal. Affirmed.

Ray L. Chesebro, City Atty., Donald M. Redwine, Asst. City Atty., and John L. Bland, Deputy City Atty., all of Los Angeles, for appellant.

Pestana & Esterman, Katz, Gallagher & Margolis and John W. Porter, all of Los Angeles, for respondents.

BISHOP, Judge.

[1] We are called upon, in this appeal, to determine upon which side of a fairly well defined line a provision of the Los Angeles Municipal Code falls which prohibits the holding of a procession or parade, on any public street, without a permit from the Board of Police Commissioners, no standard being set up in the code by which the Board

is required to measure its decision. We have concluded that this case is governed by the principle that legislation is unconstitutional which attempts to make the free trade in ideas dependent upon that which, in so far as the legislation speaks, may be an arbitrary decision of an official or official body; that those cases which find no fault when such legislation restricts other activities than those involving the expression of ideas, are not applicable.

The appeal is by the People. To a count of a complaint charging that some 26 defendants had violated the provisions of section 23.10 of the Los Angeles Municipal Code by participating in and carrying on a parade and procession upon certain city streets, without a permit from the Board of Police Commissioners, a demurrer was interposed, sustained, and a judgment of dismissal entered. If the provisions of the section referred to are unconstitutional, as we have concluded that they are, no result other than an affirmance of the judgment from which the appeal was taken is legally possible.

Section 23.10(a) of the Los Angeles Municipal Code provides: "No person shall hold, conduct, manage, participate in or carry on any parade, march or procession on any street in the City, or beat any drum, gong, triangle, tambourine, or blow, use or play any wind or stringed musical instrument upon any street in the City, unless such person has first made written application for and received from the Board [of Police Commissioners] a permit in writing authorizing such person so to do. All applications for such permits shall set forth:

(1) The route along which any such parade, march or procession proposes to travel;

(2) The time of the proposed starting of same;

(3) The names of the persons in control of the same or responsible therefor;

(4) The purpose of such parade or procession."

We find, as we consider the principles involved in this case, that there is a very clean cut distinction made, at some points, between that which may be constitutionally legislated affecting traffic in ideas and that which may be adopted respecting traffic in things. We find an example of it in this statement of a unanimous court in Valentine v. Chrestensen, 1942, 316 U.S. 52, 54, 62 S. Ct. 920, 921, 86 L.Ed. 1262, 1265: "1. This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising." A like distinction was recognized in Pittsford v. City of Los Angeles, 1942, 50 Cal.App.2d 25, 122 P.2d 535.

Dealing now with cases involving legislation of the character before us, that is, legislation which makes a course of action unlawful if pursued without a permit, and which leaves the withholding or granting of a permit to an official or official body without any sufficient guide by which the decision to withhold or grant is to be made, we find several unequivocal declarations. In Lovell v. Griffin, 1938, 303 U.S. 444, 58 S. Ct. 666, 669, 82 L.Ed. 949, there was under review a city ordinance which attempted to outlaw the distribution of circulars, advertising, or literature of any kind, without the written permission of the city manager being first obtained. The ordinance, declared the Supreme Court with one voice, was "invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship. The struggle for the freedom of the press was primarily directed against the power of the licensor. It was against that power that John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing.' And the liberty of the press became initially a right to publish 'without a license what formerly could be published only with one.' While this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision. [Citing cases.] Legislation of the type of the ordinance in question would restore the system of license and censorship in its baldest form." We note, in passing, that the court did not even discuss the possibility that the ordinance could be saved by the presumption that the City manager, the "censor," would act reasonably and not arbitrarily.

In Hague v. Committee for Industrial Organization, 1939, 307 U.S. 496, 59 S.Ct. 954, 964, 83 L.Ed. 1423, among other things, an ordinance was involved which, by its terms, provided that no public parade or public assembly should take place in the public streets or public parks, without a permit from the Director of Public Safety. If a permit was requested, the Director was left with far less latitude than is the Board of Police Commissioners under the provisions of the Municipal Code before us, for the ordinance declared that a request for a permit should only be refused "for the purpose of [preventing] riots, disturbances or disorderly assemblage." We think the court's view sufficiently appears from these words of Mr. Justice Roberts, 307 U.S. 515, 516, 59 S.Ct. 964, 83 L.Ed. 1436, 1437: "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. * * * We think the court below was right in holding the ordinance quoted in Note 1 void upon its face. It does not make comfort or convenience in the use of streets or parks the standard of official action. It enables the Director of Safety to refuse a permit on his mere opinion that such refusal will prevent 'riots, disturbances or disorderly assemblage.' It can thus, as the record discloses, be made the instrument of arbitrary suppression of free expression of views on national affairs for the prohibition of all speaking will undoubtedly 'prevent' such eventualities. But uncontrolled official suppression of the privilege cannot be made a substitute for the duty to maintain order in connection with the exercise of the right." The thought thus expressed is quite inconsistent with the idea that the ordinance could be found constitutional because the Director of Safety should be counted upon not to abuse the power vested in him.

Again in Schneider v. Irvington, 1939, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155, the Supreme Court, with one dissenting vote, struck down an ordinance which, among other things, prohibited the distribution of circulars without a permit from the Chief of Police. The applicant was to give his name, address and other means of identifying himself, and a permit could be denied if the Chief was satisfied that the applicant was not of good character or that he was acting upon behalf of a project "not free from fraud." The court condemned the ordinance in these words, 308 U.S. 163, 164, 60 S.Ct. 152, 84 L.Ed. 166: "It bans unlicensed communication of any views or the advocacy of any cause from door to door, and permits canvassing only subject to the power of a police officer to determine, as a censor, what literature may be distributed from house to house and who may distribute it. The applicant must submit to that officer's judgment evidence as to his good character and as to the absence of fraud in the 'project' he proposes to promote or the literature he intends to distribute, and must undergo a burdensome and inquisitorial examination, including photographing and fingerprinting. In the end, his liberty to communicate with the residents of the town at their homes depends upon the exercise of the officer's discretion.

"As said in Lovell v. Griffin, [303 U.S. 444, 58 S.Ct. 666], 82 L.Ed. 949, supra, pamphlets have proved most effective instruments in the dissemination of opinion. And perhaps the most effective way of bringing them to the notice of individuals is their distribution at the homes of the people. On this method of communication the ordinance imposes censorship, abuse of which engendered the struggle in England which eventuated in the establishment of the doctrine of the freedom of the press embodied in our Constitution. To require a censorship through license which makes impossible the free and unhampered distribution of pamphlets strikes at the very heart of the constitutional guarantees."

A state statute prohibiting the solicitation of funds for any religious, charitable or philanthropic cause, unless the cause had been approved by the secretary of the public welfare council, was the subject matter under discussion in Cantwell v. Connecticut, 1940, 310 U.S. 296, 60 S.Ct. 900, 84 L. Ed. 1213, 128 A.L.R. 1352. We quote one passage from the unanimous opinion of the court, 310 U.S. 306, 60 S.Ct. 904, 84 L.Ed. 1219, 128 A.L.R. 1352: "It is suggested that the statute is to be read as requiring the officer to issue a certificate unless the cause in question is clearly not a religious one; and that if he violates his duty his action will be corrected by a court.

"To this suggestion there are several sufficient answers. The line between a discretionary and a ministerial act is not always easy to mark and the statute has not been construed by the State court to impose a mere ministerial duty on the secretary of the welfare council. Upon his decision as to the nature of the cause, the right to solicit depends. Moreover, the availability of a judicial remedy for abuses in the system of licensing still leaves that system one of previous restraint which, in the field of free speech and press, we have held inadmissible. A statute authorizing previous restraint upon the exercise of the guaranteed freedom by judicial decision after trial is as obnoxious to the Constitution as one providing for like restraint by administrative action."

Another case falls in line with those we have been listing. In Largent v. Texas, 1943, 318 U.S. 418, 63 S.Ct. 667, 87 L.Ed. 873, the court said of an ordinance which declared it to be unlawful to sell books without a permit from the mayor, who was to issue the permit if he deemed it proper or advisable, after a thorough investigation, 318 U.S. 422, 63 S.Ct. 669, 87 L.Ed. 877: "* * * this appeal is governed by recent decisions of this Court involving ordinances which leave the granting or withholding of permits for the distribution of religious publications in the discretion of municipal officers. It is unnecessary to determine whether the distributions of the publications in question are sales or contributions. The mayor issues a permit only if after thorough investigation he 'deems it proper or advisable.' Dissemination of ideas depends upon the approval of the distributor by the official. This is administrative censorship in an extreme form. It abridges the freedom of religion, of the press and of speech guaranteed by the Fourteenth Amendment."

In concluding this phase of our discussion, we refer to Thomas v. Collins, 1944, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430, only to note that it held invalid a provision interpreted as requiring a permit as a prerequisite to addressing a lawful assemblage, although, apparently, the permit could be had for the asking.

Up to this point we have been considering cases dealing with legislation which required an official permit as a condition precedent to the exercise of one form or another of the right freely to communicate ideas, but set up no sufficient standard, and we have found that the United States Supreme Court has uniformly condemned such legislation as violative of the Fourteenth Amendment. Now we come to a number of cases, decided by the appellate courts of this state, which, dealing with ordinances requiring permits for activities not involving free speech or any cognate right, hold them to be valid. Many of these cases do have some primary standard set up to control the discretion bestowed upon the permit-issuing official, and might be omitted from our list on that ground, but we err on the safe side by including them in the group: In re Flaherty, 1895, 105 Cal. 558, 38 P. 981, 27 L.R.A. 529 (beating a drum on a traveled street); Ex parte Luening, 1906, 3 Cal.App. 76, 84 P. 445 (carrying a concealed weapon); Goytino v. McAleer, 1906, 4 Cal.App. 655, 88 P. 991, 992 (conducting pool room); Hood v. Melrose, 1914, 24 Cal.App. 355, 141 P. 396 (erect a shake house); In re Holmes, 1921, 187 Cal. 640, 203 P. 398 (conduct a second-hand business); Parker v. Colburn, 1925, 196 Cal. 169, 236 P. 921 (erect public garage); South Pasadena v. San Gabriel, 1933, 134 Cal.App. 403, 406, 25 P.2d 516 (drill for water); In re Hartmann, 1938,

25 Cal.App.2d 55, 60, 76 P.2d 709 (solicit subscriptions of magazines); In re Jones, 1943, 56 Cal.App.2d 658, 133 P.2d 418 (carry on hog ranch). To keep the account accurate, we call attention to the fact that there are three cases out of harmony with those just referred to. They are County of Los Angeles v. Hollywood Cemetery Ass'n, 1899, 124 Cal. 344, 57 P. 153, 71 Am.St. Rep. 75 (establishing cemetery); Matter of Application of Dart, 1916, 172 Cal. 47, 155 P. 63, L.R.A.1916D, 905, Ann.Cas. 1917D, 1127 (solicitation of alms); and In re Wisner, 1917, 32 Cal.App. 637, 163 P. 868 (playing musical instrument).

For reasons which will be stated at once, we are not attempting to analyze the various California decisions to see whether they can be reconciled and a principle discovered. We make no comment upon them other than to note that throughout the cases holding valid the ordinances considered, the thought finds frequent expression which is contained in these words in In re Hartmann, supra, 25 Cal.App.2d 55, 60, 76 P.2d 709, 711. "We may not assume the chief of police will arbitrarily refuse to grant permits to canvass for subscriptions without good cause. The presumption is that every officer will perform his full duty in a fair and lawful manner. In re Flaherty, 105 Cal. 558, 562, 38 P. 981, 27 L.R.A. 529 * * *."

We are not undertaking the task of analyzing these California cases touching upon the problem before us because we have a late pronouncement from our Supreme Court which makes such effort needless. In the case of In re Porterfield, 1945, 28 Cal.2d 91, 168 P.2d 706, a city ordinance was held to be void which declared it to be unlawful for any person to solicit membership (for compensation) in any dues requiring organization, without a permit from the city council. An attempt was made in the ordinance to set up a standard by which the council was to guide itself, but the Supreme Court held it to be insufficient to rescue the ordinance from the attack upon it. These passages from the opinion tell their own story, 28 Cal.2d 110, 168 P.2d 718, 719: "Petitioner contends that section 6 of the ordinance is invalid because it provides for a vague and uncertain subjective test whereby the city council may exercise substantially unrestricted authority to arbitrarily grant or deny licenses. In American Law Reports, Annotated (vol. 12, p. 1436), the general rule on this subject is well stated. '[A] statute or ordinance which vests arbitrary discretion with respect to an ordinarily lawful business * * * in public officials, without prescribing a uniform rule of action, or, in other words, which authorizes the issuing or withholding of licenses * * * according as the designated officials arbitrarily choose, without reference to all of the class to which the statute or ordinance under consideration was intended to apply, and without being controlled or guided by any definite rule or specified conditions to which all similarly situated might knowingly conform,—is unconstitutional and void.' * * *

"Respondent maintains that the ordinance may be sustained if we indulge in a presumption that the council will perform its duty in a fair and impartial manner. (See People v. Globe Grain & Milling Co., 1930, 211 Cal. 121, 126-128, 294 P. 3; In re Flaherty, 1895, 105 Cal. 558, 562, 38 P. 981, 27 L.R.A. 529; 19 Cal.L.Rev. 449.) This contention rests upon the assumption that no question of, or akin to that of, free speech is presented, for where free speech or any other fundamental right is involved the presumption of proper action by the licensing authority cannot be relied upon. Numerous recent decisions from the United States Supreme Court have struck down ordinances which attempted to vest city officials with virtually unlimited discretionary power to grant or refuse permits and to thereby effectively impose a censorship or previous restraint upon constitutional rights or liberties. (See Lovell v. Griffin, 1938, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949; Hague v. C.I.O., 1939, supra, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423; Schneider v. Irvington, 1939, supra, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155; Cantwell v. Connecticut, 1940, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213, 128 A.L.R. 1352; Largent v. Texas, 1943, 318 U.S. 418, 63 S.Ct. 667, 87 L.Ed. 873.) As shown in some detail later in this opinion, in at least one aspect of the instant case, the element of free speech cannot be ignored."

[2] We conclude, therefore, that whatever might be the fate of our ordinance if it were limited to parades and processions in support of commercial ventures, written as it is to forbid parades and processions even though they may have as their object the propagating of ideas, it falls within the federal cases we noted earlier in this opinion, and which are cited at the conclusion of the passage quoted from our Supreme Court's opinion in the Porterfield case, and so violates the Fourteenth Amendment.

That the purpose of parades and processions is often that of persuading others to adopt and act upon the tenets of the paraders, that is, it is "akin" to free speech, we believe to be beyond doubt. We know of no case in point in this state—In re Flaherty, supra, 105 Cal. 558, 566, 38 P. 981, 984, 27 L.R.A. 529, took pains to point out: "In the ordinance involved in the case at bar, there is no attempt to suppress processions or parades"—but there are several decisions from sister states which not only give recognition to parading as a right cognate to that of free speech, but find invalid such ordinances as ours. We note these two passages from Anderson v. City of Wellington, 1888, 40 Kan. 173, 19 P. 719, 722, 723, 2 L.R.A. 110, 10 Am.St.Rep. 175: "The right of the people in this state, by organization, to co-operate in a common effort, and by a public demonstration or parade to influence public opinion, and impress their strength upon the public mind, and to march upon the public streets of the cities of the states with the usual accompaniments of bands, banners, transparencies, glee clubs, and all the accessories of public meetings, is too firmly established, and has been too often exercised, to be now questioned, or to be made the basis of an ordinance forbidding the same * * *." "All by-laws made to regulate parades must fix the conditions upon which all persons or associations can move upon the public streets, expressly and intelligently,—such conditions operating on all of the same class alike, and being reasonable in their requirements, and not oppressive in their operation; and must not give the power of permitting or restraining processions to an unregulated official discretion, and thus allow an officer to prevent those with whom he did not agree on controverted questions from calling public attention to the principles of their party, or the objects of their organization, in one of the most effectual methods known to associated effort."

We note similar views expressed in Rich v. City of Naperville, 1891, 42 Ill.App. 222, 223: "Ever since the landing of the Pilgrims from the Mayflower the right to assemble and worship according to the dictates of one's conscience, and the right to parade in a peaceable manner and for a lawful purpose, have been fostered and regarded as among the fundamental rights of a free people. The spirit of our free institutions allows great latitude in public parades and demonstrations, whether religious or political, and if they do not threaten the public peace, or substantially interfere with the rights of others, every measure repressing them, whether by legislative enactment, or municipal ordinance, is an encroachment upon fundamental and constitutional rights. * * * If this ordinance is held valid, then may the city council shut off the parades of those whose notions do not suit their views and tastes in politics or religion, and permit like parades of those whose notions do. When men in authority are permitted in their discretion to exercise power so arbitrary, liberty is subverted, and the spirit of our free institutions violated. And it is all the same whether that discretion is exercised by one man or several. Where the granting of the permit is left to the unregulated discretion of a small body of city aldermen, the ordinance cannot be other than partial and discriminating in its practical operation." Remarks of a like import appear in: Frazee's Case, 1886, 63 Mich. 396, 30 N.W. 72, 75, 6 Am.St.Rep. 310; Trotter v. City of Chicago, 1889, 33 Ill.App. 206, 208, City of Chicago v. Trotter, 1891, 136 Ill. 430, 26 N.E. 359; and In re Garrabad, 1893, 84 Wis. 585, 54 N.W. 1104, 1106 and 1108, 19 L.R.A. 858, 36 Am.St.Rep. 948.

These cases, admittedly early ones, are cited, first of all, to establish that, contrary to the opinion expressed in State v. Cox, 1940, 91 N.H. 137, 16 A.2d 508, to which we shall shortly turn our attention, a group of persons who desired to make their beliefs known by means of a parade on a public street, come to their public officials not as suppliants for a favor, but as citizens seeking to exercise a right. True, in modern times the methods of communicating ideas have been multiplied. Even so, the highest court of the land has insisted that the ancient method of disseminating opinions by the distribution of pamphlets is also a modern right, constitutionally protected (Lovell v. Griffin, supra, 303 U.S. 444, 58 S. Ct. 666, 82 L.Ed. 949; Schneider v. Irvington, supra, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155), and we entertain no doubt that the long existing right to parade, subject to regulation though it is, has not become so decrepit through the years that it may be denied with impunity. Whatever the reason, the 26 defendants in this case chose to exercise the parade method of expressing their views, and that it was a method in vogue before this century does not destroy its present standing.

The one state case of which we are aware, that holds legislative provisions prohibiting parades without a permit to be valid, where there is no guide explicit in the legislation which governs the granting, or denial, of the permit, is State v. Cox, 1940, 91 N.H. 137, 16 A.2d 508. We do not find the reasoning of this case persuasive. In the first place, it denies that the public has a right to make use of its highways as "proper places for the exercise of the freedom of communicating information and disseminating opinion," a right declared to exist by the United States Supreme Court and other state courts, as we have seen. Nor are we able to follow the New Hampshire Supreme Court in the path it took to find that the legislation before it did not leave it to the uncontrolled discretion of the licensing board to grant or deny a permit to parade. Avowedly in order to give validity to the statute before it, the court read into the statute words which it recognized were necessary, but which are not there. We quote a passage to support our statement, 16 A.2d 513: "Also, the act is implicit in its requirement that the licensing authority act reasonably in granting or denying licenses, and with reference to the object of public order on the public ways. If it does not in express terms 'make comfort or convenience in the use of streets * * * the standard of official action' (Hague v. Committee for Industrial Organization, 307 U.S. 496, 516, 59 S.Ct. 954, 964, 83 L.Ed. 1423), the necessary inference is that it does, based upon the presumption in favor of the validity of legislation as reenforced by the express provision of the act bestowing 'delegated powers' upon the authority, as a grant intended to be only of due legislative power which may properly be delegated. The discretion thus vested in the authority is limited in its exercise by the bounds of reason, in uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination. A systematic, consistent and just order of treatment, with reference to the convenience of public use of the highways, is the statutory mandate. The licensing authority has no delegation of power in excess of that which the legislature granting the power has, and the legislature attempted to delegate no power it did not possess."

An appeal was taken to the United States Supreme Court from the judgment of the New Hampshire Supreme Court in the Cox case, and the judgment of the state court was affirmed. This much can be said of Cox v. New Hampshire, 1940, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049, 133 A.L.R. 1396, in support of the People's contention: the case stresses the right of the state to impose regulations in order to assure the safety and convenience of the people in the use of their highways more than it stresses their right to use the highways for the purposes of propagating ideas. Yet the right to use the public streets for traffic in ideas is not only not denied but is acknowledged as a factor in the situation under consideration. We read in the opinion, 312 U.S. 574, 61 S.Ct. 765, 85 L.Ed. 1053, 133 A.L.R. 1396: "As regulation of the use of the streets for parades and processions is a traditional exercise of control by local government, the question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places. Lovell v. Griffin, 303 U.S. 444, 451, 58 S.Ct. 666, 668, 82 L.Ed. 949, [953]; Hague v. Committee for Industrial Organization, 307 U.S. 496, 515, 516, 59 S.Ct. 954, 963, 964, 83 L.Ed. 1423, [1436, 1437]; Schneider v. Irvington, 308 U.S. 147, 160, 60 S.Ct. 146, 150, 84 L.Ed. 155, [164]; Cantwell v. Connecticut, 310 U.S. 296, 306, 307, 60 S.Ct. 900, 904, 84 L.Ed. 1213, [1219, 1220,] 128 A.L.R. 1352."

Nor do we find in the opinion any suggestion of the abandonment of the principle, applied in the cases cited in the portions of the opinion quoted in the preceding paragraph, and again applied in the case of Largent v. Texas, supra, 318 U.S. 418, 63 S.Ct. 667, 87 L.Ed. 873, decided after the Cox case, that if a license is required of one who desires to exercise his right freely to convey his thoughts to others, the one empowered to issue the license may not be left free to issue it or not as to him seems best. The case is not authority, contrary to all others, that a city may arbitrarily prohibit parades on its streets, for the court accepted the state statute as interpreted by the state court, as of couse it was bound to do (International Harvester Co. v. Wisconsin Dept. of Taxation, 1943, 322 U.S. 435, 445, 64 S.Ct. 1060, 88 L.Ed. 1373, 1381), and as so interpreted there was no arbitrary prohibition. We note particularly these sentences, 312 U.S. 576, 61 S.Ct. 766, 85 L.Ed. 1053, 1054, 133 A.L.R. 1396: "But the court held that the licensing board was not vested with arbitrary power or an unfettered discretion; that its discretion must be exercised with 'uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination'; that a 'systematic, consistent and just order of treatment, with reference to the convenience of public use of the highways, is the statutory mandate'. The defendants, said the court, 'had a right, under the act, to a license to march when, where and as they did, if after a required investigation it was found that the convenience of the public in the use of the streets would not thereby be unduly disturbed, upon such conditions or changes in time, place and manner as would avoid disturbance'."

The latest case on the subject before us, of which we are aware, is Trujillo v. City of Walsenburg, 1941, 108 Colo. 427, 118 P.2d 1081, 1083. The city ordinance there involved, which declared it to be unlawful to use the streets for a parade without a permit from the Chief of Police, was held to be unconstitutional upon much the same grounds as those we have advanced in support of our determination. The decision of the Supreme Courts of New Hampshire and of the United States, in the Cox case, were weighed, but found not to justify an approval of the Walsenburg ordinance. In particular, the interpretation placed upon its statute by the New Hampshire Supreme Court was considered, but the Colorado Supreme Court commented: "The ordinance before us does not permit of such a construction."

The ordinance before us contains no provision which warrants us in saying that by its terms the Board of Police Commissioners is limited to consider only the correlative rights of the public to parade and to travel on the streets, when it debates whether or not to issue a permit. It is true that the facts which are called for by the application are all, including the "purpose of such parade or procession," facts proper to consider if the only question at issue was the adjustment of the two rights, to parade and travel. But nowhere in the ordinance is the Board cautioned not to permit their disapproval, or mere lack of approval, of the purpose of the parade to influence their decision. It is not plain from the ordinance that the city council did not expect the Board, after careful consideration and acting with the highest motives, to permit the purpose of the paraders to determine, not alone when and where, but also whether, there should be a parade. An ordinance so drawn is invalid, and we are of the opinion that we have no right to add a restriction essential to its validity but which is lacking. If, in order to make legislation of this kind constitutional, words may be read into it which are not there, based upon the assumption that only those factors which can, constitutionally, be taken into consideration will be given weight by the permit issuing official, then our Supreme Court in the Porterfield case, and the United States Supreme Court in the several cases decided by it, failed in a most obvious duty. "The ordinance before us does not permit of such a construction."

[3-6] We are fortified, in this conclusion, by a principle thoroughly established in a field of law nearby to that in which our problem lies. This quotation from People v. Broad, 1932, 216 Cal. 1, 7, 12 P.2d 941, 943, sufficiently expresses the point we would make: "The rule is well settled that to constitute due process of law in regard to the taking of property the statute should give the parties interested some adequate remedy for the vindication of their rights * * * and it has accordingly been held that to constitute due process the statute itself must provide for notice of the time and place of hearing where the parties may present in a regular and orderly manner issues of law and fact (Ieck v. Anderson, 57 Cal. 251, 40 Am.Rep. 115). The same rule was declared in Moffat [Co.] v. Hecke, etc., 68 Cal.App. 35, 228 P. 546, where it was held that the essential validity of the law was to be tested not by what has been done under it, but by what may by its authority be done; and where a statute authorizes the taking of private property, but makes no provision for hearing or notice, either actual or constructive, such defect is not supplied by the voluntary adoption by public officers of rules covering the situation. So in Security Trust [& Safety Vault] Co. v. Lexington, 203 U.S. 323, 27 S.Ct. 87, 89, 51 L.Ed. 204, a case involving the validity of an assessment, it was held, that, if a statute makes no provision for notice in any form, it is not material that as a matter of grace or favor notice may be given. As the court stated, 'it is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case, that is material, but the question is whether any notice is provided for by the statute.' Nor can extra-official or casual notice, or a hearing granted as a matter of discretion, be deemed a substantial substitute for the due process that the Constitution requires. Stuart v. Palmer, 74 N.Y. 183, 30 Am.Rep. 289; Coe v. Armour Fertilizer Works, 237 U.S. 413, 35 S.Ct. 625, 59 L.Ed. 1027; Louisville & Nashville R. Co. v. Central Stockyards Co., 212 U.S. 132, 29 S.Ct. 246, 53 L.Ed 441."

That there may be no misunderstanding of our position, we conclude by saying that the invalidity of the present ordinance is not due to the lack of authority in the city to regulate the use of the city's streets by those who would parade. Of the existence of that power there is no question. It is a power lodged primarily in the legislative body of the city, however, that is, in the city council, and is to be exercised, not delegated, by it. By this we do not mean that the city council is to endeavor the impossible, that is, to anticipate and cover in its legislation every contingency which may arise, leaving no discretion to any official board. We do mean, however, that as all the streets throughout the vast stretches of the great city of Los Angeles are not at all times so burdened with traffic that at no time and under no conditions can parades be held, and as the holding of parades is a public right, subject to proper regulation and not suppression, the regulatory ordinance must allow parades, when and where traffic conditions permit. To be valid the ordinance may not leave it within the power of any administrative board to issue or withhold a permit, dependent upon the Board's approval or disapproval of the purpose of those who seek it.

The order sustaining the demurrer and dismissing Count I is affirmed.

SHAW, P. J., concurs.

STEPHENS, Judge.

I dissent. Complaint was filed against the defendants herein in the Municipal Court charging in Count I thereof that they "did wilfully and unlawfully hold, conduct, manage, participate in and carry on a parade, march, and procession on [certain named streets] in the City of Los Angeles, without having first made written application for and received from the Board of Police Commissioners of the City of Los

Angeles, a permit so to do." To this count the trial court sustained a demurrer without leave to amend, and dismissed the complaint as to such count. From this action of the trial court the People present this appeal. The ordinance is set forth in full (except as to one section, not material here) in the majority opinion.

It thus appears that defendants made no attempt to obtain a permit, and made no application to the Board; but on the contrary ignored the law as written upon the apparent assumption (at least as now contended) that the Board not only had arbitrary power under the ordinance but would use it in an arbitrary and unreasonable manner. We are, therefore, called upon to decide whether or not such action upon the part of persons coming under the regulation of the prescribed law is justified. I am convinced that such disregard of a duly enacted statute cannot be sustained unless the invalidity of the statute clearly appears upon its face, and that upon no reasonable basis can its validity be upheld.

Some years ago the judges of this Appellate Department, in another case, arrived at the conclusion that this ordinance was invalid because "it failed to provide a guide whereby the Board of Police Commissioners was to determine whether a permit should or should not be granted." The majority opinion now follows this view and in doing so finds it necessary to disagree with, or distinguish, the later decision of the United States Supreme Court in the case of Cox v. New Hampshire, 1940, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049, 133 A.L.R. 1396. I shall, therefore, discuss that case first of all. The only distinction suggested is that the New Hampshire Supreme Court construed the law there under consideration in such a manner as to practically amend it and that under well established principles the Supreme Court of the United States approved it as thus construed. I disagree with this view. An examination of the case in the light of the principles of interpretation established by the decisions and statutes of this state shows that insofar as anything said therein affects, or is necessary to the matter with which we are here concerned or the decision of the United States Supreme Court thereon, the New Hampshire court merely construed the law in a common sense manner and upon the same principles of construction followed by our own courts in numerous cases. (I do not consider that the preliminary discussion by the New Hampshire Court concerning title to streets is necessary to the decision or that it in any manner affected the decision of the United States Supreme Court.) The decision added nothing to the law as enacted and took nothing away. In fact, the New Hampshire court, 16 A.2d 508, at page 513, specifically disavows any such intention in the following language: "Where a statute is fairly susceptible of two interpretations, one rendering it constitutional and one not, that construction will ordinarily be adopted which will uphold its constitutionality. * * * While 'words, provisions, or modifications' may not at all events be read into a law to the end that it may be clothed with constitutional validity (State v. Gerry, 68 N.H. 495, 503, 38 A. 272, 276, 38 L.R.A. 228), yet when the language used fairly admits of a construction which endows the law with validity, that construction will be adopted in preference to an opposing construction." In connection with the interpretation of statutes, our Civil Code, section 3541, provides as follows: "An interpretation which gives effect is preferred to one which makes void." That is exactly what the New Hampshire court did. For all the purposes which concern us, the statutes under consideration there and here are the same, except that upon comparison, our ordinance is much more obviously directed solely to the regulation of streets as arteries of travel, because the New Hampshire law also attempted to put "open-air public meetings upon any ground abutting thereon" in the same category as the streets, in requiring a permit. This was held invalid, while the provision as to streets was sustained, but the very fact that this was included suggests that the New Hampshire legislative body may have had in mind something other than the traffic angle. No such possible inference can be deduced from our ordinance. The New Hampshire law made no reference to any standard to be observed nor even the purpose of its enactment, but the necessity of the law for the obvious purpose of controlling traffic was apparent both to the United States and New Hampshire Supreme Courts. Such obvious interpretations sustained the law, while the one now adopted in the majority opinion would have made it void. (Civil Code, sec. 3541, supra.) In my opinion, the New Hampshire law cannot be distinguished from our ordinance upon any fundamental basis, and it follows that the decision of the United States Supreme Court should control our action here upon a Federal Constitutional question.

I quote from the latter decision wherein it quotes from the New Hampshire Supreme Court, as follows: "The obvious advantage of requiring application for a permit was noted as giving the public authorities notice in advance so as to afford opportunity for proper policing. And the court further observed that, in fixing time and place, the license served 'to prevent confusion by overlapping parades or processions, to secure convenient use of the streets by other travelers, and to minimize the risk of disorder'. But the court held that the licensing board was not vested with arbitrary power or an unfettered discretion; that its discretion must be exercised with 'uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination;' that a 'systematic, consistent and just order of treatment, with reference to the convenience of public use of the highways, is the statutory mandate'. The defendants, said the court 'had a right, under the act, to a license to march when, where and as they did, if after a required investigation it was found that the convenience of the public in the use of the streets would not thereby be unduly disturbed, upon such conditions or changes in time, place and manner as would avoid disturbance'."

An examination of the two decisions (by the United States and New Hampshire Supreme Courts) in the Cox v. New Hampshire case discloses that the only principle laid down by the New Hampshire court and relied upon by the United States court in having any controlling effect upon the latter is that the grant of power to issue permits is not one to be used arbitrarily but only in the honest exercise of a reasonable discretion. Our own Supreme Court in a long line of decisions has given exactly that construction to laws giving similar powers in this state. The principles discussed and laid down by the United States Supreme Court in its decision, and which should be a guide to us, are its own and not those of the New Hampshire court.

That the jurisdiction of the officer or board to whom such authority is given is thus limited has been held by our own Supreme Court many times. In Gaylord v. Pasadena, 1917, 175 Cal. 433, 166 P. 348, 349, the court had before it an ordinance which gave to the city electrician the power to examine "any electric wiring, connections, fixtures, etc. [appliances, apparatus, machinery, equipment, or work]" already installed in any building, and if he determined it was dangerous to life or property, he was empowered to notify the owner to cease using it and to make the changes required by such city electrician within a designated number of days. No other standard for his determination is provided. The ordinance was held valid, and I shall quote more fully from the decision later; upon the point presently being discussed the court says, 175 Cal. at page 437, 166 P. at page 349: "That an official charged with such a duty as this may, and indeed must, exercise discretion precisely as he may or must exercise judgment is, of course, true, *but this fact in no way militates against the validity of the law, for,* as said in the Van de Carr Case, supra: *'the authority sustained is the grant of power to issue or withhold permits in the honest exercise of a reasonable discretion.'"* (Emphasis added.)

In the case of Riley v. Chambers, 1919, 181 Cal. 589, 185 P. 855, 856, 8 A.L.R. 418, the court had before it the law which empowered the Real Estate Commissioner to issue a permit to a person to act as real estate broker upon finding him to be "honest, truthful and of good reputation." The court notes that the law does not in so many words authorize the commissioner to deny a permit but holds that such authority is necessarily implied. He is also empowered to revoke upon presentation of written charges. Answering an attack upon the law similar to the one we are now considering, the court says, 181 Cal. at page 595, 185 P. at page 857, 8 A.L.R. 418: "But it may be said that the power of the commissioner to refuse a license if he is not satisfied as to the character of the applicant practically gives him arbitrary power, as he alone can determine whether he is satisfied or not. This, however, is not true. While the commissioner has the power to refuse a license if he is not satisfied as to the character of the applicant, his discretion is not arbitrary. There must exist facts which reasonably justify his conclusion that the applicant is not of good character and reputation. If such facts do not exist, it is his duty to issue the license, and this duty can be enforced by the courts."

Furthermore, as indicated by the last sentence above quoted, the courts of this state have taken the next logical step, based upon this limitation of the authority vested in the officer or board and have held that mandate will lie to compel the issuance of a permit in the event it is arbitrarily withheld. In Gaylord v. Pasadena, supra, 175 Cal. at page 439, 166 P. at page 350, the court says: "An unnecessary liberality is shown in this ordinance in conferring, as it does, a right of appeal to the council, for the ordinance, if good at all, would unquestionably be good without such right of appeal, and the householder, conceiving himself to be injured would be left to his action in court."

The case of In re Holmes, 1921, 187 Cal. 640, 203 P. 398, involved an ordinance of the City and County of San Francisco empowering the Board of Police Commissioners to grant or refuse permits to persons desiring to engage in selling and dealing in second-hand books, and in response to an attack thereon upon the ground that it gave arbitrary and uncontrolled power to the Board, the court says, 187 Cal. at page 646, 203 P. at page 400: " 'Many cases are to be found sustaining ordinances prohibiting acts, or even the following of trades or occupations, without procuring permits which may be issued at the discretion of the council, mayor, or some other city officer or department, and the fact that the dispensing power was apparently conferred without restraint or qualificaton has been regarded as arising merely from the difficulty of defining in advance upon what conditions the permits shall be given or the dispensing power exercised. It has been said that it is not to be assumed that the council or officer, in exercising the dispensing power, will act arbitrarily, or otherwise than in the exercise of a sound discretion.' * * * If this petitioner had applied for a permit under the requirement of the section of the charter above quoted and been either whimsically or arbitrarily refused such permit, he might then, as is shown in Gaylord v. City of Pasadena, supra, have had recourse to the courts for relief from such unjust and arbitrary action."

In Butterworth v. Boyd, 1938, 12 Cal.2d 140, 82 P.2d 434, 126 A.L.R. 838, the court had under consideration a charter provision in which certain officers were given authority to make determinations and this was attacked as arbitrary and for which no standard was set up. The court says, 12 Cal.2d at page 149, 82 P.2d at page 439, 126 A.L.R. 838: *"It is to be presumed that the board will exercise its powers in conformity with the requirements of the Constitution;* and if it does act unfairly, the fault lies with the board and not the statute. *Constitutional guaranties against arbitrary and discriminatory action are read into the law, and the courts will compel administrative officials to respect them."* (Emphasis added.)

It may be noted that our ordinance, like the law discussed in Riley v. Chambers, supra, 181 Cal. 589, 185 P. 855, 8 A.L.R. 418, does not in words empower the Board to deny the application for a permit; however, as said in that case, such power is necessarily implied. *It would be an anomaly to say that the law implies an arbitrary and illegal power.*

It is axiomatic that every intendment is in favor of the validity of a law and that "the authority of the courts to declare a regulation invalid will be exercised with caution and only when it is clear that the law exceeds the limits of legislative power and infringes upon rights guaranteed by the Constitution." The above quotation is from Bernstein v. Bush, March 1947, 29 Cal.2d 773, 177 P.2d 913, 916, citing the well known case of Dobbins v. Los Angeles, 195 U.S. 223, 25 S.Ct. 18, 49 L.Ed. 169. See also In re Jones, 1943, 56 Cal. App.2d 658, at page 665, 133 P.2d 418.

There are numerous cases in California sustaining laws requiring the obtaining of a permit from a board or officer with no more clearly defined standards fixed therein than in the ordinance here under examination. I again quote from Gaylord v. Pasadena, supra, 175 Cal. at pages 436 and 439, 166 P. at page 349: "Even a casual observer of governmental growth and development must have observed the ever-increasing multiplicity and complexity of administrative affairs—national, state, and municipal—and even the occasional reader of the law must have perceived that from necessity, if for no better grounded reason, it has become increasingly imperative that many quasi legislative and quasi judicial functions, which in smaller communities and under more primitive conditions were performed by the legislative or judicial branches of the government, are intrusted to departments, boards, commissions, and agents. No sound objection can longer be successfully advanced to this growing method of transacting public business. * * * It (the ordinance under attack) does not define what conditions the city electrician must find to exist before he determines that the electrical apparatus is unsafe or dangerous. From the very nature and character of such apparatus it would be impossible for any ordinance so to do without working in many instances the very oppression which its language, necessarily general, is designed to prevent. As we have said, it is presumed that the city electrician will act fairly." To same effect, see In re Holmes, supra, 187 Cal. 640, 203 P. 398; Riley v. Chambers, supra, 181 Cal. 589, 185 P. 855, 8 A.L.R. 418; In re Hartmann, 1938, 25 Cal.App.2d 55, 60, 76 P.2d 709, 711, where the court says, "We may not assume the chief of police will arbitrarily refuse to grant permits to canvass for subscriptions without good cause. The presumption is that every officer will perform his full duty in a fair and lawful manner." Citing In re Flaherty, 105 Cal. 558, 38 P. 981, 27 L.R.A. 529; In re Jones, 1943, 56 Cal.App.2d 658, 133 P.2d 418; Gospel Army v. City of Los Angeles, 1945, 27 Cal.2d 232, 163 P.2d 704, in which the authority given to the Board of Police Commissioners to issue permits to second-hand goods dealers is similarly attacked, and the court says, 27 Cal.2d at page 249, 163 P.2d at page 714: "The board has no discretion to withhold a license if the applicant's good character and reputation and his financial responsibility are established and the required bond is filed. The board is not free to deny licenses, but must act reasonably in the light of the evidence presented." (Citing many cases.) See also Carter v. Stevens, 1930, 211 Cal. 281, 295 P. 28, specifically approving Gaylord v. Pasadena, 175 Cal. 433, 166 P. 348, and quoting at length from it. The early but often quoted case of In re Flaherty, 1895, 105 Cal. 558, 38 P. 981, 27 L.R.A. 529, is direct authority for the ordinance in question, insofar as the presumption concerning the performance of official duty is concerned. The following statement from that case has been quoted in later California cases too numerous to mention: "Laws are not made upon the theory of the total depravity of those who are elected to administer them; and the presumption is that municipal officers will not use these small powers villianously and for purposes of oppression and mischief." In fact, we find this exact quotation in a recent case in this Appellate Department—People v. Walton, 1945, 70 Cal.App.2d Supp. 862, 161 P.2d 498, 503. In that case a county ordinance made it unlawful for a minor under 18 years of age to remain upon a public street, park, etc. between certain hours without a permit from the sheriff, which the latter was authorized to issue upon application of the parent or guardian, stating the name and age of such minor, his description and the reason for such permit. This court sustained the validity of the ordinance and said, 70 Cal.App.2d Supp. at page 870, 161 P.2d at page 503: "It is readily apparent that the discretion so reposed in the sheriff to grant or deny such permit is not an arbitrary, unbridled or unlimited one, but is based upon grounds of reasonable necessity as shown by the facts and reasons therefor set forth in the written application." See also Mutual Film Corp. v. Industrial Comm. of Ohio, 1915, 236 U.S. 230, 35 S.Ct. 387, 59 L.Ed. 552, at page 560, Ann.Cas.1916C, 296, discussing alleged lack of standard in the law.

The ordinance before us, like the one under discussion in People v. Walton, supra, requires the filing of an application setting forth certain information, viz., the course to be traveled, time of starting, names of persons in control or responsible, and the purpose of the proposed parade. These clearly indicate the nature of the information which *must be* considered by the Board in passing upon the application and each is consistent with the purpose of bringing out facts necessary to be known in order to decide whether or not issuance of the permit is consistent with traffic conditions at any particular time and place. The fact that this detailed information is required to be presented to the Board before any permit is issued clearly refutes any claim that the power given to the Board was to be exercised arbitrarily or for some capricious reason of its own; furthermore, *upon no basis of decision whatever except the control of traffic* could *all* of the information thus required be material to their consideration of the application. Manifestly, as hereinafter more specifically pointed out, no general ordinance could contemplate and provide for all the situations presented by the facts thus placed before the board. The only one of these inquiries which could possibly be said to be such as would give information upon which the board could violate its duty by acting capriciously and arbitrarily instead of in accordance with its plain duty, is the one requiring a statement of the purpose of the parade. However, upon reflection, it will be seen that this information is perhaps the most necessary of all in order to pass upon the legitimate purpose for requiring a permit. To illustrate in Pasadena the parade on New Year's day is for such a purpose and of such a nature that not only the entire police force of that city is required to handle the huge crowds, but the peace officers of neighboring cities and the motor vehicle officers of the state are called in to assist, and, in addition planes are employed to circle in the air with radio communication with the ground officers in handling the traffic and protecting life and limb, as well as the comfort and convenience of the people. On the other hand, if a permit for a parade in that city should be requested for the purpose of reviving interest in the habits of the Ancient Babylonians, doubtless the normal shift of a portion of the local police force of that city on duty at the particular time could readily handle the situation; and these would be needed primarily to keep the small number of paraders from being run over by the normal flow of traffic.

As said by the court in the case of In re Anderson, 1933, 130 Cal.App. 395, 398, 19 P.2d 1027, 1028. "The primary purpose of a highway is the passing and repassing of the public, which is entitled so far as needed to the full, unobstructed and uninterrupted enjoyment of the entire width of the layout for that purpose," and even though historically the streets may have been used also for dissemination of ideas by parades, this has always been subject to the primary and basic purpose of furnishing a place for transportation. The relation of these two uses might be compared, by analogy, to a first lien and a junior lien; or to the respective rights of the public and the owner of the fee in streets where the public has only a right of way, in which case the owner may make all uses of the property not inconsistent with street use, but as the latter requirement grows with greater public need, the rights of the fee owner are correspondingly lessened. (Colegrove Water Co. v. City of Hollywood, 1907, 151 Cal. 425, 430, 90 P. 1053, 13 L.R.A.,N.S., 904.) The growth of the demand upon the streets for their primary purpose and the lessening of the need for their use as avenues for the dissemination of ideas have gone hand in hand and are matters of common knowledge.

In the very nature of things no possible new idea or invention can take the place of streets for the purpose of accommodating traffic—there is no substitute for streets but more streets; yet modern invention and increased production are constantly adding to the wide-spread use of motor vehicles, including huge trucks and busses, thus piling up the burden on streets and constantly increasing the danger to life and limb until the alarming number of fatalities has created a national as well as local problem. On the other hand, as to the facilities for free speech, which may be called the secondary use of streets, and which is made to loom so large in its presentation in this case, the situation is just the reverse. Modern invention and progress are constantly facilitating the exercise of free speech and dissemination of ideas by radio, motion pictures, telephone, constantly expanding press, innumerable magazines, more presses for printing of handbills, increasing number of public meeting places, automobiles, and even planes, equipped with loud speakers, and now television. In view of these considerations and weighing the protection of life, limb and safety in traffic against possible curtailment of free speech, "that interference with [freedom] of speech and writing seem slight" (Cox v. New Hampshire, supra); especially since such interference is brought about by natural conditions and not arbitrarily imposed by law.

It is important to have in mind that while fundamental rights and principles never change, the manner and extent of their exercise must of necessity vary with changing conditions. The right of free speech is a fundamental right that goes with the individual anywhere he may be, but the extent to which and the manner in which he may exercise it vary with places and circumstances. The right to engage in a parade is not a fundamental right but is merely one phase of the exercise of the fundamental right of free speech. The manner and extent of its exercise is limited by similar or more important rights of others using the streets at the same time for their primary purpose. This limit is brought about by the circumstances themselves rather than by any law.

A parade is defined by Webster's dictionary as, "1. Pompous show; formal display or exhibition. 3. Any march or procession; esp. a formal public procession; the movement of any body marshaled in something like military order." Such an activity necessarily involves the exclusive use of all or a substantial portion of the street to the exclusion of all others. Does any person or group of persons have a fundamental right to such exclusive use? If so, how many groups have the same right at the same time? Only the moving of persons in mass formation or parade order involving in greater or less degree the exclusive use of the street is within the ordinance, by which such use is adapted to the primary purpose of such streets. No other manner of the exercise of free speech in the street is touched by the ordinance—distributing handbills, carrying banners on foot or in cars, full discussion with others on the street, calling out from cars or any other phase of free speech, even the movement of a group of persons or cars not unduly burdening the street and not in parade formation.

The majority opinion recognizes the right of the city to regulate the holding of parades but insists that the ordinance is void because it fixes no standard to be observed by the Board in granting or withholding permits, with the result that the Board could act arbitrarily and perhaps deny a permit to those with whose economic, political or other ideas of the Board might disagree.

It seems to me this ordinance is one whose standard is obvious from its purpose. The police department has the duty of enforcing all ordinances having to do with the regulation of traffic on the streets and the Police Commission is given authority by the charter (sec. 204) to create a special bureau devoted to this. The ordinance before us, giving that commission the responsibility of passing upon applications for parades is in full consonance with these duties. On the other hand, to assume that the Board in passing upon such applications will do so from the standpoint of censors instead of in connection with traffic considerations, is to assume that they will ignore their obvious and recognized powers in their own field and step into the field of censorship without the slightest basis therefor in any ordinance or charter provision, or state law or the decisions of our courts. But let us assume that the ordinance should state that the standard by which the Commission shall be guided is the safety, comfort and welfare of persons using the street. That would add nothing to the information of the Commission because it is something that is already *obvious and implicit in the present ordinance* in the light of the information required by the ordinance to be presented to the Board and of the powers customarily exercised by our police department; and if we are to assume that the Commission is to be arbitrary and reckless of their sworn duty (a necessary assumption under the majority opinion) then there is nothing magic in the words above suggested, and venal board members could just as readily accomplish their desire to be unfair by placing their decision ostensibly upon public safety. We would still require the aid of the presumption that official duty would be regularly and honestly performed; but upon what theory should we indulge it then, but reject it in the broad view of the ordinance now before us? The only other course then would be for the ordinance to set forth in detail all the days and hours on which parades should or should not be permitted on each of the innumerable streets in the many congested shopping centers of this sprawling metropolis, in such manner as to leave nothing to the discretion of the Board. The detail suggested above for such an ordinance would alone make the task impractical, but when we add to it the necessity of anticipating future conditions and unpredictable emergencies or special circumstances that would make the holding of a parade undesirable and contrary to the general welfare in any particular district or street on any particular day in the future, the impossibility of such an undertaking becomes at once apparent.

The bill of rights of the United States Constitution is not a set of by-laws but statements of fundamental rights. They are to be applied by the courts to conditions and affairs as they exist from time to time in harmony with the general welfare of the whole people and the practical operation of our scheme of government. The presumption that official duty will be honestly and fairly performed is absolutely necessary to governmental operation, for laws cannot be made wholly automatic. As the Supreme Court of the United States once said, "Wherever power is lodged it may be abused. But this forms no solid objection against its exercise. Confidence must be reposed somewhere * * *" (Ex parte Terry, 1888, 128 U.S. 289, 9 S.Ct. 77, 32 L.Ed. 405.)

It would unduly extend this opinion to discuss each of the cases relied upon in the majority opinion. Many of them are specifically distinguished by the United States Supreme Court in Cox v. New Hampshire, 312 U.S. 569, 61 S.Ct. 762, 766, 85 L.Ed. 1049, 133 A.L.R. 1396, supra, in the following language: "The decisions upon which appellants rely are not applicable. In Lovell v. Griffin, [303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949], supra, the ordinance prohibited the distribution of literature of any kind at any time, at any place, and in any manner without a permit from the city manager, thus striking at the very foundation of the freedom of the press by subjecting it to license and censorship. In Hague v. Committee for Industrial Organization, supra [307 U.S.496, 59 S.Ct. 954, 83 L.Ed. 1423], the ordinance dealt with the exercise of the right of assembly for the purpose of communicating views; it did not make comfort or convenience in the use of streets the standard of official action but enabled the local official absolutely to refuse a permit on his mere opinion that such refusal would prevent 'riots, disturbances or disorderly assemblage'. The ordinance thus created, as the record disclosed, an instrument of arbitrary suppression of opinions on public questions. The court said that 'uncontrolled official suppression of the privilege cannot be made a substitute for the duty to maintain order in connection with the exercise of the right'. In Schneider v. Irvington, supra, 308 U.S. page 163, 60 S.Ct. [146], page 151, 84 L.Ed. 165, the ordinance was directed at canvassing and banned unlicensed communication of any views, or the advocacy of any cause, from door to door, subject only to the power of a police officer to determine as a censor what literature might be distributed and who might distribute it. In Cantwell v. Connecticut, supra, 310 U.S. page 305, 60 S.Ct. [900], page 904, 84 L.Ed. 1218, 128 A.L.R. 1352, the statute dealt with the solicitation of funds for religious causes and authorized an official to determine whether the cause was a religious one and to refuse a permit if he determined it was not, thus establishing a censorship of religion.

"Nor is any question of peaceful picketing here involved, as in Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093, and Carlson v. People of California, 310 U.S. 106, 60 S.Ct. 746, 84 L.Ed. 1104. The statute, as the state court said, *is not aimed* at any restraint of freedom of speech, and *there is no basis for an assumption that it would be applied* so as to prevent peaceful picketing as described in the cases cited." (Emphasis added.) Further, the parade ordinance involved in the Hague case was only one phase of what the trial court actually found to be a conspiracy which constituted a shining example of what was termed in Yick Wo v. Hopkins, 1886, 118 U.S. 356, 6 S.Ct. 1064, 1073, 30 L.Ed. 220, an *administration* by public authority, "with an evil eye and an unequal hand."

The distinction between our case and Lovell v. Griffin, 303 U.S. 444, 58 S.Ct. 666, 669, 82 L.Ed. 949, is that in the latter the law directly attacks a fundamental right—the distribution of literature "of any kind at any time, at any place, and in any manner"; it does not and cannot possibly be construed as a regulation to adapt the exercise of this right to another equally necessary right, but is an attempted bold authority to deprive the citizen of this right directly and solely and without regard to the exercise of any other right by other persons. The real vice of this and similar laws, therefore, is not that they *do not fix a standard,* but that in the very nature of the subject involved, no fixed standard other than the will of the licensing authority was intended or could possibly be construed as having been intended. An examination of the other cases decided by the United States and California Supreme Courts, and cited in the majority opinion, shows that a similar distinction exists as to substantially all of them, including the Porterfield case so heavily relied upon.

Extensive quotation upon the general subject of the importance of parades as instruments of free speech is made from two decisions, one by the Supreme Court of Kansas, and the other by the Illinois Court of Appeals. The former was rendered in 1888 and the latter in 1891. Those were the days when boys played marbles and men in shirt sleeves amused themselves by playing baseball in the streets of the towns with no danger to themselves or interference with traffic, and parades posed no problem other than possible frightening of some farmer's skittish colt. They are hardly proper guides at this time concerning an ordinance obviously designed to prevent obstruction to the free flow of traffic in this great metropolitan center.

The majority opinion, conscious of the antiquity of these cases, says "* * * we entertain no doubt that the long existing right to parade, subject to regulation though it is, has not become so decrepit through the years that it may be denied with impunity." On the other hand, however great may be our respect for this ancient right, it must, like our honored and respected elders of similar years, adjust itself to changed conditions and not endanger the safety of all by needlessly stepping into the pathway of oncoming modern traffic. The point is, of course, that it is not our respect for the abstract right which has changed, but the circumstances which under it may be properly exercised.

The words of Justice Frankfurter in his separate opinion in the case of Martin v. Struthers, 1943, 319 U.S. 141, 63 S.Ct. 862, 868, 87 L.Ed. 1313, seem particularly appropriate: "From generation to generation fresh vindication is given to the prophetic wisdom of the framers of the Constitution in casting it in terms so broad that it has adaptable vitality for the drastic changes in our society which they knew to be inevitable, even though they could not foresee them. * * * The Constitution cannot be applied in disregard of the external circumstances in which men live and move and have their being. Therefore neither the First nor the FourteenthAmendment is to be treated by judges as though it were a mathematical abstraction, an absolute having no relation to the lives of men."

Great reliance has been placed upon the decision of our Supreme Court in Re Porterfield, 1946, 28 Cal.2d 91, 168 P.2d 706. I find no conflict therein with the views I have expressed, nor with the prior decisions of this court upon which they are based. In the first place, it is not a parade case, and deals with a very different activity—one dealing directly with a fundamental freedom and not merely limiting one phase of an activity in the face of a greater need. The reliance is principally on the general statement in the opinion, 28 Cal.2d at page 112, 168 P.2d at page 719, as follows: "This contention (the presumption that the council will perform its duty in a fair and impartial manner) rests upon the assumption that no question of, or akin to that of, free speech is presented, for where free speech or any other fundamental right is involved the presumption of proper action by the licensing authority cannot be relied upon." This is a broad statement of general principle and I am not persuaded that the court intended to say that under every imaginable situation, if the right of *free speech or any other fundamental right* is involved even in the slightest and most remote degree, any law which vests any discretion whatever in a public official must be declared void, even though the problem involved by its own nature permits of no definite and precise detailed standards which will contemplate each possible contingency; and even though the proposed exercise of such asserted right would necessarily conflict with the exercise of equally necessary and important rights by others; and that as to such laws we must proceed "upon the theory of the total depravity of those who are elected to administer them." In re Flaherty, 1895, 105 Cal. 558, 562, 38 P. 981, 27 L.R.A. 529. I do not believe that the words "akin to * * * free speech" were intended to be so far reaching as to eliminate from the principles so thoroughly established in this state a law upon a subject necessary to the public safety and welfare merely because as a remote incident thereof there is a possibility of curtailment of the right to exercise that full freedom of speech, through some particular channel, that some individual may desire. In my opinion, the court had in mind a law which *directly* or necessarily restricts to a substantial degree the exercise of such right. All constitutional and other rights of the individual must be exercised in deference to and in conformity with similar rights of others and the safety and welfare of the public. Even in Cantwell v. Connecticut, 1940, 310 U.S. 296, 60 S.Ct. 900, 905, 84 L.Ed. 1213, 128 A.L.R. 1352, which has been cited, the court says: "No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, *interference with traffic upon the public streets,* or other immediate threat to public safety, peace, or order, appears, the power of the state to *prevent* or punish is obvious. * * * There are limits to the exercise of these liberties." (Emphasis added.)

Again quoting from the opinion of the United States Supreme Court in Cox v. New Hampshire: "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. *The control of travel on the streets of cities is the most familiar illustration of this recognition of social need. Where a restriction of the use of highways in that relation is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection.*" (Emphasis added.)

In my opinion, the section of the Municipal Code in question constitutes a valid exercise of the police power, and is fully sustained by the decision of the United States Supreme Court in Cox v. New Hampshire, supra; and it follows therefrom that the order of the trial court in dismissing this count of the complaint should be vacated and the case remanded with instructions to overrule the demurrer.

STEPHENS, Judge.

CALIFORNIA REPORTER

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SECOND SERIES

29 Cal.2d 873

DEPARTMENT OF SOCIAL WELFARE v. KERN COUNTY et al.

S. F. 17454.

Supreme Court of California, in Bank.

April 28, 1947.

1. Paupers 🔑43(3)

Giving additional aid to eligible needy children without state assistance where caretaker of child is not qualified by residence for aid, but is in fact needy and hence cannot provide adequate home care for the child, is discretionary with county and not mandatory. Welfare and Institutions Code, §§ 15, 1500–1580, 1500, 1503, 1507, 1510, 1511, 1525, 1526, 1560.

2. Paupers 🔑43(3)

The statutory provision that county "may" pay additional sums for care of needy child and that state and county "may" pay aid needed for adequate care of the family uses quoted word as a word of permission or authorization but not of compulsion. Welfare and Institutions Code, §§ 15, 1500–1580, 1511.

See Words and Phrases, Permanent Edition, for all other definitions of "May".

3. Paupers 🔑43(2)

The statute providing for payment of $22.50 per month for each needy child qualifying for aid or so much thereof as is necessary for adequate care of child, establishes the maximum total amount which county and state can be required to pay per month for each needy child and statutory authority of State Department of Social Welfare to determine the minimum standards of adequate care is limited by such maximum. Welfare and Institutions Code, §§ 1500–1580, 1511.

4. Paupers 🔑43(4)

The state program of aid for needy children meets the requirements of eligibility for federal grant of uniform administration and supervision by statewide agency, notwithstanding inability of State Department of Social Welfare to compel counties to grant additional aid where caretaker of child is unable due to necessitous circumstances to provide adequate home care for child but is not qualified by residence for aid. Welfare and Institutions Code, §§ 1500–1580, 1511; Social Security Act, §§ 401–405, 42 U.S.C.A., §§ 601–605.

◆

Proceeding in mandamus by the Department of Social Welfare against County of Kern and others to compel defendant county to grant aid to needy children and their caretaker.

Alternative writ discharged and petition for a peremptory writ denied.

Fred N. Howser, Atty. Gen., and Clarence A. Linn, Deputy Atty. Gen., for petitioner.

Norbert Baumgarten, County Counsel, of Bakersfield, for respondents.

Harold W. Kennedy, County Counsel, and Gerald G. Kelly, Deputy County Counsel, both of Los Angeles, as amici curiae, on behalf of respondents.

CARTER, Justice.

Petitioner, Department of Social Welfare of the State of California, seeks by mandamus to compel Kern County to grant aid to needy children and their caretaker regardless of the caretaker's eligibility to general relief. The solution of the case rests upon the interpretation of the statutory provisions for aid to needy children (Welf. & Inst. Code, §§ 1500–1580) and the rules adopted by the department pursuant thereto.

We are concerned here only with needy children who do not receive institutional care. Needy children are described in section 1500 of the Welfare and Institutions Code. The object and purpose of the statute with reference to such children is "* * * to provide aid for children whose dependency is caused by circumstances defined in sections 1500 and 1501 and to keep children in their own homes wherever possible and to provide the best substitute for their own homes for those children who must be given foster care." (Welf. & Inst.Code, § 1503.) And it is to be liberally construed to effect those objects and purposes. (§ 1507.) A child to qualify (with certain exceptions not here pertinent) must have been a resident of the state by being physically present therein for one year, or having parents who have been residents for one year, or born here (§ 1525); he must be a resident of the county for a year as residence is there defined (§ 1526). With reference to who must bear the burden of the aid, there is provided out of state moneys to each county for each child *not in excess of* $180 per year, or $15 per month, if the county residence is satisfied, otherwise $270 per year, $22.50 per month (§ 1510). "For each needy child qualifying for aid under the provisions of this chapter, * * * there shall be paid the sum of * * * ($22.50) per month, or so much thereof as is necessary for the adequate care of the child. The State shall pay 66⅔ per cent and the county shall pay 33⅓ per cent of the aid furnished for the adequate care of any needy child who has a county residence, but the State shall not pay more than * * * ($15) for any month or portion of a month for any needy child who has such county residence.

[1] "Any county *may* pay from its own funds additional sums for the care of any needy child, and the State and county *may* pay such aid as is needed for the adequate care of the family from other State or county funds.

[2] "Minimum standards of adequate care shall be determined by the rules and regulations of the State Department of Social Welfare, approved by the State Board of Social Welfare. The rules and regulations shall be distributed to the counties and shall be binding upon them." (§ 1511.) [Emphasis added.] (The foregoing paragraphs are numbered for convenience in reference.) The department shall "(a) make rules and regulations for the proper maintenance and care of needy children; (b) make rules and regulations for the administration of aid to needy children; (c) inquire, at any time, * * * into the management, by any county, of aid to needy children. Such rules and regulations shall be binding upon the institutions and counties." (§ 1560.) If compliance with the rules or statute by the county cannot be enforced in any other manner, aid may be withheld from the county. (§ 1560.)

The department's rule reads: "Aid shall be granted in accordance with the ANC [aid to needy children] standard of adequacy with respect to children eligible to ANC *and their caretaker (regardless of the caretaker's eligibility to general relief)*, except that when ANC is granted on a noncounty basis the county supplemental aid is granted as the county in its discretion may determine.

"When the county includes in the determination of the amount of the grant the needs of the parent (other than the caretaker), ineligible minors, or the stepparent in accordance with the ANC standard, ANC may be granted as thus determined and the State will participate to the extent as provided in Section 1511 of the W&IC.

"When the needs of other individuals in the household are not determined in accordance with the ANC standard, the county shall grant aid for them in accordance with general relief standards if they are otherwise eligible for general relief.

"Individuals who are ineligible to general relief or other categories of aid may be granted such aid as the county in its discretion shall determine." (§ 158-07, SDSW Manual.) [Emphasis added.]

It is the department's contention that under the foregoing the respondent county must, without state assistance, give additional aid to eligible needy children where the caretaker of the child is not qualified by residence for aid; but is in fact needy and as a result cannot give adequate home care for the child; that the statute imposes such obligation and grants the power to the department. Upon the county's refusal to give the aid an appeal was taken and the State's Social Welfare Board ordered it to be given.

[1, 2] There is nothing in the statute that imposes such an obligation on the county. The county is required to bear its stated share up to $22.50 per month. The state is limited in its contribution to the amounts specified. Under section 1511 the sum of $22.50 is specified as the amount to be paid or "so much thereof," that is, of the $22.50, as is necessary "for the adequate care of the child." The state and county each shall pay a fixed per cent of "the aid furnished for the adequate care of any needy child." The "aid furnished" can only refer to the $22.50 or a less amount if all of that sum is not required. Both county and state are authorized to make additional payments in aid of needy children. Under paragraph [1] of section 1511 the word "may" is used, a word of permission or authorization but not of compulsion. That word is defined: "'Shall' is mandatory and 'may' is permissive." (Welf. & Inst. Code, § 15.) Hence there is no basis for asserting that the statute imposes a mandatory duty on a county to give additional aid. The matter is left to its discretion.

[3] Paragraph [2] of section 1511 states that the "minimum" standards of adequate care must be fixed by the department through rules and regulations and such standards are binding upon the counties. Assuming that the rule of the department, above quoted, does impose on the counties the obligation to increase the aid in order to give consideration to the needy caretaker (respondent county claims it does not), and it does so to a point where more than $22.50 must be paid, thus increasing the amount payable by the county to more than $7.50, the question arises as to whether the department has exceeded its powers in adopting the rule. Is it within the area of its discretion as found in the statute? Plainly the Legislature in fixing the sum of $22.50 in section 1511 intended to establish a maximum. Hence the grant of power to the department in paragraph [2] is concerned only with minimum standards of adequate care, insofar as that relates to the sum of the aid payable below that maximum. That is to say, the authority given to the department is limited by the legislative maximum. To hold otherwise would make the $22.50 provision meaningless; that is, as far as the county is concerned. The maximum to be supplied by the state is unequivocally stated. With no ceiling, the department could increase the aid to be furnished by the county to any amount. If it is said that the amount of the state's contribution could be increased also under paragraph [2], then the restrictions on the state's maximum as fixed by the Legislature would be without significance. While the maximum for the state is perhaps more positively stated yet there is no ambiguity or uncertainty as to the total amount of aid that the county may be compelled to supply.

In the face of the positive language of the statute the foregoing construction is not altered by the requirement of liberal construction or the expression of policy to keep needy children in homes rather than institutions. The latter policy may still be effective within the framework of the provision for the maximum amount of aid that can be required of the county and also where the county voluntarily gives additional aid, which it may do. It may at first blush seem that the policy of having needy children kept in homes which involves a caretaker, coupled with the one year residence requirement, is inconsistent with the residence requirement for adults, but that is a matter for legislative correction.

[4] The aid for needy children program is assisted by the federal government (42 U.S.C.A. §§ 601–605), and it is suggested that the failure of the county to give additional aid in order to give consideration to the caretaker, and the absence of a right in the department to compel it to do so, will jeopardize the federal grants. We fail to see how the refusal of the county to give additional aid will have that result. True, the federal statute requires uniform administration and supervision by a state wide agency but we have

exactly that here. It is only in the matter of whether additional aid may be compelled that its powers are limited.

The alternative writ is discharged and the petition for a peremptory writ denied.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

30 Cal.2d 84

VICE v. THACKER et al.

L. A. 19965.

Supreme Court of California, in Bank.

May 6, 1947.

1. Principal and agent ⇨79(5)

Evidence established a confidential relationship between seller and agent employed to sell stock in trade of shoe repair business and justified conclusion that agent fraudulently induced seller to sign bill of sale prepared by agent with himself designated as buyer without reading it or knowing it included shoe repair machinery, tools, and store fixtures in addition to stock in trade.

2. Appeal and error ⇨996, 1011(1)

The weight to be given conflicting testimony and inferences to be deduced therefrom are questions for trial court, and findings based on substantially conflicting evidence will not be disturbed on appeal.

3. Principal and agent ⇨190(3)

In action to rescind sale of shoe repair machinery, tools, and store fixtures for fraud and recover such property or value thereof, evidence established that agent, who was employed to sell stock in trade of shoe repair business and store machinery, tools, and fixtures, also acted as agent for ultimate buyer and fraudulently included machinery, tools, and fixtures in bill of sale.

4. Principal and agent ⇨161(2)

Where agent undertakes to represent both parties to transaction, principal, having no knowledge of such dual representation, may repudiate transaction, regardless of actual injury and even though agent intended no wrong and other party acted in good faith, and, if transaction has been executed, principal may, by acting promptly and before rights of innocent parties have intervened, restore consideration received, rescind the contract, and recover back property or rights with which he has parted thereunder.

5. Principal and agent ⇨161(3)

Seller, upon learning that agent employed to sell stock in trade of shoe repair business had also acted as agent for ultimate buyer and had fraudulently induced seller to sign bill of sale including shoe repair machinery, tools, and store fixtures, had to act within a reasonable time thereafter to effect a rescission of transaction.

6. Principal and agent ⇨161(3)

Where seller, immediately upon learning of fraud practiced on him in sale of personal property by his agent who without seller's knowledge also represented buyer, retained an attorney and when attorney failed to take any action employed other counsel, notice of rescission served on agent and buyer a few days later and within two months after seller learned of fraud was timely.

7. Sales ⇨107

In seller's notice of recission of sale of personal property for fraud, his offer to restore everything of value obtained from buyer upon being restored to the property or reasonable value thereof was sufficient, and it was not necessary for seller at that time to return consideration received in transaction. Civ.Code, § 1691, subd. 2.

8. Sales ⇨316(1), 384(1)

Where agent employed to sell stock in trade of shoe repair business and store shoe repair machinery, tools, and store fixtures acted also as agent for ultimate buyer and fraudulently induced seller to sign bill of sale including machinery, tools, and fixtures, and seller upon learning of agent's duplicity gave timely notice of rescission and offered to restore everything of value received through transaction, buyer was entitled to judgment awarding him recovery of property sold and damages for loss of use and allowing credit to ultimate buyer for repairs made upon property.

9. Appeal and error ⚿1010(2)

In action to rescind sale of personal property for fraud, recital in findings that recission was not timely, being without support in the evidence and directly opposed to implied timeliness of notice from finding that seller thereby rescinded the transaction and effectively disaffirmed the parties' dealings by accompanying offer to restore, must be disregarded.

10. Appeal and error ⚿1071(3)

Where the facts found support the conclusion necessary to the judgment, inconsistent conclusions stated in findings will be disregarded, particularly where inconsistent finding is without support in the testimony.

11. Appeal and error ⚿1073(1)

Judgment decreeing return to seller of personal property and recovery of damages for loss of use comported only with seller's theory of action based upon rescission of sale for fraud, and, where such theory was supported by substantial evidence, trial court's direction to seller's attorney at conclusion of trial to leave the rescission out in drafting judgment for seller should be disregarded.

SCHAUER, J., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by A. D. Vice against W. N. Thacker, Harry Kurofsky, individually, and doing business under the fictitious name of Dan Dee Factory Shoe Repair, to recover personal property after rescission of sale and for claim and delivery. From an adverse judgment, Harry Kurofsky appeals.

Judgment affirmed.

Prior opinion 172 P.2d 930.

Harvey L. Silbert, of Los Angeles, for appellant.

William Ellis Lady, of Los Angeles, for respondent.

SPENCE, Justice.

Defendant Harry Kurofsky appeals from a judgment for plaintiff decreeing the return of certain personal property or its value, together with damages for the loss of its use, in accordance with the theory of plaintiff's action based on the rescission of the sale of said property because of fraud. Plaintiff did not prevail against defendant W. N. Thacker and has not appealed from that portion of the judgment in the latter's favor. Defendant Kurofsky premises his appeal solely upon the claim that the relief granted to plaintiff conforms neither with the evidence nor with the findings and rulings of the trial court. A review of the record in the light of well-settled rules of law leads to the conclusion that his position cannot be maintained, and that the judgment for plaintiff should be affirmed.

According to the findings, which are in general agreement with the allegations of plaintiff's second amended complaint and are amply supported by the record, the facts out of which this controversy arose are as follows: For a number of years prior to August 9, 1943, plaintiff had conducted a shoe repair shop in Los Angeles. On the date mentioned he had on hand therein an assorted stock of merchandise and supplies necessary to the operation of his business, as well as various items of shoe repair machinery, tools and store fixtures against which there were no liens or claims of any kind. Defendant Thacker was the local representative of The Landis Machine Company of St. Louis, Missouri, manufacturers of shoemaking and repairing equipment, and he maintained a branch office and storeroom in Los Angeles. During the time plaintiff was conducting his shoe repair shop, he became acquainted with Thacker, they grew to be close friends, an advisory business relationship developed between them, and as the result plaintiff imposed implicit confidence in Thacker.

In the spring or early summer of 1943, plaintiff, an elderly man and in poor health, decided, with the advice of Thacker, to discontinue the operation of his business for a period of time—to sell his stock of merchandise and supplies but to keep and store his machinery, tools and fixtures, without expense, at Thacker's place of business, where the latter represented that ample space could be provided. Thacker offered and agreed to act as plaintiff's agent to find a purchaser for plaintiff's said merchandise and supplies, which offer was accepted by plaintiff. They then boxed up all of such stock, and Thacker stated that it should be delivered by plaintiff to any purchaser whom Thacker might find who would pay $1,000 therefor.

Through the efforts of Thacker, various prospective purchasers visited plaintiff's shop for the purpose of inspecting his merchandise and supplies and made offers therefor, which offers plaintiff rejected as insufficient in amount. Finally, on August 9, 1943, Thacker, as agent for plaintiff, represented that he had a party [defendant Kurofsky] who would purchase such stock, not including any machinery, tools or fixtures, for the sum of $1,000, to be paid as soon as such stock was delivered to Thacker's place of business. On that same day, for and on behalf of defendant Kurofsky and while also acting as agent for plaintiff, Thacker prepared in his office a bill of sale, denominating himself as buyer and including therein all of plaintiff's machinery, tools and fixtures as well as the stock of merchandise and supplies, for the price of $1,000; and at Thacker's direction, a woman who was employed by him in his office, and who was a notary public, affixed her notarial acknowledgment to the instrument. Thacker thereupon proceeded to plaintiff's place of business; and while purporting to act as agent for plaintiff, and also acting for and on behalf of Kurofsky as his agent, Thacker presented the bill of sale to plaintiff without disclosing to him its nature, contents or effect. Rather, at that time he represented to plaintiff that the bill of sale covered only the merchandise and supplies, and that it was not necessary for plaintiff to examine or read it; and plaintiff, believing in and relying upon Thacker's statements, signed the bill of sale, without reading or knowing its contents, and delivered it to Thacker.

On the same day, August 9, 1943, Thacker executed and delivered to Kurofsky a bill of sale reciting the same consideration of $1,000 and covering all of the machinery, supplies and miscellaneous property included in the other bill of sale from plaintiff to Thacker. Kurofsky had given the stipulated sum to Thacker as his agent, with directions that he deliver it to plaintiff, and Thacker had done so. Plaintiff had no knowledge of the transaction between Thacker and Kurofsky, or that Thacker was acting as the agent of Kurofsky in paying plaintiff; nor did Thacker or Kurofsky disclose to plaintiff their relationship concerning these matters.

Thereupon plaintiff on said August 9, 1943, and while Thacker was purporting to act as his agent, delivered to Thacker the key to his shoe repair shop, with permission to remove therefrom (1) the stock of merchandise and supplies for delivery to the buyer and (2) the machinery, tools and fixtures for storage at Thacker's place of business, as previously agreed between them. Thacker gave the key to plaintiff's shop to Kurofsky, and then invited plaintiff to accompany him on a business trip outside the state. During plaintiff's absence of a few days on the trip, Kurofsky used the key, entered plaintiff's shop, and removed therefrom only the stock of merchandise and supplies. Following plaintiff's return and on or about September 6, 1943, Kurofsky and some workmen went to plaintiff's shop to remove the machinery, tools and fixtures. Plaintiff being uncertain in the matter, telephoned Thacker, who advised him to deliver the articles to the men who came for them and that he would take care of everything for plaintiff; and plaintiff, in the belief that his property would be delivered to Thacker's place of business for storage, consented to its removal. But the machinery, tools and fixtures were not so delivered for storage; rather, all such property, in pursuance of an agreement made between Thacker and Kurofsky for the purpose of obtaining possession thereof from plaintiff, and with full knowledge of plaintiff's rights, was taken to the place of business of Kurofsky, where it was installed and put in operation, and so used for a long time thereafter.

A few days later plaintiff went to Thacker's place of business for the purpose of inspecting his property, which he believed to be stored there, and for the first time learned that it had been delivered elsewhere. Plaintiff then read and examined the bill of sale which he had signed in favor of Thacker, as buyer, and for the first time learned that it included not only the stock of merchandise and supplies, but also the machinery, tools and fixtures. Thereafter, and on or about November 1, 1943, plaintiff served on defendants a notice whereby he rescinded the purported sale of his property to Thacker as above recited.

While there is testimony of higher appraisements in the record, the trial court found that the reasonable value of the merchandise and supplies was the sum of $350 and the reasonable value of the machinery, tools and fixtures was the sum of $892.50, or a total of $1,242.50; and that as stated in his notice of rescission served upon defendants, plaintiff had offered to return to them everything of value that he had obtained from them upon his being restored to the property with which he parted, or the reasonable value thereof. The court further found that all of the property here involved was then in the possession of Kurofsky, and that plaintiff was entitled to have it returned to him or, in lieu thereof, the sum of $1,242.50, as its reasonable value; plus the sum of $1,122 damages for loss of use thereof, conditioned upon plaintiff either paying to or crediting Kurofsky with the sum of $1,000, which plaintiff had theretofore received from him, and the additional sum of $150 which Kurofsky expended in making repairs on the property, or a total of $1,150. Judgment followed accordingly, as against Kurofsky.

[1] The parties do not dispute that the record amply supports the court's finding that in all dealings between Kurofsky and Thacker concerning the sale and purchase of the involved personal property, the latter was plaintiff's agent. The evidence also discloses the existence of a confidential relationship between plaintiff, as principal, and Thacker, as agent, as the result of their extended friendship and advisory business relationship over the years; and a reliance thereupon by plaintiff with regard to the transactions here in question. Scovill v. Guy, 205 Cal. 386, 388, 270 P. 934; Adams v. Talbott, 61 Cal.App.2d 315, 320, 142 P.2d 775. In the light of these considerations, the trial court was justified in concluding that the bill of sale, prepared by Thacker with himself designated as buyer, fraudulently included plaintiff's machinery, tools and fixtures, and was presented by Thacker to plaintiff for signature without disclosing such deceit; that plaintiff relied upon the representations of such agent as to the contents of the instrument and that he need not read it; and that plaintiff's signature was fraudulently obtained thereto without his having read it or knowing that it included the additional property therein. Kane v. Mendenhall, 5 Cal.2d 749, 758, 56 P.2d 498.

[2, 3] But it is argued that even though it does appear that Thacker was the agent of plaintiff and fraudulently breached their confidential relationship by procuring a bill of sale from plaintiff to Thacker in which the machinery, tools and fixtures were wrongfully included, there is no evidence to show that Thacker was also acting as agent for Kurofsky in his dealings with plaintiff. While the matter of the agency connection between Thacker and Kurofsky was a sharply controverted issue, and conclusions contrary to the existence of such relation might reasonably have been drawn from the record, the weight to be given the differing testimony, as well as the inferences to be deduced therefrom, were questions for the trial court; and it need only be said that findings based on substantially conflicting evidence will not be disturbed on appeal. In support of the challenged findings the record discloses that Thacker and Kurofsky had known each other for several years; that Kurofsky had asked Thacker to find and get for him, at the best possible price, equipment of the general kind later obtained from plaintiff; that Thacker agreed to undertake this task and told Kurofsky about plaintiff's property; and that Kurofsky went to see it at plaintiff's shop and met Thacker there. After he had inspected the property, Kurofsky told Thacker that he wanted it and instructed him to buy it; and Thacker then bought it for Kurofsky after having first obtained the money from him

with which to purchase it, which money was paid to plaintiff. Thacker had the property sold to himself because plaintiff said that he wouldn't trust anybody else and he wanted Thacker to do the business for him, which facts were known to Kurofsky from conversation had with plaintiff. Kurofsky then accepted a bill of sale from Thacker, executed and delivered by the latter as seller, on the same day and covering the same property as listed in plaintiff's bill of sale to Thacker. Upon receiving from Thacker the key to plaintiff's shop, where all the property was located, and while plaintiff was absent on an automobile trip with Thacker, Kurofsky removed the stock of merchandise and supplies. Some few weeks later Kurofsky and two workmen went to plaintiff's shop to take the remaining property, consisting of the machinery, tools and fixtures. Instead of hauling that property to Thacker's place of business for storage, Kurofsky took it to his own store, where Thacker helped him to install it. Such evidence substantially supports the court's findings to the effect that Thacker was also acting as agent for Kurofsky during all the dealings and transactions in question.

[4] It is the general rule that where an agent has assumed to act in a double capacity, a principal who has no knowledge of such dual representation—as the court found the fact to be with respect to plaintiff herein—may avoid the transaction. Actual injury is not the principle upon which the law holds such transaction voidable; rather, the law holds it voidable in order to prevent the agent from putting himself in a position where he will be tempted to betray his principal. 2 Am.Jur. sec. 265, p. 213. To this point Mechem in his work on Agency, Second Edition, Volume 2, section 2138, p. 1715, says: "* * * an agent who is relied upon to exercise, in behalf of his principal, his skill, judgment, knowledge or influence, will not be permitted without such principal's full knowledge and consent, to undertake to represent the other party also in the same transaction. Such conduct is a fraud upon his principal, and not only will the agent not be entitled to compensation for services so rendered, but the contract or dealings made or had by the agent, while so acting also for the other party without the knowledge or consent of the principal, are not binding upon the latter, and if they still remain executory, he may repudiate them on that ground, or, if they have been executed in whole or in part, he may by acting promptly and before the rights of innocent parties have intervened, restore the consideration received, rescind the contract and recover back the property or rights with which he has parted under it. It makes no difference that the principal was not in fact injured, or that the agent intended no wrong, or that the other party acted in good faith; the double agency is a fraud upon the principal and he is not bound." Gordon v. Beck, 196 Cal. 768, 772, 773, 239 P. 309; see, also, Patterson v. DeHaven, 88 Cal.App. 418, 428, 429, 263 P. 568.

[5-8] In line with these observations, it was necessary for plaintiff upon discovering the duplicity of Thacker in negotiating the transactions in question, to take steps within a reasonable time thereafter to effect a rescission. 3 C.J.S., Agency, § 252a, p. 182. The record discloses that on September 14, 1943—a day or two following plaintiff's visit to Thacker's place of business when he first learned of the misrepresentations that had been made with respect to the sale of his property—plaintiff retained an attorney but the latter failed to take any action in the matter so that, on or about October 27, 1943, plaintiff withdrew all papers which he had deposited with that attorney and employed his present counsel to establish his rights in the premises. A few days thereafter the latter prepared, and plaintiff signed, a notice of rescission for service on defendants Thacker and Kurofsky. There is no conflict in the record with respect to this chronology, and it was apparently accepted as sufficient evidence of plaintiff's effective exercise of his right to rescind. Cameron v. Evans Securities Corporation, 119 Cal.App. 164, 172, 6 P.2d 272. Thus, the court found that "on or about November 1, 1943, plaintiff gave to defendants and sent them by mail under registered cover a notice wherein and whereby he rescinded the transaction mentioned above" and thereby "offered to return

to defendants anything and everything of value that he obtained from them upon his being restored to the property with which he parted or the reasonable value thereof." Such "offer to restore" was sufficient and it was not necessary that plaintiff at that time return the $1,000 which he had received in the transaction he desired to rescind. Civ. Code, § 1691, subd. 2; Kent v. Clark, 20 Cal.2d 779, 784, 785, 128 P.2d 868, 142 A.L. R. 576. Accordingly, the resulting judgment was predicated upon plaintiff's theory of relief; that upon his return of the $1,000 which he had received and his reimbursement of Kurofsky in the amount of $150, which the latter had expended in repair of the involved property, plaintiff was entitled to the recovery of said property plus damages for its loss of use in the sum of $1,122, which amount was computed at the rate of $2. per day for 561 days—from September 6, 1943, the date of the removal of the equipment from plaintiff's shop, to March 22, 1945, the date of decision in plaintiff's favor. Such judgment, designed to place the parties in status quo, comports wholly with the principles of rescission and the equities of the case as the court resolved the controverted issues. 12 C.J.S. Cancellation of Instruments, § 77, pp. 1077-1079; sec. 79a, p. 1083; Black on Rescission and Cancellation, Second Ed., Vol. 3, sec. 695, p. 1653; Stewart v. Crowley, 213 Cal. 694, 700-701, 3 P.2d 562; see, also, Kent v. Clark, supra, 20 Cal.2d 779, 785, 128 P.2d 868, 142 A.L.R. 576; Pendell v. Warren, 101 Cal.App. 407, 410, 281 P. 658; Carter v. Carr, 139 Cal.App. 15, 27, 33 P.2d 852.

[9-11] In this state of the record no force can be assigned to the inconsistent recital in the findings that plaintiff's "rescission was not prompt nor timely." Such recital is not only directly opposed to the implied timeliness of plaintiff's notice of rescission from the finding that he thereby "*rescinded* the transaction" in question and effectively disaffirmed the parties' dealings by his accompanying "offer to restore," but it is a conclusion wholly without support in the evidence bearing upon the promptness with which plaintiff acted under the above chronology relating to his employment of successive counsel for the protection of his rights. As was said in Marsh v. Marsh, 79 Cal.App. 560, at page 571, 250 P. 411, at page 415: "* * * if the facts found support the conclusion necessary to the judgment, inconsistent conclusions stated in the findings will be disregarded. *This rule should apply with added force to a case where the inconsistent finding urged upon the attention of the court is wholly without support in the testimony.*" (Emphasis added.) To the same effect, see Danziger v. Benson, 175 Cal. 565, 570, 166 P. 313; McNutt v. City of Los Angeles, 187 Cal. 245, 259, 201 P. 592; Ross v. Gentry, 94 Cal.App. 742, 745, 271 P. 1098; and Klein Norton Company v. Cohen, 107 Cal. App. 325, 332, 290 P. 127. Nor is it of any consequence here that the court at the conclusion of the trial made the following observation to plaintiff's counsel: "You follow my directions, exactly the way you have them in the findings, *leaving the rescission out.*" (Emphasis added.) While the motive of the court in adding the italicized words does not appear, they may reasonably be interpreted as referring merely to the choice of language in drafting the judgment in plaintiff's favor, and not intended to detract from the premise of plaintiff's claims. If the comment was made for any other purpose, it must be disregarded as an immaterial conclusion inconsistent with the mature deliberation of the court upon making final disposition of this case. The ensuing judgment comports only with the theory of plaintiff's cause for relief based upon rescission and the record contains substantial evidence in support thereof, as above detailed. In such circumstances, it was aptly said in Danziger v. Benson, supra, 175 Cal. at page 570, 166 P. at page 315: "The ultimate conclusions of the court below are those manifested by its judgment."

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, and CARTER, JJ., concur.

SCHAUER, Justice (dissenting).

I cannot agree that the finding that plaintiff's "rescission was not prompt nor timely" is wholly unsupported by the evidence and can be ignored. Nor can I agree that the so-called finding that plaintiff "rescinded the transaction" implies that the rescission was timely. The former finding is particularly addressed to a factual element essential to the effectiveness of the attempted rescission. The latter is a portion of a clause contained in the finding addressed to the question of whether and when plaintiff attempted to rescind; i. e., "about November 1, 1943, plaintiff gave to defendants and sent them by mail under registered cover a notice wherein and whereby he rescinded the transaction." Plaintiff executed his bill of sale to Thacker on August 9, 1943. He first learned of his mistake a few days after September 6, 1943. It was nearly two months later that he attempted rescission. Whether, in the circumstances, he exercised reasonable diligence to rescind promptly (Civ.Code, § 1691) was typically a question to be decided by the trial court upon the facts of the case and its discretion in this regard should be respected by the appellate courts. (Davis v. Butler, (1908), 154 Cal. 623, 628, 98 P. 1047; Cross v. Mayo (1914), 167 Cal. 594, 605, 140 P. 283; French v. Freeman (1923), 191 Cal. 579, 589, 217 P. 515; Lubarsky v. Richardson (1933), 218 Cal. 27, 31, 21 P.2d 557; Bryan v. Baymiller (1928), 95 Cal.App. 481, 487, 272 P. 1106; Ballagh v. Williams (1942), 50 Cal.App.2d 10, 13, 122 P.2d 343.)

Even if it be assumed, contrary to the fact, that there is no evidence that plaintiff's "rescission was not prompt" there is another difficulty in the way of sustaining the judgment on the theory that this was a transaction which plaintiff could and did rescind. The notice of rescission was given about November 1, 1943. The bill of sale from Thacker to Kurofsky was executed on August 9, 1943. Therefore, if Kurofsky was a bona fide purchaser, he acquired title to the goods and plaintiff cannot recover from him. (Civ.Code, § 1744; Keegan v. Kaufman Bros. (1945), 68 Cal.App.2d 197, 202, 156 P.2d 261.) Defendant Kurofsky contends that there is no evidence that he knew of defendant Thacker's misrepresentations of the contents of the bill of sale from plaintiff to Thacker. Plaintiff points to and I have found no evidence that Kurofsky knew anything of the terms of the agreement between plaintiff and Thacker. Certainly no inference that Kurofsky knew of the duplicity of Thacker can be drawn from the price and the value of the goods, as found by the trial court; Kurofsky could have no reason to suspect, because of such price and value, that plaintiff demanded and believed he was receiving $1,000 for goods of a reasonable value (according to the express finding) of $350.

However, giving effect to all the findings, including the finding that the attempted rescission was "not prompt nor timely," the conclusion that plaintiff is entitled to recover from Kurofsky the supplies and machinery, or their value, can be upheld upon the theory of plaintiff's second cause of action. During the trial the judge remarked, "Second cause of action dismissed," but no written order to that effect was made. An order by a court of record is effective only when entered in writing. (See Cox v. Tyrone Power Enterprises (1942), 49 Cal.App.2d 383, 394, 121 P.2d 829.) It must be assumed that at a later stage of the trial the court determined that the second cause of action should not be dismissed, since its findings can support a judgment for plaintiff only upon the theory of such cause of action. Plaintiff therein alleges that "at all times herein mentioned without plaintiff's consent, and wrongfully, defendants withheld the possession of said personal property." The findings support this allegation, for it appears therefrom that the transaction whereby Kurofsky obtained possession of the property is void. Where a person, because he is deceived by fraudulent misrepresentations, manifests assent to a transaction different from that which he believes he is entering into, the transaction is void rather than voidable and "there is no necessity for attempting to rescind that which never in fact existed." (McElhaney v. W. E. Moyer & Co. (1929), 101 Cal.App. 53, 57, 281 P. 87, 89; C. I. T. Corporation v. Panac (1944), 25 Cal.2d 547, 548-550, 154 P.2d 710, 160 A.L.R. 1285; 6 Cal.Jur., pp. 85, 86; Rest., Contracts, § 475; 5 Williston, Contracts, § 1488.)

According to the findings Thacker told plaintiff that he would deliver the supplies to any purchaser he could find who would pay $1,000 therefor; he represented to plaintiff as a fact that he had found a purchaser willing to buy the supplies for $1,000; he prepared and obtained plaintiff's signature to a document which states that plaintiff has sold both supplies and machinery for $1,000; he did not disclose to plaintiff the "nature and effect" of the document, represented to plaintiff that plaintiff need not read it, and plaintiff therefore signed the document "without knowing its contents." These findings show that plaintiff's execution of the bill of sale to Thacker was a manifestation of assent to a transaction with terms materially different from the terms of the sale plaintiff intended to make, and that plaintiff's mistake as to the terms of the sale was induced by Thacker's knowing misstatements concerning the contents of the document. The general rule that a person who signs and accepts a written contract is charged with knowledge of its provisions, does not apply where, in reliance upon false misrepresentations of the other party, he does not seek the information which he could otherwise have obtained. Particularly is this so where there is a confidential relation between the parties. (6 Cal.Jur., pp. 85, 86.) Here, the trial court found, "plaintiff reposed implicit confidence and faith in the integrity and honesty of said defendant [Thacker] and sought and obtained his advice in many matters and particularly concerning [the instant transaction]."

In the similar case of Meyer v. Haas (1899), 126 Cal. 560, 58 P. 1042, 1043, defendant's agent, purporting to act as plaintiff's agent also, by fraud caused plaintiff to sign a release of all claims against defendant; plaintiff was deceived into the belief that the release discharged only his claim for loss of time while he was incapacitated because of an injury caused by defendant. It was held that the consideration received by plaintiff from defendant should be considered only as payment for his claim for loss of time; that "The contract, under such circumstances, will be held to be what the maker of it intended it should be, and not what it was made to appear to be by the deception practiced." In the instant case, however, the parties and the trial court have proceeded on the view that the contract is void, voidable or valid as to *all* the goods. Assuming, for the purpose of testing the majority opinion, that this position is correct, nevertheless the judgment is in error as to the amount of recovery.

Upon such assumption, the plaintiff can recover, as the trial court concluded, the property or its reasonable value, together with damages for the loss of its use. But the finding that plaintiff has been damaged by loss of the use of the property for the period from September 6, 1943, to March 22, 1945, is demonstrably untenable. The court found that the damage amounted to $2 a day for loss of the use of the machinery. This finding was based upon testimony as to the rental value of the two machines known as a stitcher and a finisher, and plaintiff's testimony as to the amount by which his earnings would be greater when he used such machines than when he did the work by hand. Plaintiff further testified, and this testimony is not questioned, that on March 30, 1944, he bought another stitcher and another finisher of apparently equal utility for $700 (less than the amount awarded as compensation for the stitcher and finisher taken by Kurofsky). From that date, then, plaintiff was not deprived of the use of a stitcher and a finisher and was not damaged by being without such machines. It is obvious, then, that the award of $2 a day for the period from March 30, 1944, to March 22, 1945, is wholly unjustified.

The judgment should be reversed or, in any event, modified.

30 Cal.2d 34

ISENBERG v. CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION et al.

L. A. 19448.

Supreme Court of California, in Bank.

May 2, 1947.

1. Taxation 🔑543(7)

In action by owner of string of horses to recover contributions paid under protest, in accordance with Unemployment Insurance Act, on remuneration received by free-lance jockeys, on ground that jockeys were independent contractors rather than employees, owner's right of control over jockeys could be shown by usages and customs. Gen.Laws, Act 8780d, § 6.5.

2. Taxation ⟹59

The principal test of employment under section of the Unemployment Insurance Act defining employment is the right of the alleged employer to exercise control over the alleged employee. Gen.Laws, Act 8780d, § 6.5.

3. Taxation ⟹59

Rules of racing board, even though they limited the horse owner's right of control over jockeys, did not remove jockeys from the protection of the Unemployment Insurance Act. Gen.Laws, Act 8780d, § 6.5; St.1933, p. 2046.

4. Taxation ⟹543(7)

In action by owner of string of horses to recover contributions paid under protest, in accordance with Unemployment Insurance Act, on remuneration received by free-lance jockeys, on ground that jockeys were independent contractors rather than employees, owner had burden of proving that jockeys were not employees. Gen. Laws, Act 8780d, § 6.5.

5. Taxation ⟹59

One who is an employee within meaning of the Workmen's Compensation Act is an "employee" within meaning of the Unemployment Insurance Act. Labor Code, §§ 3300, 3351; Gen.Laws, Act 8780d, § 6.5.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee".

6. Taxation ⟹59

Free-lance jockeys over whom horse owner or trainer had right of control except in so far as limited by rules of racing board, and who could be discharged by owner, were "employees" of owner within meaning of Unemployment Insurance Act, though they were hired especially for each race and received a fixed sum. Gen.Laws, Act 8780d, § 6.5.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee".

7. Taxation ⟹543(7)

In action by owner of string of horses to recover contributions paid under protest, in accordance with the Unemployment Insurance Act, on remuneration received by free-lance jockeys, on ground that they were independent contractors, evidence that jockeys believed that they would not be rehired if they failed to follow instructions of owners of horses or trainer was relevant to show submission of jockeys to control. Gen.Laws, Act 8780d, § 6.5.

8. Appeal and error ⟹996

Supreme Court was not precluded from reversing judgment for owner of string of horses in action to recover contributions paid under protest, in accordance with Unemployment Insurance Act, on remuneration received by free-lance jockeys, on ground that question whether a person is an employee under the Act is wholly one of fact, even when the evidence is not in conflict and not reasonably susceptible of conflicting inferences, since under such a rule, there could be conflicting interpretations of identical facts, rendering effective enforcement of the Act impossible. Gen. Laws, Act 8780d, § 6.5.

9. Appeal and error ⟹842(7)

If the essential facts concerning question whether a person is an employee within meaning of the Unemployment Insurance Act are not in conflict, the question of legal relations arising therefrom is a question of law, reviewable by the Supreme Court. Gen.Laws, Act 8780d, § 6.5.

EDMONDS and SCHAUER, JJ., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by H. N. Isenberg against the California Employment Stabilization Commission, successor to the California Employment Commission (formerly Unemployment Reserves Commission), and Homer W. Buckley and other members of the California Employment Stabilization Commission, and others to recover contributions paid by plaintiff under protest under the California Unemployment Insurance Act on remuneration received by free-lance jockeys performing services for plaintiff. From a judgment in favor of the plaintiff, the Commission and members thereof appeal.

Judgment reversed.

Prior opinion, 172 P.2d 527.

Robert K. Kenny, Atty. Gen., and Clarence A. Linn and Doris H. Maier, Deputy Attys. Gen., for appellants.

John Moore Robinson, of Los Angeles, for respondent.

TRAYNOR, Justice.

Plaintiff brought this action pursuant to section 45.10 of the California Unemployment Insurance Act (Statutes of 1935, p. 1226, as amended, 3 Deering's Gen. Laws, Act 8780d) to recover contributions paid under protest on the remuneration received by free-lance jockeys performing services for plaintiff during the period from April 1, 1944 to June 30, 1944. Defendant appeals from a judgment in favor of plaintiff.

During the period in question plaintiff owned a string of horses that he raced at Bay Meadows race track. He engaged free-lance jockeys to ride the horses in various races. They were not in his regular employment but were engaged separately for each race. In March, 1944, the California Employment Stabilization Commission ruled that the free-lance jockeys involved were in "employment" within the meaning of section 6.5 of the Unemployment Insurance Act and that any remuneration paid to the jockeys was subject to contributions as provided in the Act.

The evidence at the trial related in the main to the customs and practices of the owners of race horses and the trainers generally in employing jockeys, and their control over the jockeys' activities in riding the horses. Plaintiff testified that he had no written agreement or understanding with the jockeys in question other than a standard form signed by the jockeys' agents specifying the jockey's name, the race, the date, and the first and second calls. There was no other evidence of any specific agreement, written or oral between the plaintiff and the jockeys whose services are involved in this case. Neither plaintiff nor defendant introduced any competent evidence as to the actual control exercised over the jockeys in question by the plaintiff and his trainer. The evidence showed that the jockeys, through agents, contracted with the owners to ride particular horses in particular races. In accordance with rule 278 of the rules adopted by the California Horse Racing Board pursuant to Chapter 769, p. 2046, Statutes of 1933, the remuneration for the services of these jockeys was $35 when they won a race and $15 when they lost. Such remuneration was received by all jockeys in the absence of specific contract provisions to the contrary. It was shown that it is the custom for a jockey to report to the jockey room with his personal riding equipment at noon on the day of the race; that he changes into silks furnished by the owner and then proceeds to the paddock, where he meets with the owner or trainer. At this time either the owner or the trainer, acting as the owner's agent, gives instructions as to the running of the race and the handling of the horse; but, under Rule 323 (a) of the rules of the California Horse Racing Board, the owner or trainer can give no instructions or orders that do not have as their objective the winning of the race, unless the owner has more than one horse entered in the same race. If the owner or trainer does not wish the horse to be whipped, he may so instruct the jockey, but he cannot enforce such an instruction unless he has the whip taken from the horse upon application to the stewards, in which case no whip may be used on that particular horse until, upon the application of the owner or trainer, the stewards change the ruling. The owner must pay the jockey the contract price in the event he discharges the jockey without cause before the running of the race. Obviously neither the owner nor the trainer can discharge the jockey while he is engaged in running the race. After the race, the owner or trainer usually confers with the jockey to ascertain how the horse performed and, if the horse did not do as expected, the reasons therefor. If it is apparent that the jockey did not follow instructions, the owner does not engage the jockey to ride again.

[1] There is no conflict in the evidence as to the facts outlined above, but plaintiff

contends that defendant had the burden of showing the actual control exercised by plaintiff or his trainer over the jockeys in question, and since defendant failed to show that such control was actually exercised, the jockeys were properly held not to be employees. It is clear, however, that plaintiff made no showing that the owner or trainer did not exercise, or have the right to exercise, control except insofar as the right to exercise control was limited by the rules of the California Horse Racing Board or by the inaccessibility of the jockeys while actively engaged in the race. The only finding of fact made by the trial court on the question of employment was a general finding that during the period in question the free-lance jockeys engaged by plaintiff were not employees and the compensation paid them consisted of payments to independent contractors. The basis of this finding is clear from the memorandum opinion of the trial court. The trial court not only decided the case on the theory that the actual control exercised by the particular taxpayer over those performing services for him determines their relationship but placed the burden of proof on the defendant commission to show that control was actually exercised. It thus distinguished Drillon v. Industrial Accident Commission, 17 Cal.2d 346, 351, 110 P.2d 64, upholding a determination by the Industrial Accident Commission that free-lance jockeys are employees within the meaning of section 3351 of the Labor Code. The facts in that case are substantially the same as those in the present case except that the right to control was shown by its actual exercise (cf. Connell v. Harris, 23 Cal.App. 537, 542, 138 P. 949; see Nichols v. Harvey Hubbell, Inc., 92 Conn. 611, 103 A. 835, 19 A.L.R. 226, 240) rather than by the customs and practices of the occupation. Clearly, the existence of a contractual right may be shown by usages and customs. See Hind v. Oriental Products Co., Inc., 195 Cal. 655, 667, 235 P. 438.

[2-4] The decision in the Drillon case was based on the right of the owner to exercise control over the jockeys (supra, 17 Cal.2d at page 355, 110 P.2d 64), the principal test of employment under section 6.5 of the Unemployment Insurance Act. Empire Star Mines v. California Emp. Com., 28 Cal.2d 33, 43, 168 P.2d 686. It was held that statutes and administrative regulations designed for public protection, such as the rules of the racing board, even though they may limit the principal's right of control, do not remove persons performing services for others from the protection of the Workmen's Compensation Act. In the present case the same reasoning is applicable to the same rules. See California Emp. Stab. Com. v. Morris, 28 Cal.2d 812, 817, 172 P.2d 497. Hence, the ultimate facts of this case are indistinguishable from those in Drillon v. Industrial Accident Commission, supra. Even if it is assumed that the actual exercise of control rather than the right to control is the crucial element in this case, it clearly is not the law that the burden of proof is on the taxing authority in an action by a taxpayer to recover taxes on the ground that they were illegally assessed. See United States v. Anderson, 269 U.S. 422, 443, 46 S.Ct. 131, 70 L.Ed. 347; 3 Cooley, Law of Taxation, 4th Ed. sec. 1307; and see Robinson v. George, 16 Cal.2d 238, 244, 105 P.2d 914, holding that the burden of proof generally is on the party attacking the employment relationship.

[5] It cannot seriously be contended that one who is an employee within the meaning of section 3351 of the Labor Code (Workmen's Compensation Act) is not engaged in "employment" within the meaning of section 6.5 of the California Unemployment Insurance Act. Section 3351 of the Labor Code provides that "'Employee' means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written * * *." An employer is defined by section 3300 of the Labor Code to include "Every person including any public service corporation, which has any natural person in service." Section 6.5 of the Unemployment Insurance Act defines employment as "service * * * performed for wages or under any contract of hire, written or oral, express or implied." It has been held that the word "employment" as defined in section 6.5 of the Unemployment Insurance Act does not include independent contrac-

tors. Briggs v. California Emp. Comm., 28 Cal.2d 50, 54, 168 P.2d 696. The Empire Star Mines Co. v. California Employment Commission, 28 Cal.2d 33, 43, 168 P.2d 686, this court set forth the rules for the determination of the question whether or not a person is an independent contractor or is engaged in employment under section 6.5. The principal test of the employment relationship was held to be the "right to control over the manner and means of accomplishing the result desired." Strong evidence of this right is shown by the right of the principal to discharge the worker. The secondary tests are listed in that opinion as including, "(a) whether or not the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee. Rest. Agency, § 220; Cal.Ann. § 220."

It has already been observed with regard to the principal test, that the owner or trainer has the right of control except insofar as he is limited by the rules of the racing board. The right to discharge in this case is limited only by the rule that the owner may not discharge a jockey without cause unless he pays the contract price. There is no question that the owner may discharge a jockey up to the time he is out on the track and physically out of his control. As in any contract of employment for a fixed period, an employee prematurely discharged without cause may recover damages based on his wages. W. F. Boardman Co. v. Petch, 186 Cal. 476, 483, 199 P. 1047; cf. Drillon v. Industrial Accident Comm., supra, 17 Cal.2d at page 354, 110 P.2d 64.

[6, 7] Among the secondary elements of the employment relation, only three are clearly absent from this case: (c) Jockeys are not unskilled workmen; however, many skilled workmen are employees. (e) Free-lance jockeys are employed for a fixed period, the duration of one race. (f) The basis of payment is the race, not the time involved. The other elements are either present or inapplicable to this case: (a) The occupation is an integral part of the owner's business. (b) The work is usually performed under the direction of the owner or trainer to the extent allowed by the rules of the California Horse Racing Board. (d) Although the jockey furnishes his personal riding equipment the silks and the horse are furnished by the owner. (g) The question whether horse racing is the regular business or occupation of owners of race horses is immaterial in determining whether jockeys are employees. The plaintiff made no showing that it was not his regular occupation and testified that he could not say what his regular occupation was. (h) The belief of the parties as to the relationship created is relevant only to indicate whether or not there was an assumption of control by the principal and submission thereto by the worker. (Rest. Agency, sec. 220, comment (i).) There was no evidence in regard to the belief of the parties as to their relationship at the time the services were performed. The belief of the jockeys, however, that they would not be rehired if they failed to follow instructions is relevant to show their submission to control.

[8] Plaintiff contends that the judgment cannot be reversed, since it is based on a conclusion drawn from the evidence as an inference of fact, not as a conclusion of law. There was no evidence from which the trial court could reasonably have drawn any inference inconsistent with the conclusion that the plaintiff had the right to control the activities of the jockeys except where he was prevented from doing so by the rules of the Racing Board or by the inaccessibility of the jockeys while they were actively engaged in the race

The contention that the question whether a person is an employee under section 6.5 of the Unemployment Insurance Act is wholly one of fact, even when the evidence is not in conflict and not reasonably susceptible of conflicting inferences, is untenable. Under such a rule there would be nothing to prevent conflicting interpretations of identical facts by the various trial courts so that free-lance jockeys would sometimes be classified as employees and sometimes not. Such a rule would make effective enforcement of the Unemployment Insurance Act impossible.

In California Employment Stabilization Commission v. Morris, 28 Cal.2d 812, 818, 172 P.2d 497, 500, this court, applying the same rule as that applied in the Drillon case, supra, held that the Real Estate Act insofar as it regulates real estate salesmen for the protection of the public is not relevant to the question whether such salesmen are employees under section 6.5 of the California Unemployment Insurance Act. The court stated that "* * * the occupation of real estate salesman, insofar as the Unemployment Insurance Act is concerned, is one that may be classified as that of an employee, or an independent contractor, depending upon the facts of the particular case." Clearly this statement does not mean that the trial courts of the state can conclude that, under section 6.5, one real estate salesman is an employee while another operating under identical facts is not. It means that whether a particular type of real estate salesman is within the purview of the act depends on the facts involved in the relationship between such salesmen and their principals rather than on some statute that has no relation to unemployment insurance.

[9] The result of the application of the rules of law set forth in Empire Star Mines v. California Employment Commission, supra, will depend in any particular case on the essential facts of that case. Thus, in California Employment Commission v. Bates, 24 Cal.2d 432, 436, 150 P.2d 192, the judgment of the trial court was reversed because the conclusion of the trial court from the facts was inconsistent with the decision in California Employment Commission v. Los Angeles Down Town Shopping News Corporation, 24 Cal.2d 421, 425, 150 P.2d 186, where the facts were substantially the same. This holding is in accord with the rule, particularly applicable to public law cases where uniformity of decision is important, that if the essential facts are not in conflict the question of the legal relations arising therefrom is a question of law. Leis v. City and County of San Francisco, 213 Cal. 256, 258, 2 P.2d 26; San Diego Trust & Savings Bank v. San Diego County, 16 Cal.2d 142, 153, 105 P.2d 94, 133 A.L.R. 416.

The judgment is reversed.

GIBSON, C. J., and SHENK, CARTER, and SPENCE, JJ., concur.

EDMONDS, Justice (dissenting).

In my opinion, the decision in this case departs from the established rule that the judgment of the trial court will not be disturbed if there is substantial evidence to support its determination. Giving full effect to the evidence and the reasonable inferences to be drawn from it, the finding that an independent contractor relationship existed between the owner and the jockeys should be upheld. As stated by the trial judge in his memorandum of opinion, "there is sufficient evidence in the record to establish the fact that the jockeys in question were independent contractors although the evidence is in dispute.'

I agree that the burden of establishing an independent contractor relationship is upon the party attacking the determination of employment. See, Industrial Indem. Exch. v. Industrial Acc. Comm., 26 Cal.2d 130, 136, 156 P.2d 926. Quite evidently that rule was followed in the trial of this case, and, in any event, this court may not rely upon an error of law found in a memorandum of opinion as a basis for reversal. DeCou v. Howell, 190 Cal. 741, 214 P. 444; see, Witkin, New Rules on Appeal, 17 So. Cal.L.Rev. 109.

A jockey, called as a witness in behalf of Isenberg, testified, "I think the procedure is, that if an owner is willing to pay a rider his fee, that he can substitute a rider". This was in answer to the question as to whether it was "possible for * * * [the jockey] * * * to be removed from that mount without the horse being taken out of the race?" As indicated by other testimony of this witness, he was not necessarily referring to the rules of the Racing Board, and it reasonably may be inferred that in his statement as to "the procedure" he was referring to the agreement of the parties or the national custom.

There was also evidence from which it reasonably could be inferred that the jockeys were not required to follow instructions given them. One jockey testified that "His trainer sometimes gave * * * [him] * * * intructions how he thought a horse would run best." But, he added: "They [owner and trainer] have suggested ways of riding them [horses]. I wouldn't say they told me just how to ride them. That is impossible." As to whether or not such instructions were followed, he testified, "Well, if I found out that the horse wasn't running under those instructions, I would try some other means of getting him to run". This witness also testified that the owner "may leave it up to your own judgment" as to manner in which the jockey should ride. When asked whether he used his own judgment when riding in a race, he replied: "Yes, you have to use your own judgment. Instructions are followed only when you don't figure in your own judgment that they hinder the chances of winning."

It is the well settled rule that when there is a conflict in the evidence, including not only objective facts but also the inferences which reasonably may be deduced therefrom, the determination of the trial court, in regard to the legal relationship of the parties to a controversy, will not be disturbed. California Emp. Stab. Comm. v. Norins Realty Co., 29 Cal.2d 419, 175 P.2d 217; California Emp. Stab. Comm. v. Morris, 28 Cal.2d 812, 172 P.2d 497; Twentieth, etc., Lites v. California Dept. Emp., 28 Cal. 2d 56, 168 P.2d 699; Briggs v. Cal. Emp. Comm., 28 Cal.2d 50, 168 P.2d 696; Empire Star Mines Co. v. California Emp. Comm., 28 Cal.2d 33, 168 P.2d 686. And although strong evidence in support of an employment relationship is the right to discharge at will, without cause, the fact that a person's services may not be so terminated justifies the finding of an independent contractor relationship. Briggs v. California Emp. Comm., supra, 28 Cal.2d at page 54, 168 P.2d at page 698; Empire Star Mines Co. v. California Emp. Comm., supra, 28 Cal.2d at page 45, 168 P.2d at page 693.

The testimony quoted clearly warrants a conclusion of lack of control, and there is other evidence which supports the trial court's determination. The jockey furnished most of his own equipment. The method of payment was by the race, not according to the time involved. Jockeys are skilled workers and are employed for a fixed period, the duration of the race. Giving no effect to the rules of the Racing Board, the trial court had ample ground for deciding that an independent contractor relationship existed between the owner and the jockeys. Evidence that, by custom, the owner or trainer had the right to give instructions to the jockey, merely raised a conflict in the evidence which was resolved by the trier of fact. Furthermore, the rules of the Racing Board limit the right of the owner and trainer to control the activities of the jockeys and, therefore, support the finding of an independent contractor relationship.

Neither California Emp. Stab. Comm. v. Morris, supra, nor Drillon v. Industrial Accident Commission, 17 Cal.2d 346, 110 P.2d 64, is inconsistent with this conclusion. In the Morris case, the trial court found that certain real estate salesmen were independent contractors. Upon appeal from the judgment, the commission contended that the Real Estate Act gave a broker the right to control a salesman in certain ways and therefore, as a matter of law, and regardless of a trial court's finding, all real estate salesmen were employees. Rejecting this contention, the court held that there was evidence to support the finding of the lack of control, and the provisions of the Real Estate Act did not compel a contrary determination. In the Drillon case, the Industrial Accident Commission decided that certain jockeys were employees. As requiring a reversal of the judgment, the taxpayer relied upon the rules of the Racing Board which restrict the right of an owner and trainer to control the activities of a jockey. These rules, it was urged, establish, as a matter of law, that a jockey is an independent contractor. But the court refused to so construe them, and held that the evidence supported the trial court's determination.

These cases are clearly distinguishable from the situation presented in the record now under review. Here the trier of fact determined that the jockeys who rode Isenberg's horses were independent contractors. The commission attacks the decision upon the ground that the only evidence in the record which supports the trial court's finding of lack of control is the limitations found in the rules of the Racing Board. The issue in this regard, therefore, is whether the rules may be used to support a finding of the trial court. In the Morris and Drillon cases, the question was whether, when there is evidence to support the finding of the trial court or commission, may the rules of the Racing Board or the regulatory provisions of the Real Estate Act be invoked to compel a determination contrary to those findings. Both the Morris and the Drillon cases hold that the effect of such rules or regulations is, at most, to set up a conflict in the evidence; they may not be used to require findings contrary to those made by the trial court upon substantial evidence.

Also, I do not agree with the strong implication in the majority opinion that the determination of the legal relationship is primarily a question of law. This implication is found in the reference to the Workmen's Compensation Act, the holding, in effect, that the Drillon case controls the disposition of the present controversy, and the direction that judgment be entered in favor of the commission. Moreover, the cases of California Emp. Comm. v. Los Angeles, etc., News Corp., 24 Cal.2d 421, 150 P.2d 186, 188, and California Emp. Comm. v. Bates, 24 Cal.2d 432, 150 P.2d 192, are cited as standing for the proposition that whether persons are independent contractors or employees is, in effect, a question of law. On the contrary, in the first of these cases the decision was based upon the proposition that "there is substantial evidence to support the findings of the trial court that the boys were employees within the meaning of the Unemployment Insurance Act. * * *" The ground of decision in the Bates case was that there was no substantial evidence to support the trial court's finding of an independent contractor relationship. This is quite different from the present statement that the judgment in favor of Bates "was reversed because the conclusion of the trial court from the facts was inconsistent with the decision in California Employment Commission v. Los Angeles Down Town Shopping News Corporation, 24 Cal.2d 421, 425, 150 P.2d 186, where the facts were substantially the same."

For these reasons, I would affirm the judgment of the trial court.

SCHAUER, Justice (dissenting).

I agree with the views expressed by Mr. Justice Edmonds. I am thoroughly cognizant of the (at least to the involved agencies) administrative desirability of having a simple, absolute, and universal or rule of thumb method for classifying entire industrial or professional groups as employes or non-employes. But that desirability certainly does not warrant this court in departing from constitutional standards. Is it the intention of the majority of this court to hold that as a matter of law all jockeys who ride horses for compensation, regardless of the more specific terms of their several contracts, are employes? If that is not the effect of the holding its avowed object is not attained. If that is the effect of the holding it means that stable owners and riders no longer are permitted the freedom of mutually contracting such reciprocal relationships as they may agree upon. No longer do they have the right or capacity to establish the character of their obligations to each other. No matter how specific may be the terms by which they agree that the rider is a skilled specialist, that he shall furnish his own equipment, that he shall undertake a single project to be performed in his own way without any supervision or direction of the owner, the result will be the same as though the converse of all those heretofore material elements were substituted.

It is difficult for me to believe that the majority actually subscribe to the doctrine above indicated. But if they do not subscribe to it then not only do they fail to achieve the assertedly desirable objective of administrative universality but the only other rational basis for their holding in this case is equally disturbing. It means not that there shall be uniformity in classifying all jockeys as employes but that the majority have weighed the evidence in this one case and have themselves elected to draw inferences contrary to those drawn by the trial court. The evidence related by Mr. Justice EDMONDS is in the record. It admits of the inferences suggested by him. Those inferences support the trial court's judgment. The functions of trial and appellate courts are constitutionally disparate and no rule should be more scrupulously observed by courts of appeal than that in their appellate work they should not encroach upon or usurp a trial court function. The resolution of factual questions including the determination of the inferences to be drawn from the evidence whether that evidence be documentary or undisputed or otherwise, is in a major sense exclusively the province of the trial court (or of the jury). It is exclusive in the trial court (or jury) in the sense that the appellate court is given no right to resolve factual conflicts or to indulge its preference as to the selection of inferences from the evidence. It is only where clearly there is no substantial evidence from which essential inferences can be drawn that the appellate court may properly interfere in a factual sense; and its interference then should be both in form and in substance by a statement of the law not a declaration of fact. Any other course by an appellate court is dictatorial in nature and tends toward depriving litigants of the constitutional standards of a fair trial.

The principles involved in this case are markedly similar to those in Cardillo v. Liberty Mutual Ins. Co. (1947), 67 S.Ct. 801. There the critical question was whether the injury was one "arising out of and in the course of employment." In a proceeding before the commissioner under the District of Columbia Workmen's Compensation Act, (D.C.Code, § 36—501, 33 U.S.C.A. §§ 901 note, 901 et seq.), it had been found that the injury which resulted in the decedent's death had so arisen and an award was made to the widow. The employer and insurance carrier brought action in the District Court to annul the award; they contended that there was "a lack of substantial evidence" to support the essential finding. The District Court held that the findings "were supported by evidence in the record" but the Court of Appeals reversed. App.D.C., 154 F.2d 529. The Supreme Court in reversing the Court of Appeals and reinstating the judgment of the District Court said: (pages 806, 807 of 67 S.Ct.) "In determining whether a particular injury arose out of and in the course of employment, the Deputy Commissioner must necessarily draw an inference from what he has found to be the basic facts. * * * If supported by evidence and not inconsistent with the law, the Deputy Commissioner's inference that an injury did or did not arise out of and in the course of employment is conclusive. No reviewing court can then set aside that inference because the opposite one is thought to be more reasonable; nor can the opposite inference be substituted by the court because of a belief that the one chosen by the Deputy Commissioner is factually questionable. Voehl v. Indemnity Ins. Co., supra, 288 U.S. [162] at page 166, 53 S.Ct. [380] at page 381, 77 L.Ed. 676, 87 A.L.R. 245; Del Vecchio v. Bowers, 296 U.S. 280, 287, 56 S.Ct. 190, 193, 80 L.Ed. 229; South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251, 257, 258, 60 S.Ct. 544, 548, 84 L.Ed. 732; Parker v. Motor Boat Sales, 314 U.S. 244, 246, 62 S.Ct. 221, 223, 86 L.Ed. 184; Davis v. Department of Labor, supra, 317 U.S. [249] at page 256, 63 S.Ct. [225,] at page 229, 87 L.Ed. 246.

"*It matters not that the basic facts from which the Deputy Commissioner draws this inference are undisputed* rather than controverted. See Boehm v. Commissioner, 326 U.S. 287, 293 [66 S.Ct. 120]. It is likewise immaterial that the facts permit the drawing of diverse inferences. The Deputy Commissioner alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court. Del Vecchio v. Bowers, supra, 296 U.S. at page 287, 56 S.Ct. at page 193, 80 L.Ed. 229. *Moreover, the fact that the inference of the type here made by the Deputy Com-*

missioner involves an application of a broad statutory term or phrase to a specific set of facts gives rise to no greater scope of judicial review. National Labor Relations Board v. Hearst Publications, 322 U. S. 111, 131, 64 S.Ct. 851, 860, 88 L.Ed. 1170; Commissioner v. Scottish American Co., 323 U.S. 119, 124, 65 S.Ct. 169, 171, 89 L.Ed. 113; Unemployment Compensation Commission v. Aragan, 329 U.S. 143, 153, 67 S.Ct. 245, 250. *Even if such an inference be considered more legal than factual in nature, the reviewing court's function is exhausted when it becomes evident that the Deputy Commissioner's choice has substantial roots in the evidence and is not forbidden by the law.*" (Italics added.)

Again, in an action originating in a state court under the Federal Employers' Liability Act (35 Stat. 65, as amended, 45 U.S.C.A. § 51 et seq.) and which was before the United States Supreme Court on certiorar after the state supreme court had reversed a trial court "for insufficiency of evidence to show negligence", the highest court said (Ellis v. Union Pacific Railroad Co. (1947), 67 S.Ct. 598, at page 600): "The choice of conflicting versions of the way the accident happened, the decision as to which witness was telling the truth, *the inferences to be drawn from uncontroverted as well as controverted facts, are questions for the jury.* Tennant v. Peoria & P. U. R. Co., 321 U.S. 29, 64 S.Ct. 409, 88 L.Ed. 520; Lavender v. Kurn, supra [327 U.S. 645, 66 S.Ct. 740]. Once there is a reasonable basis in the record for concluding that there was negligence which caused the injury, it is irrelevant that fair-minded men might reach a different conclusion. For then it would be an invasion of the jury's function for an appellate court to draw contrary inferences or to conclude that a different conclusion would be more reasonable." (Italics added.) To the same effect is Eagles v. Samuels (1946), 329 U.S. 304, 67 S.Ct. 313, 320, (the case of a selective service registrant seeking to evade service as a theological student) where the court, in recognizing the force of that class of practical evidence which so often appears to the fact finder but which cannot be reflected in a phonographic record, said: "A registrant might seek a theological school as a refuge for the duration of the war. Congress did not create the exemption * * * for him. There was some evidence that this was Samuels' plan; and that evidence, *coupled with his demeanor and attitude,* might have seemed more persuasive to the boards than it does in the cold record. Our inquiry is ended when we are unable to say that the board flouted the command of Congress in denying Samuels the exemption." (Italics added.) See also In re Estate of Bristol (1943), 23 Cal.2d 221, 223, 143 P.2d 689.

For the reasons above set forth I would affirm the judgment of the trial court.

LORI, LIMITED, Inc., et al. v. WOLFE et al.

Civ. 15636.

District Court of Appeal, Second District, Division 3, California.

June 25, 1947.

Rehearing Denied July 22, 1947.

Hearing Denied Aug. 21, 1947.

1. Attachment 🔑91

Affidavit for attachment conforming to wording of the statute is sufficient. Code Civ.Proc. § 537.

2. Landlord and tenant 🔑291(7½)

In unlawful detainer action by landlord, whether terms of lease had been breached, being a fundamental issue could not be determined on motion to discharge attachment, but could be determined only by being put in issue and tried on merits.

3. Pleading 🔑403(2)

In unlawful detainer action, any deficiency in pleadings under statute providing for issuance of attachment in an unlawful detainer action, arising from failure to allege a privity of contract with assignees of lease or that rent claimed was actually due and payable by assignees to lessors was supplied, at least for limited purpose of the validity of motion to discharge attachment, by exhibit admitting possession as tenant assignees and tendering all rents due. Code Civ.Proc. § 537, subd. 4.

4. Action 🔑36

In unlawful detainer action by landlords, the mere fact that landlords may possibly have changed their position by attachment proceedings to one of recognition of assignees as tenants under the lease did not invalidate the attachment. Code Civ.Proc. § 537, subd. 4.

5. Landlord and tenant 🔑94(3)

A written three-day notice by landlords to deliver up possession of leased hotel premises satisfied statutory requirements. Code Civ.Proc. § 1161, subd. 4.

◆

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action in unlawful detainer by Lori, Limited, Inc., and another against E. E. Wolfe and others. From an order denying motion to discharge plaintiffs' writ of attachment, Ben Hecht and J. G. Salomon, a partnership operating under the fictitious firm name of Monarch Hotels Operating Company, and another appeal.

Affirmed.

Benjamin J. Goodman, of Los Angeles, for appellants.

A. Brigham Rose, of Los Angeles, for respondents.

KINCAID, Justice pro tem.

Defendants Ben Hecht and J. G. Salomon, a copartnership operating under the fictitious firm name of Monarch Hotels Operating Company, and Ben Hecht, appeal from an order entered on January 22, 1946, denying their motion to discharge plaintiffs' writ of attachment. An appeal from such an order may be taken. Code Civ.Proc. sec. 963, subd. 2.

The plaintiffs herein have instituted this action in unlawful detainer and by amended complaint allege that in February, 1944, they leased in writing to defendants Wolfe certain premises known as the Hotel Brevoort and the Hotel Brevoort Villas, situate in Los Angeles, California, for the term of five years, at the monthly rental of $1,200, with a proviso that at the expiration of one year lessors have the option of receiving thirty percent of the gross revenue received as rent by the lessees, in lieu of the aforesaid stipulated rental, it being incumbent upon lessees to furnish plaintiffs, on the 1st of December, 1945, and of each year thereafter, a true account of all revenues obtained by lessees from their operation of the demised premises; said lease further provides for the employment and payment of gardener personnel; that no cooking is to be permitted by guests, nor any part of the premises used for any illegal or immoral purpose. The pleading further alleges the defendants Wolfe continued to operate and manage the premises until April 15, 1945, when they turned over its possession, management and operation to defendants Hecht, Salomon and Monarch Hotels Operating Company, the latter defendants being now in possession thereof; that the defendants have breached and violated the covenants of the lease in that they have failed to pay the monthly rentals due on the premises since April 14, 1945, have not paid the sum provided for gardening expense, have permitted guests to cook meals and maintain electrical attachments therefor on the premises as a result of which the property has been overrun with rodents and insects; that defendants have permitted the premises to be used as headquarters for bookmakers, prostitutes, and for other immoral purposes; that the defendants failed to furnish plaintiffs on the due date thereof with a true account of all revenues obtained by the lessees from the premises as in the lease provided, and have caused to be maintained false and untrue records of account concerning such revenues for the period subsequent to February 14, 1945, and that certain of such accounts have been destroyed by defendants. Plaintiffs further allege that on December 15, 1945, they served on defendants a written notice of their election to accept thirty per cent of the gross revenues received as rent by defendants and upon information and belief allege said percentage of gross revenue received by defendants in their operation and use of the premises is $30,000, no part of which has been paid, notwithstanding a three-day notice previously served demanding payment thereof; that by reason of the aforesaid breaches of the conditions and covenants, other than the payment of the rentals and for gardening, defendants have violated the provisions of section 1161, subdivision 4, Code of Civil Procedure; that on December 8, 1945, plaintiffs served upon defendants a written three-day notice to deliver up possession of the premises; that more than three days have elapsed thereafter and the defendants are still in possession and refuse to surrender the premises to plaintiffs. Plaintiffs pray judgment for restitution of possession, for the sum of $30,000 rent due and unpaid, $250 due for gardening, and for other relief.

Plaintiffs also filed an affidavit for attachment wherein it was deposed that defendants were indebted to them in the sum of $25,000, plus interest, upon an express contract for the direct payment of money, to wit: covenant and written lease to pay rent for use and occupation of premises and costs of suit, such contract being made or payable in this State and that payment has not been secured by any mortgage, deed of trust or lien upon real estate or personal property or any pledge of personal property. An undertaking in due form was filed and thereupon, on January 3, 1946, a writ of attachment was issued and levied upon the bank account of the appealing defendants in the sum of $22,146.78.

On January 15, 1946, said defendants moved the court for an order discharging the writ of attachment on the following grounds:

"(1) That the same was improperly and irregularly issued, in that the alleged cause of action set forth in the Complaint on file in this action is not predicated upon an obligation for the direct payment of money, nor is the demand against these moving defendants predicated upon privity of contract between plaintiffs and defendants; and on the ground that the action is not predicated upon an express contract between plaintiffs and defendants; and upon the ground that said Complaint shows that the amount claimed by plaintiffs to be due from defendants requires an accounting action before the same can be ascertained; and on the ground that the affidavit on attachment upon which said writ was issued states under oath that the claim of plaintiffs is predicated upon a covenant and written lease to pay rent for use and occupation of premises, and there is no allegation in the Complaint to show that these defendants are in privity of contract with plaintiffs on any such covenant; and on the ground that it must be alleged in an action in unlawful detainer that rent is actually due and payable from the defendants to the plaintiffs before an attachment can be levied thereon.

"(2) That the writ of attachment was improperly and irregularly issued and is not such an action which entitles plaintiffs to an attachment under the provisions of Section 537 of the Code of Civil Procedure of the State of California.

"(3) That plaintiffs did not serve the required statutory notice on these defendants before instituting the above-entitled action, to wit, a three-days' notice to pay rent or quit."

The notice of said motion further stated that, in addition to the records, files and pleadings in the action, it would be based upon the affidavit of Ben Hecht filed and served therewith.

This affidavit by defendant Hecht recites, in part, that the involved lease contains no covenants against its assignment and that on April 9, 1945, the defendants Wolfe transferred and assigned said lease to the appealing defendants for a consideration of $52,500 and including the sum of $4,800 which had theretofore been deposited by the Wolfes with plaintiffs as advanced or security rent on the lease; that said appealing defendants took possession of the premises and have continued to and do now manage and operate the same, having on the same date notified plaintiffs of such transfer and assignment; that affiant has tendered to plaintiffs all rent which has accrued under the terms of the lease and will continue to tender all future rent which may become due; that plaintiffs have continued to and do now fail and refuse to accept said rents from the appealing defendants and have refused to recognize such defendants as assignees of the lease, or as tenants in possession; that plaintiffs, by a separate action against the defendants Wolfe, seek to reform the involved lease by having inserted therein a clause against transfer and assignment of lease without the consent of the lessors which plaintiffs contend was inadvertently omitted from the lease through mutual mistake of fact and law.

The principal point stressed by appellants as requiring a reversal of the order complained of is that the affidavit of plaintiffs for attachment is fatally defective in that, while it negatives the existence of all the kinds of security mentioned in section 537, Code of Civil Procedure, it fails to set forth the fact that the lease, including the obligation to pay rent, is secured by the sum of $4,800, in advance rentals in possession of plaintiffs; further, there is no allegation in the amended complaint or affidavit for attachment that this security has become valueless.

[1, 2] The language employed by plaintiffs in the affidavit for attachment conforms to the wording of the statute which is all that is required for the issuance of the writ. Corum v. Superior Ct., 114 Cal. App. 741, 746, 300 P. 837. The most that can be said in support of appellant's apparent contention that the deposit with plaintiffs of the sum of $4,800 created some kind of lien or security preventing issuance of attachment is that it was posted as security for the faithful performance of the terms of the lease. The question as to whether the terms and provisions of the lease have been breached by defendants constitutes the fundamental issue of this unlawful detainer action and necessarily cannot be determined on a motion to discharge an attachment but only by being put in issue and tried on the merits of the case itself. Republic Truck Sales Corp. v. Peak, 194 Cal. 492, 504, 229 P. 331; Asamen v. Thompson, 55 Cal.App. 2d 657, 661, 131 P.2d 839; Corum v. Superior Ct., supra, 114 Cal.App. at page 746, 300 P. 837.

[3-5] Appellants further contend that section 537, subdivision 4, Code of Civil Procedure, providing for the issuance of an attachment in an unlawful detainer action, has not been complied with by the amended complaint in that such pleading fails to allege a privity of contract with appellants or that the rent claimed was actually due and payable by them to the lessor plaintiffs. Any such claimed deficiencies in the pleading are supplied, however, at least for the limited purpose of the validity of the motion to discharge attachment, by Exhibit "E" made a part of Hecht's supporting affidavit in which appellants concede the sum of $74,269.47 gross revenue has been received by them from the demised premises, that they are in possession as tenant assignees of the lease and again tender plaintiffs all rents now due under its terms and provisions. The mere fact that plaintiffs may possibly have changed their position by these proceedings to one of recognition of appellants as tenants under the lease is not a ground for invalidity of the attachment. The notice to quit which was served upon defendants meets the requirements of sec-

tion 1161, subdivision 4, Code of Civil Procedure.

The order from which this appeal is taken is affirmed.

SHINN, Acting P. J., and WOOD, J., concur.

80 Cal.App.2d 492

GEISELMAN v. CAMPBELL-JOHNSTON et al.

Civ. 15804.

District Court of Appeal, Second District, Division 3, California.

June 20, 1947.

Rehearing Denied July 11, 1947.

1. Specific performance 🔑121(4)

In action for specific performance of alleged oral agreement to sell realty, evidence sustained finding that there was no such agreement.

2. Costs 🔑260(4)

Where appeal was shown to be wholly without merit, and it satisfactorily appeared that it was frivolous and was taken solely for the purpose of delay, respondents were awarded judgment against appellant for $100 damages for a frivolous appeal.

◆

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by D. W. Geiselman against May Isabel Campbell-Johnston and others for specific performance, accounting, establishment of a trust, and for damages for alleged fraud. From an adverse judgment, plaintiff appeals.

Judgment affirmed, and defendants awarded judgment against plaintiff for damages for a frivolous appeal.

Richard B. Newton and William P. Gray, both of Los Angeles, for appellant.

Peter J. Youngdahl, Thomas P. Cruce, Berger & Irell and Clinton F. Seccombe, all of Los Angeles, for respondents.

SHINN, Acting Presiding Justice.

The second amended complaint in this action is denominated one for specific performance, accounting, establishment of a trust, and for damages for fraud. When the verbose and redundant allegations of its four separate causes of action are sifted for matter of substance, there remain only allegations to the following effect: that May Isabel Campbell-Johnston owned Tract No. 12955 in the City of Redondo Beach, County of Los Angeles, State of California, consisting of 187 town lots; that on or about March 18, 1943, she agreed in writing to sell the tract to plaintiff for $14,600, of which $600 was to be paid in cash and the balance by assumption of a trust deed indebtedness on the property of $14,000; that plaintiff paid said defendant $600, demanded a conveyance, which was refused, and that plaintiff has been damaged in the sum of $37,400. It was also alleged that said sum of $600 was paid to defendant Cheroske, acting on his own behalf and on behalf of Campbell-Johnston and certain other defendants, and that Cheroske, so acting promised that defendants would give plaintiff an option to purchase said land for the sum of $14,600, payable as aforesaid, that Cheroske delivered the sum of $600 to defendant Campbell-Johnston, that defendants refused to give the option, to plaintiff's damage, as aforesaid, and that defendants have sold and are proceeding to sell the lots in the tract to other persons. The other defendants named were alleged to claim interests in the property. The prayer is for specific performance of the agreement, for an accounting, for the establishment of a $^{9}/_{170}$ths interest in said tract and another tract of land, and for damages. The separate answers of defendants admitted ownership of the land by defendant Campbell-Johnston and contained complete denials of the material allegations of the complaint which we have stated. It was further alleged that since on or about March 13, 1943, lots in the tract had been sold to various and sundry purchasers, many houses had been built and other improvements made thereon, all with the knowledge of plaintiff, and that plaintiff had made no claim to the land or an interest in it until the filing of his complaint, March 1, 1946.

The answers of Cheroske and Campbell-Johnston admitted the receipt of $600 from plaintiff and alleged that defendant Campbell-Johnston had previously advanced to plaintiff $1,250 and that the $600 was paid upon said indebtedness and for no other purpose.

At the trial plaintiff was represented by an attorney who was called into the case shortly before the trial, without an opportunity to familiarize himself with the issues to be tried or the evidence. As a result the court was exceedingly indulgent and allowed the trial to proceed for five full days. Plaintiff produced no written agreement or option for purchase of the property and no evidence in support of the claimed purchase except his own, uncorroborated, testimony which was sharply contradicted by the evidence of defendants in every material particular. After the appeal was taken, plaintiff substituted other counsel to represent him.

Plaintiff testified that he delivered $600 to defendant Sebald Cheroske on March 13, 1943, and that Cheroske promised that he would get an option signed by Mrs. Campbell-Johnston for the sale of the tract to plaintiff for $600 cash and the assumption of a trust deed indebtedness of $14,000; that he handed Cheroske an option form for Mrs. Campbell-Johnston to sign, that it was never signed, and no part of the $600 was returned to him. He also testified that on February 13, 1943, he had borrowed $1,250 from Mrs. Campbell-Johnston and had executed a note in that amount in favor of Sonja Husson, an employee of Mr. Cheroske. He denied that the $600 was paid to Cheroske for credit upon the note.

Sebald Cheroske testified that he was an attorney at law and attorney in fact of Mrs. Campbell-Johnston; that he arranged the loan of $1,250 to plaintiff, for use in connection with a laundry business which plaintiff was financing in San Luis Obispo County, and that the loan was made on condition that if Geiselman was unable to lease or purchase the land upon which the laundry building stood, he was to return the borrowed money and that Geiselman promised that he would do so. He testified that Geiselman signed a statement that the $1,250 was to be used for the stated purpose, but that at Geiselman's request Cheroske consented that he might use a part of the money for expenses; that on March 15 Geiselman reported that he had been unable to clear the title; that by telephone he requested Cheroske to meet him and bring the note, stating that he wished to make a payment on the note and wished to have it credited; that Geiselman paid the sum of $600, requested that he be credited with $150 in addition for expenses he had incurred on a trip to San Luis Obispo, and that Cheroske consented to this and endorsed a credit of $750 on the note in the presence of Geiselman. The note was secured by Geiselman's chattel mortgage and contained a provision that the payee would look to the mortgaged property for payment and that there would be no personal liability of Geiselman on the note. These two witnesses were the only ones having anything to do with the arrangement of the loan and the payment of the $600.

There is not in the pleadings or in the 500 pages of reporter's transcript any suggestion of a claim upon the land or for the return of money or for damages, other than the assertion by plaintiff of the promise by Cheroske, as attorney in fact of Mrs. Campbell-Johnston, that an option would be procured from the latter for Geiselman to buy the property upon the terms we have stated. This was the issue to be tried and which was tried, although if it had been decided in plaintiff's favor there would have been incidental issues. The question was solely one of the credibility of witnesses. The court so stated toward the close of the trial and counsel agreed with the statement. In summing up the evidence on the point the court stated: "I do not believe Mr. Geiselman and I do believe Mr. Cheroske, and that is the alpha and omega of this decision * * * I do believe from a preponderance of the evidence that the $600.00 was credited upon the loan of $1250.00 and was a return of some of that money, and not for an option to this property." The findings were against the plaintiff and in favor of the defendant upon this issue and these findings constituted a complete determination of the litigation. There were many other findings, just as there were allegations in the complaint, which are wholly irrelevant to plaintiff's alleged cause of action.

[1] Upon the appeal plaintiff attacks the sufficiency of the evidence under the following heading: "The Findings and Judgment Based Thereon are Unsupported by the Weight and Preponderance of the Evidence." The argument which follows is to the general effect that plaintiff's evidence established a case for relief, followed by the statement: "This case was never overcome by the defendants." An examination of the reporter's transcript enables us to say that the decision not only has support in the evidence but appears to be the only one which would have been justified.

Another point of appellant is: "Defendants have failed to plead affirmatively that the $600.00 transferred from plaintiff to defendant Campbell-Johnston was in partial payment of a separate loan agreement. Evidence was erroneously admitted on this issue." Plaintiff alleged in his complaint that he had given the $1,250 note to Sonja Husson, Campbell-Johnston's nominee. As previously noted, the answers of Cheroske and Mrs. Campbell-Johnston alleged that the $600 was paid upon account of plaintiff's said note. Of course a denial that the $600 was paid for an option would have been sufficient to allow defendants to prove that it was paid and received for some other purpose, but the answers went further and alleged the very facts which appellant says were not alleged.

Under another heading of the brief it is claimed that the evidence does not support the findings and the findings do not support the judgment. Nothing is said under this heading which is deserving of particular attention. It is also claimed that there are irreconcilable conflicts in the findings, in that there was a finding that there was no written contract between the parties and another finding to the effect that there was a written contract. There is no finding to the latter effect. It is claimed also that there are conflicts between the findings and the admissions of the pleadings. No such conflict appears.

Upon a motion to advance the appeal for an early hearing and to dismiss the appeal or affirm the judgment for obvious want of merit, it has been shown to the court that many houses have been built in Tract 12955; that prior to the institution of this action some 70 houses had been sold; that all but a few of the purchasers are veterans; that many of them have paid for their properties and find their titles clouded by reason of plaintiff's lis pendens; that many resales have been arranged which cannot be concluded and that in the present action another lis pendens was filed clouding the title to some 85 lots in an adjoining tract, which have likewise been sold, largely to veterans, although it was not alleged in the complaint that defendant agreed to sell plaintiff all or any part of this second tract. Practically all lots in the two tracts upon which some 250 houses have been built were sold prior to the institution of the present action. It was further shown by affidavit that plaintiff has demanded that he be paid and has been paid substantial sums for releases from the effect of his lis pendens of lots in the two tracts. The cause has been advanced for early hearing, the appeal has been shown to be wholly without merit, and it satisfactorily appears that it is frivolous and was taken solely for the purpose of delay.

[2] The judgment is affirmed, and defendants are awarded judgment against plaintiff for $100 damages for a frivolous appeal.

WOOD, J., and KINCAID, J., pro tem, concur.

80 Cal.App.2d 463

PEOPLE v. GUERNSEY et al.

Cr. 2456.

District Court of Appeal, First District,
Division 2, California.

June 19, 1947.

1. Rape 🔑51(4)

Evidence authorized conviction of forcible rape.

2. Indictment and information 🔑71

Where each count of information charged defendants and each of them with rape in that "they did have and accomplish an act of sexual intercourse with prosecutrix and that she resisted", the language used indicated with sufficient clarity that in each count each defendant was charged with commission of a separate act of rape.

3. Indictment and information 🔑196(5)

Uncertainty of information for failure to clearly inform defendants of the number of acts of rape charged to each was waived by defendants' failure to demur to the information or raise the point during trial.

4. Criminal law 🔑564(3)

In rape prosecution, on question of venue in San Mateo county, evidence that parties drove from San Francisco to San Mateo county was sufficient to support the inference that the acts or part of them took place in San Mateo county. Pen. Code, § 781.

5. Criminal law 🔑564(2)

Venue need not be proved beyond a reasonable doubt but only by a preponderance of evidence.

6. Criminal law 🔑564(1)

Evidence that any one of the acts on which prosecution was predicated was committed in the county in which case was tried was sufficient proof of venue. Pen. Code, § 781.

7. Criminal law 🔑564(7)

In prosecution for rape, evidence that paint resembling that of defendants' automobile was found on barbs of a wire fence in San Mateo county and proof that scratches which corresponded with alignment of barbs of fence were found on automobile and that a button torn from prosecutrix' jacket was found at the spot was sufficient to show venue in San Mateo county regardless of where actual rape took place. Pen.Code, § 781.

8. Criminal law 🔑543(2)

The sufficiency of the foundation laid to authorize transcript of the testimony of a witness at preliminary examination to be read to jury is within sound discretion of trial judge.

9. Criminal law 🔑543(2)

Testimony that people's witness, a member of the Women's Army Corps, had been transferred from her station in California to a separation center, which she left declaring that she was going to her home in New York, together with testimony that prosecutrix said that she had seen letters from absent witness written from New York, the last one about two weeks before the trial, was a sufficient foundation to authorize in exercise of trial court's discretion the reading to jury of testimony of absent witness given at the preliminary examination.

10. Criminal law 🔑543(2)

Where there is satisfactory showing of absence of witness outside the state, no futile acts of diligence to secure attendance are required in order to read the testimony of the witness at trial.

11. Criminal law 🔑1144(12)

Where transcript of testimony given at preliminary examination is read to jury, in absence of specific objections in trial court on ground of a want of proper certificate, reviewing court presumes, in support of ruling of trial court, that transcript was properly certified.

◆

Appeal from Superior Court, San Mateo County; Edmund Scott, Judge.

William Guernsey and Henry Guernsey were convicted of rape and from the judgment and from an order denying them a new trial, they appeal.

Judgment and order affirmed.

Bullock, Wagstaffa & Daba, of Redwood City, and Raymond D. Williamson and

Arthur J. Healy, both of San Francisco, for appellants.

R. N. Howser, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

The defendants were charged in one information in two counts—each count charging each defendant with separate acts of rape. Each defendant was found guilty of two acts and both appeal from the judgment and from the order denying them a new trial.

At about 10 p. m. on one of the streets of San Francisco the two defendants took the prosecuting witness and a friend into their automobile on the promise that they would drive them to the Berkeley center of the WAC where they were stationed. Instead the defendants drove them south into San Mateo County, stopping for drinks along the way. After repeated advances the girls left the car and started walking along the highway. The defendants drove after them and again persuaded them to enter the car. But the car was turned and defendants drove south to a point near the ocean somewhere in the neighborhood of Half Moon Bay. One of the girls left the car and escaped through a nearby field. The two defendants seized the prosecutrix and put her back in the car. After severely beating her on the face Henry Guernsey forced her to disrobe and committed the act upon her. His brother then accomplished a similar act. After driving northerly for about a half an hour the same act was repeated by each defendant. When she escaped from the car she found a house in the outskirts of the city of Belmont from where the authorities were notified. She was taken to the Dibble Hospital near Menlo Park where at 5 a. m. she was examined by the physician in charge. He testified fully as to the contusions upon her face and thighs, which were not more than a few hours old, and also to the positive evidence of recent intercourse.

[1] There is no contention that the evidence is not sufficient to support the charge of forcible rape. Only one of the defendants appeared as witness. He testified that the acts were done with the consent of the prosecutrix. But her testimony about the force used finds corroboration in the convincing testimony of the medical witness.

The first attack upon the judgment is that since each count of the information charges both appellants jointly of a simple act of rape, they could together only be found guilty of two acts whereas they were found guilty of four acts.

Each count of the information charges defendants "and each of them" of rape in that "* * * they did * * * have and accomplish an act of sexual intercourse" with the prosecutrix "and she * * * resisted the accomplishment of said acts of sexual intercourse. * * *"

[2, 3] The language used seems to indicate with sufficient clarity that in each count each defendant was charged with the commission of a separate act of rape. Manifestly there was no uncertainty in that respect during the trial—both appellants were tried on the theory that each separately committed two acts. The utmost that could be said against the charging part of the information is that the use of both "act" and "acts" in the same sentence caused the information to be uncertain in that it did not clearly inform appellants of the number of acts charged to each. However, such objection was waived by defendants' failure to demur to the information or to raise the point during the trial. People v. Stone, 199 Cal. 610, 624, 250 P. 659; People v. Pryor, 17 Cal.App.2d 147, 151, 61 P.2d 773.

[4, 5] Secondly it is argued that the venue was not established as it was not proved that any of the acts were committed in San Mateo County. The evidence is that the parties drove from San Francisco to San Mateo County and is sufficient to support the inference that the acts or part of them took place in that county. It is not necessary that the venue be proved beyond a reasonable doubt but only by a preponderance of the evidence. People v. Megladdery, 40 Cal.App.2d 748, 764, 106 P.2d 84; People v. Carter, 10 Cal.App.2d 387, 389, 52 P.2d 294.

The prosecutrix testified that, when after the last act she left the car, she had only to walk up a hill and through a field to come to a house that proved to be in the city of Belmont, San Mateo County. From the site of the first attacks near the ocean to the place near Belmont where the second attacks took place she had been driven in the dark for not more than half an hour, from which circumstance the jury could infer that also the first attacks must have taken place in San Mateo County. After the friend had escaped and when the prosecutrix was being held forcibly in the car for the purpose of committing the crime on her, the car was driven through a wire fence on an abandoned dirt road at the coast south of Half Moon Bay. Green paint resembling that of appellant's car was later found on the barbs of the wire fence. Scratches were found on the car which witnesses testified corresponded with the alignment of the barbs of the fence. A button torn from the jacket of the prosecutrix was found at the spot indicated. Witnesses testified that this spot was in San Mateo County.

[6, 7] The evidence that any one of the acts was committed in San Mateo County is sufficient proof of venue under section 781 of the Penal Code which reads: "When a public offense is committed in part in one county and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction is in either county." The forcible abduction of prosecutrix which was in progress at the wire fence was an act "requisite to the consummation of the offense" as described in that section.

Finally it is argued that the transcript of the testimony of the companion of the prosecutrix given at the preliminary examination was improperly read to the jury as no proper foundation was laid for its introduction. Before the transcript was read evidence was taken that the witness had been transferred from her station in California to a separation center which she left declaring that she was going to her home in the Bronx, New York. The prosecuting witness had seen letters from her written from there, the last one received about two weeks before the trial.

[8-10] The sufficiency of the foundation laid is within the sound discretion of the trial judge. People v. Crandall, 100 Cal.App. 785, 791, 281 P. 81. The foundation in this case is on a par with that in People v. Barker, 144 Cal. 705, 707, 78 P. 266, where the court held that evidence that the absent witness stated that he was leaving California to reside in another state, and evidence of the receipt of letters from the witness postmarked in the other state was sufficient to support the ruling of the trial court that the deposition was admissible. No specific foundation as to the genuineness of the letters was required where they were apparently written in the ordinary course of things. See also 8 Cal. Jur. p. 131. Where there is a satisfactory showing of absence of the witness outside the state no futile acts of diligence to secure attendance are required. People v. Padilla, 81 Cal.App. 528, 532, 254 P. 585. See also People v. Land, 137 Cal.App. 196, 30 P.2d 433. As no abuse of discretion appears the decision of the trial judge will not be disturbed.

[11] Appellants' objection that there is no proof of authenticity of the transcript read to the jury is not well taken. In the absence of specific objections on the ground of want of a proper certificate in the court below, it will be presumed in the appellate court in support of the ruling of the court below that the transcript was properly certified. People v. Buckley, 143 Cal. 375, 383, 77 P. 169.

Judgment and order affirmed.

GOODELL and DOOLING, JJ., concur.

80 Cal.App.2d 340

HERZOG v. BLATT et al.

Civ. 15802.

District Court of Appeal, Second District, Division 2, California.

June 13, 1947.

Rehearing Denied July 2, 1947.

Hearing Denied Aug. 7, 1947.

1. Brokers ⚷43(3)

In suit by broker to recover commission, in order to show compliance with the statute of frauds the writing signed by the party to be charged or his agent must unequivocally show on its face an authority to act or negotiate a sale of the property for the owner. Civ.Code, § 1624, subd. 5.

2. Brokers ⚷43(3)

Memorandum, signed by owner of realty, that owner would take specific amount for the realty with stated terms of payment and would take that amount until stated time, was merely an offer to sell and devoid of any showing that broker was employed to sell or negotiate a sale and so was insufficient to meet the requirements of the statute of frauds. Civ.Code, § 1624, subd. 5.

3. Frauds, statute of ⚷144

An estoppel to plead the statute of frauds cannot be predicated upon the refusal of seller of realty to comply with an oral promise to pay a commission.

4. Brokers ⚷43(1)

Owner of realty was not estopped to plead statute of frauds so as to preclude recovery of commission by broker by reason of alleged oral agreement to employ the broker and the fact that the owner actually sold the realty to the broker's customer. Civ.Code, § 1624, subd. 5.

5. Brokers ⚷43(1)

A contract to employ a broker to sell owner's property was not taken out of the statute of frauds by performance on the ground of owner's sale of the property to the broker's customer. Civ.Code, § 1624, subd. 5.

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Action by Harry N. Herzog, doing business under the fictitious name of National Realty Construction Company, against Sam Blatt and others, to recover a real estate broker's commission. From a judgment for plaintiff, Sam Blatt appeals.

Judgment reversed.

Henry Haves, of Los Angeles (Julian H. Weiss, of Los Angeles, of counsel), for appellant Blatt.

Benjamin J. Goodman and Byron Schwartz, both of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action to recover a real estate broker's commission, defendant appeals.

Statement of Facts

For some time prior to January 12, 1945, defendant, Sam Blatt, was the owner of an apartment building located at 456 South Cochran Avenue, Los Angeles. Plaintiff was at all times herein mentioned a duly licensed real estate broker. On or about January 6, 1945, Miss Fraser, a real estate agent in the employ of plaintiff, called on Mr. Blatt and requested a listing of the aforementioned apartment house. The details relative to the property were discussed, but defendant Blatt refused to sign a listing, or any other agreement or memorandum.

On January 12, 1945, shortly after noon, plaintiff went to defendant Blatt's home with two copies of an offer to purchase the apartment house for the sum of $85,000. The offer was signed by Ray Radin. This offer was accompanied by a check in the sum of $1,000. Defendant refused to sign an acceptance of the offer unless plaintiff agreed to limit his commission to $1,000. This plaintiff refused to do. Plaintiff requested an additional twenty-four hours to obtain a higher bid from the prospective purchaser. In compliance with this request defendant, on the reverse side of one of the printed forms, wrote in his own handwriting the following:

"I will take 8400. net for 456 So. Cochran this is good until January 13 at 6 o'clock I will accept 25000 cash and ballance 16500 a second mortgage at 6% payable 200 dollars a month. The Second mortgage will expair 2 year from date.

"Sam Blatt."

Plaintiff thereafter took with him both copies of the offer and the check.

On the following day about 12 o'clock noon, two real estate brokers, named Jack London and Erich Blumenthal, called on defendant and inquired about the sale of his apartment house. Defendant informed them that he could not entertain any offers until after 6 p. m. of that day. Shortly after 6 p. m. of January 13, 1945, Jack London returned to the home of defendant accompanied by Mr. Radin, the person who had signed the offer which had previously been submitted ot defendant. About 6:30 p. m. on the same day an agreement was reached between defendant and Mr. Radin for the sale of the property for the sum of $85,000 and a check in the sum of $1,000 was given as partial payment of the purchase price. Thereafter the transaction was completed and a commission of $1,000 was paid to Messrs. London and Blumenthal.

After plaintiff left defendant's home on January 12, 1945, he did not prior to 6 o'clock p. m. of January 13, 1945, communicate with defendant.

Question for Determination

Was there a sufficient memorandum signed by defendant to meet the requirements of subsection 5, section 1624 of the Civil Code, which provides that an agreement, authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission, is invalid unless the same or some note or memorandum thereof is in writing, and subscribed by the party to be charged or by his agent?

[1] This question must be answered in the negative. The rule is established that in a suit by a broker to recover a real estate commission in order to show compliance with the requirements of section 1624, subdivision 5 of the Civil Code, the writing, signed by the party to be charged or his agent, must unequivocally show on its face the fact of employment of the broker, that is, it must show an authority to act or negotiate a sale of the property for the owner. (Kleinsorge & Heilbron v. Liness, 17 Cal.App. 534, 535 et seq., 120 P. 444; Morrill v. Barneson, 30 Cal.App.2d 598, 603, 86 P.2d 924.)

[2] Applying this rule to the facts in the instant case the memorandum signed by defendant constituted merely an offer to sell his property on certain terms and conditions if the offer was accepted within the time specified in the writing. It is devoid of any showing that plaintiff was authorized to sell the property, negotiate a sale of the property on behalf of defendant, or employed to sell the property. The facts are analogous to those in Kleinsorge & Heilbron v. Liness, supra, and the principle of law is identical. In the cited case the court held the memorandum insufficient to meet the requirements of the statute of frauds, and held that the broker was not entitled to recover a commission. Therefore the trial court improperly entered judgment in favor of plaintiff.

Corvin v. Smead Inv. Co., 115 Cal.App. 175, 1 P.2d 507, and Coulter v. Howard, 203 Cal. 17, 262 P. 751, are inapplicable to the facts of the present case because in such cases the question before the court was the sufficiency of a memorandum conceded to meet the requirements of the statute of frauds but executed subsequent to full performance by the broker of the service for which he sought his commission. This question is, of course, not involved in the present case.

Neither is Moore v. Borgfeldt, 96 Cal. App. 306, 273 P. 1114, here in point since in such case the memorandum provided, "commission all over and in excess of the above amount," and also expressly committed the seller to accept in exchange a specific piece of property named in the memorandum and owned by the broker's customer. The court there held that from these facts the memorandum on its face showed the employment of the broker to sell defendant's property. No such facts appear in the present case.

[3, 4] There is likewise no merit in plaintiff's contention that defendant is estopped to plead the statute of frauds by reason of an alleged oral agreement to employ plaintiff and the fact that defendant actually sold his property to plaintiff's customer. The rule is established in California that an estoppel to plead the statute of frauds cannot be predicated upon the seller's refusal to comply with an oral promise to pay a commission. (Sweeley v. Gordon, 47 Cal.App.2d 381, 384, 118 P. 2d 14; Hicks v. Post, 154 Cal. 22, 28, 96 P. 878; Edwards v. Laird, 22 Cal.App. 398, 402, 134 P. 365.)

[5] Neither is there any merit in plaintiff's contention that the contract was fully performed on the part of plaintiff by defendant's sale to plaintiff's customer, and that thereby the bar of the statute of frauds was removed. The law is settled that the procurement of a purchaser is not such performance as will entitle a broker to recover a commission in the absence of a compliance with the requirements of subdivision 5, section 1624 of the Civil Code. (See Crawford v. Kennedy, 64 Cal.App. 719, 222 P. 644; Sweeley v. Gordon, supra.)

Needham v. Abbot Kinney Co., 217 Cal. 72, 17 P.2d 109; Vierra v. Pereira, 12 Cal. 2d 629, 86 P.2d 816; Fleming v. Dolfin, 214 Cal. 269, 4 P.2d 776, 78 A.L.R. 585; Brenneman v. Lane, 87 Cal.App. 414, 262 P. 400; Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am.St.Rep. 154, are factually distinguishable from the present case and therefore not here in point.

Finally, plaintiff's proposition that this court may not substitute its interpretation of a written memorandum for that of the trial court where the memorandum is susceptible of either of two inferences is clearly not involved in the present case for the reason that the memorandum signed by defendant is clear and unambiguous and susceptible of only one interpretation.

Judgment reversed.

MOORE, P. J., and WILSON, J., concur.

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80 Cal.App.2d 508

In re McGIVERN'S ESTATE.

MARTIN v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

Civ. 13411.

District Court of Appeal, First District, Division 1, California.

June 21, 1947.

1. Charities 🔑22(1)

An attempted testamentary trust fails, if objects or subjects thereof are uncertain.

2. Wills 🔑601(8)

While desire of testator for disposition of his estate will be construed as a command when addressed to his executor, it will not, when addressed to his legatee, be construed as a limitation upon the estate or interest which is given to him in absolute terms.

3. Wills 🔑601(8)

Under testatrix's will bequeathing residuary of estate to named legatee to dispose thereof in accordance with testatrix's wishes, and expressly providing that it was not her intent to create a trust in legatee, legatee took an absolute gift where testatrix died before conveying her wishes to legatee.

◆

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Proceeding in the matter of the estate of Katherine A. McGivern, deceased, wherein Blossom Martin appeals from portion of decree of distribution, opposed by Bank of America National Trust & Savings Association and another.

Affirmed.

Walter H. Hewicker, of Bakersfield, for appellant.

Thos. J. Riordan and Eugene H. O' Donnell, both of San Francisco, for respondents.

PETERS, Presiding Justice.

The appellant, the niece of decedent, and the person who would succeed to testatrix' estate had she died intestate, appeals from that portion of the decree of distribution holding that the residue of the estate should be distributed to the Reverend Thomas Byrne. The sole question presented on this appeal relates to the proper interpretation of that portion of the will disposing of the residuary estate.

The witnessed will, drafted by an attorney, was executed June 15, 1935. The decedent died November 27, 1943, as the result of an automobile accident. She left no spouse or children. By her will she provided that if a designated half sister should survive her, the entire estate should be held in trust for that half sister to pay a certain sum to her for life; that upon the death of the half sister the trust should terminate and certain specific legacies should be paid; that the residue and remainder of the estate should then be paid to the Reverend Thomas Byrne. The will provided: "It is my desire that said property so devised and bequeathed to said Reverend Thomas Byrne shall be disposed of by him in accordance with my wishes heretofore expressed to him, although by expressing this desire it is not my intention to create any trust covering any of said property." It was then provided that if the half sister should predecease the testatrix, which she did, that "I hereby devise and bequeath my estate as follows:" Here follows a list of specific legacies, and then: "To said Reverend Thomas Byrne the whole of the remainder and residue of my estate, to be disposed of by him in accordance with my said wishes heretofore expressed to him. It is not my desire to create a trust in Father Byrne."

It is this last quoted clause that is involved on this appeal. The trial court ruled that by this clause the residue of the estate should be distributed to Father Byrne, and it is from that ruling that this appeal is taken.

The evidence shows, without conflict, that the will was executed just before the testatrix left for an extended trip, and that neither before nor after the execution of the will, did she express to Father Byrne her desires as to the disposition of the residue of her estate. Appellant contends that the bequest to Father Byrne failed, as a matter of law, because, so it is asserted, the will shows that he was not to take absolutely, but only to take so that the property could be "disposed" of by him in accordance with the wishes of decedent. It is claimed that, because the wishes of decedent were never conveyed to the residuary legatee, decedent must be deemed to have died intestate as to the residue of her estate, and the appellant takes. The contention is without merit.

The validity of the will has heretofore been established. In a prior litigation appellant, who is not mentioned in any portion of the will, contested its probate on the grounds that decedent lacked testamentary capacity, and that Father Byrne was guilty of undue influence. She was nonsuited on the undue influence issue, and a jury decided against her on the capacity count. These determinations were affirmed on appeal. Estate of McGivern, 74 Cal.App.2d 150, 168 P.2d 232.

In reading the clause of the will here involved three things are immediately apparent: (1) The residue of the estate was devised and bequeathed to Father Byrne; (2) Father Byrne was to "dispose" of the estate in accordance with the wishes of the testatrix; and (3) as clearly as words can express the thought, the testatrix provided that it was not her intent to create a trust in Father Byrne. This last thought was expressed not once, but twice. It is of decisive importance in interpreting the entire clause in question.

[1] In most cases involving factual situations somewhat similar to the one here involved the real question is whether a trust or an absolute gift was intended. This type of problem was discussed by this court in the recent case of Estate of Feldman, 78 Cal.App.2d 778, 178 P.2d 498. Of course, if a trust was intended, but the objects or subjects of the trust are uncertain, the gift fails, and in some cases the heirs or next of kin are let into the beneficial ownership of the property. See Estate of Ralston, 1 Cal.2d 724, 37 P.2d 76, 96 A.L.R. 953. It is apparently this rule that appellant seeks to invoke here. While, if the portion of the clause designated "3" above had been omitted, it could be argued that an imperfect trust had been created, with that portion of the clause

included, there is just no room for plausible argument. The testatrix has stated that even if she had expressed her wishes to Father Byrne, no trust was intended. A fortiori, therefore, an absolute gift was made.

It is most difficult to ascertain the theory upon which appellant seeks to upset the holding that Father Byrne takes absolutely. She cites but one case in her opening brief —Estate of Sloan, 7 Cal.App.2d 319, 46 P.2d 1007—and has not filed a reply brief. That case is obviously not in point. There the will directed that upon the termination of a trust the trust fund "shall go to, belong to, vest in and be distributed by a court of competent jurisdiction to the heirs of said William Wilson Sloan 3rd as per his last will and testament." 7 Cal.App.2d at page 321, 46 P.2d at page 1008. The court held that such a clause constituted an absolute direction, and that the donee of the power could not so exercise it so as to will the property to one heir to the exclusion of others. Obviously, the case has no application where the testatrix has expressed her intent that there be no trust.

[2] Even had the testatrix failed expressly to declare her intent not to create a trust, it is extremely doubtful whether the statement that Father Byrne was to dispose of the residue in accordance with the wishes of the testatrix would create a trust. In Estate of Mallon, 34 Cal.App.2d 147, 93 P.2d 245, the testatrix bequeathed certain property to "my sister, Mary A. Mallon, who will care for Mary L. Barrett until death shall separate them." 34 Cal.App.2d at page 150, 93 P.2d at page 246. The appellate court designated that language as "a mere recital of the testator's expectation." 34 Cal.App.2d at page 152, 93 P.2d at page 247. The court also stated (34 Cal.App.2d at page 151, 93 P.2d at page 250): "While the desire of the testator for the disposition of his estate will be construed as a command when addressed to his executor, it will not, when addressed to his legatee, be construed as a limitation upon the estate or interest which he has given [to him] in absolute terms." Estate of Farelly, 214 Cal. 199, 4 P.2d 948, 949, is also applicable. There the testatrix willed certain property to two nieces "share and share alike. If said residue shall not exceed one-third of my estate I direct that the same shall be expended for charitable or philanthropic purposes and in accordance with my views as expressed. If such residue shall exceed one-third of my estate, I direct that said one-third of my estate shall be expended as in this item provided, and the excess thereof shall be expended by them as I may suggest to them hereafter." 214 Cal. at page 200, 4 P.2d at page 949. The testatrix wrote a letter containing her instructions, but also stated that "The above charitable purposes are only suggestions on my part. After investigation and advising with Maude T. Pesante and others who may be competent to advise with you, you may find a better use for each or all of these properties, but you know my general desire in the matter and I leave it to your good judgment." 214 Cal. at page 201, 4 P.2d at page 949. The trial court held that the devise was an absolute one, and that finding was affirmed. In so holding the Supreme Court stated that the evidence was consistent "with the conclusion that no trust was intended, that an obligation was likewise not intended, and that the decedent left performance to the good faith of the legatees without interference on the part of a court of equity." 214 Cal. at page 206, 4 P.2d at page 951.

It is true, of course, that in the instant case, unlike the Farelly case, no instructions were ever conveyed to Father Byrne by the testatrix. But that fact can be of no avail to appellant. Since, under the Farelly case, Father Byrne might have taken absolutely even if instructions had been given, the failure to instruct cannot alter his status as an absolute legatee. See 1 Scott on Trusts, p. 313, § 55.5; Estate of Holt, 61 Cal.App. 464, 215 P. 124; O'Donnell v. Murphy, 17 Cal.App. 625, 120 P. 1076.

Whatever the rule may be where the testatrix has failed to express her intent on the subject, there can be little doubt, where the testatrix has expressly declared her intent not to create a trust, that the legatee takes absolutely. In Cooke v. King, 154 Or. 621, 61 P.2d 429, 107 A.L.R. 881 (petition for rehearing denied 62 P.2d 20), the husband and wife executed a mutual will. The document contained an expression of "hope" that the devisees would "dispose of and handle" the property in accordance with the testator's and testatrix' intentions, but the will also contained an express disclaimer of an intent not to create a trust. The court stated: "The great weight of authority is to the effect that where the testator uses words disclaiming an intention to create a trust, no trust will be implied from the inclusion of precatory or recommendatory language." 61 P.2d at page 434.

[3] Although not very clearly expressed, it must be appellant's position that intestacy resulted because the testatrix attempted to create a trust, which attempt was abortive because of the failure of the testatrix to inform Father Byrne of her "wishes." This contention must fail because here the intent not to create a trust was expressed. Father Byrne, therefore, took an absolute gift.

The portion of the decree of distribution appealed from is affirmed.

WARD, J., concurs.

BRAY, J., being disqualified has not participated in this decision.

MATHER et al. v. MATHER.

Civ. 13275.

District Court of Appeal, First District, Division 2, California.

May 10, 1947.

Hearing Granted May 29, 1947.

1. Judgment 🔑590(4), 736

Where no accounting had been had in any court at any stage of prior proceedings between husband and wife and there was no prior adjudication that wife was not entitled to accounting, wife's action for accounting was not barred and wife was not estopped by any adjudication necessarily inconsistent with account.

2. Trial 🔑45(1)

In wife's proceeding to compel husband to account for proceeds of claim against estate in which wife was entitled to share, wife's offer of proof including vouchers signed by husband, acknowledging receipt of more than half the claim from executors, was not subject to objection that accounts and papers in the estate were hearsay and inadmissible against husband who was not a party to the estate proceedings.

Appeal from Superior Court, San Francisco County; Edmund P. Mogan, Judge.

On petition for rehearing.

Petition denied.

Prior opinion, 179 P.2d 82.

Don Lake and James R. Jaffray, both of Los Angeles, for plaintiffs and appellants.

Cerf, Robinson & Leland, of San Francisco, for defendant and respondent.

NOURSE, Presiding Justice.

[1] The respondent has filed a petition for rehearing arguing that the accounting ordered by this court was barred by prior adjudications. He concedes that appellant sought an accounting in her original pleadings. Her offer of proof of the respective payments was consistent with this theory. No accounting has been had in any court at any stage of the proceedings and there is no prior adjudication that she is not entitled to one. Therefore such action is not barred. Neither is appellant estopped by any adjudication necessarily inconsistent with an accounting of the prior payments. All adjudications actually made are fully recognized and adhered to in our original opinion.

[2] We have examined the briefs and records on the previous appeals. Counsel for respondent have not been frank in their statements of facts appearing in these

briefs. They still refrain carefully from conceding or denying the truth of the alleged overpayment received by their client. They argue that the proffered evidence on the accounting was hearsay. The argument is based on the equivocal statement that "the accounts and papers in the Greenfield Estate file are not admissible against Mr. Mather, who was not a party thereto." Concealed is the fact that the offer also included the vouchers signed by Mr. Mather acknowledging receipt by him from the executors of some $26,000, or more than one-half of the claim against the Greenfield estate, of which, under the final decision of the Supreme Court, 25 Cal.2d 582, 154 P.2d 684, he and appellant were each entitled to an equal one-half. Yet respondent, in his verified complaint herein, alleged that the claim, without interest, amounted to $39,000, on which $7,000 had been paid appellant.

Our reversal of the judgment was deliberately made to enable the courts to reach at last a fair and equitable termination of the case.

Petition denied.

GOODELL, and DOOLING, JJ., concur.

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79 Cal.App.2d 443

SYLVESTER v. KIRKPATRICK.

KIRKPATRICK v. SYLVESTER et al.

Civ. 13310.

District Court of Appeal, First District, Division 1, California.

May 2, 1947.

Rehearing Denied May 27, 1947.

Hearing Denied June 30, 1947.

1. Execution 🔑283

In action to quiet title to property purchased by defendant at execution sale who alleged that plaintiff's title was based on a sham deed from execution debtors seeking to defeat the defendant's just claim, finding that property had not been redeemed from execution sale so as to defeat defendant's claim was supported by evidence.

2. Mortgages 🔑38(4)

Though a deed absolute on its face given only to secure an obligation will be interpreted as creating a mortgage, mere statements of grantor and grantee are not conclusive though not contradicted by other specific testimony, since surrounding circumstances may convince trial court of the inherent unworthiness of their testimony and he may resolve the issue contrary to their testimony.

3. Mortgages 🔑32(6), 39

Whether a deed absolute in form is a mortgage is a mixed question of law and fact to be determined from all the evidence, written and parol, and, in determining it, all circumstances attending the transaction should be considered.

4. Mortgages 🔑38(4)

In action to quiet title to property purchased by defendant at an execution sale, evidence established that a document executed by plaintiff to the debtors was a deed though the parties testified that it was intended only as a mortgage.

5. Execution 🔑283

In action to quiet title to property purchased by defendant at an execution sale with defense that deed by debtors to plaintiff was a sham for purpose of defeating defendant's title, finding that debtors did have title before execution sale and that defendant acquired it at such sale was sustained by the evidence.

6. Deeds 🔑179

In action to quiet title to property purchased by defendant at execution sale who claimed that deed by debtors to plaintiff was a sham in order to defeat defendant's claim, where plaintiff prior to sale had deeded property to the debtors, fact that the debtors returned deed to plaintiff was not sufficient to reinvest title in plaintiff so as to defeat defendant's title. Civ. Code, § 1058.

7. Execution 🔑283

Evidence established that debtors owned property at the time defendant purchased it at execution sale and that record title was in plaintiff only as a sham to prevent the defendant from reaching the property with his judgment, and that neither plaintiff nor the debtors had any title or interest in the property.

8. Judgment ⚷538

A judgment pronounced long after the statutory right of redemption had lapsed need not preserve to the execution debtors such right of redemption merely because the trial of the action was concluded six days before the statutory period closed. Code Civ.Proc. §§ 700, 702.

9. Appeal and error ⚷1073(5)

In action to quiet title to property purchased by defendant at execution sale who claimed that deed by debtors to plaintiff was a sham to defeat defendant's title where there was nothing to show that debtors ever attempted to exercise a right of redemption nor do they now offer to do so, technical error in entry of judgment would be disregarded on ground that debtors were not prejudiced.

10. Quieting title ⚷49

In action to quiet title to property purchased by defendant at an execution sale, who claimed that deed by debtors to plaintiff was a sham to defeat defendant's title, failure of trial court to proportion respective interests of plaintiff as record owner and debtors as beneficial owners was not error, where trial court found in effect that plaintiff had no interest in the property.

11. Witnesses ⚷54

In action to quiet title, where both husband and wife filed disclaimers, wife could not object to interrogation of husband as an adverse party under section 2055 on theory that her husband's testimony would be either "for or against her" within section 1881 precluding examination of a spouse without the other spouse's consent. Code Civ.Proc. §§ 1881, 2055.

On Rehearing.

12. Appeal and error ⚷832(4), 833(5)

Where record showed that none of facts relied on by appellants in their petitions for rehearing had been called to trial court's attention prior to entry of its modified judgment, petitions for rehearing were denied with understanding that nothing said in prior opinion affirming trial court's modified judgment should be interpreted to effect any rights based on facts not before trial court. Rules on Appeal, rule 12.

Appeal from Superior Court, Santa Clara County; John D. Foley, Judge.

Action by John B. Sylvester against W. J. Kirkpatrick for damages for slander of title, in which defendant filed a cross-complaint against plaintiff and against Mary Nunnes Martin Almeida and husband, to have title quieted to real property. From the judgment for cross-complainant quieting title to the property, plaintiff and cross-defendants appeal.

Affirmed.

John H. Machado, of San Jose, for appellant.

R. V. Bressani, of San Jose, and G. D. Schilling, of San Francisco (Edwin J. Owens, of San Jose, of counsel), for respondent.

WARD, Justice.

John B. Sylvester, plaintiff and cross-defendant, and Mary Nunnes Martin Almeida and John Almeida, cross-defendants, appeal from the judgment for W. J. Kirkpatrick, defendant and cross-complainant, quieting title to real property. Hereafter the parties will be referred to as Sylvester, the Almeidas, and Kirkpatrick.

Sylvester's complaint alleged his ownership of certain real property in which Kirkpatrick claimed title. A prayer for damages was based on allegations that through the latter's wrongful acts in slandering Sylvester's title to such property, Sylvester had been damaged in the sum of $1,500.

The answer to the complaint denied generally Sylvester's allegations of title and the slander thereof, and by way of separate defense alleged that "at all times in the Complaint mentioned, Mary Nunnes Martin, now known as Mary Nunnes Martin Almeida, and John Almeida, were the owners of the real property described in the Complaint. That on the 17th day of June, 1939, in the Municipal Court of the City and County of San Francisco, State of California, in Action No. 130314, Defendant W. J. Kirkpatrick, recovered judgment against said Mary Nunnes Martin, now known as Mary Nunnes Martin Almeida, and John Almeida, in the sum of $1061.76, debt, $378.35 interest, and $7.50 costs." The defense then alleged that execution was issued thereon on May 6, 1944; that the property was levied upon; that it was advertised that the constable would "on June 3, 1944, sell all right, title and interest and estate of said Mary Nunnes Martin now known as Mary Nunnes Martin Almeida, and John Almeida" at public auction to satisfy said execution and judgment; and that Kirkpatrick purchased the property in question at such sale receiving a certificate of sale which was duly recorded. It is further alleged that the Almeidas "for the express purpose of concealing their assets and to prevent defendant from satisfying his judgment aforesaid, conspired with plaintiff and caused the deed to the real property described in the Complaint to be recorded in Plaintiff's name in an effort to have it appear that Plaintiff was purchasing the same and/or was the owner thereof; that at no time was plaintiff the purchaser of said property or the owner thereof, nor did he advance or pay any part of the purchase price thereof or have or claim any interest therein; * * * that the making of the deed to said property and causing the same to be placed in the name of plaintiff was fraudulent as to defendant and done for the sole purpose of defrauding defendant and concealing the true ownership of said property and secreting the assets of said judgment debtors."

Kirkpatrick's cross-complaint joined the Almeidas with Sylvester as cross-defendants. Allegations similar to those which appear in the answer are followed by a prayer that Sylvester take nothing by his complaint; that the cross-defendants be enjoined from asserting any claim or demand to said property, and that Kirkpatrick be entitled to the possession thereof.

The Almeidas answered the cross-complaint by filing a disclaimer of "all right, title, or interest of whatsoever kind or extent in or to any or all of the premises described in cross-complainant's cross-complaint on file herein," and prayed judgment for costs against Kirkpatrick.

Judgment, entered in favor of Kirkpatrick, decreed that Sylvester never had any interest in the property and that the Almeidas "do not now have, and ever since June 3, 1944, have not had any right, title, estate or interest" in the property. All defendants were restrained from asserting any claim or demand in the property adverse to the interest of Kirkpatrick. After the judgment was entered it was modified by striking therefrom a provision that Kirkpatrick was entitled to possession from June 3, 1944, leaving it to read: "* * * Kirkpatrick since June 3, 1944, has been, and now is, the sole owner in fee of the real property * * *." Kirkpatrick recovered costs against Sylvester. Motions for a new trial were denied.

On appeal, Sylvester contends that "The findings and the judgment based thereon are not supported by the evidence" and that the judgment "is against law." The Almeidas contend that the judgment is against law in enjoining them from asserting any claim to the property, and in not proportioning the interests of the record and beneficial owners, assuming that the property was purchased as found in the court's findings; and that the court committed prejudicial error in requiring John Almeida to testify.

The trial court found that on June 17, 1939, a municipal court judgment was rendered in favor of Kirkpatrick against the Almeidas for the sum of $1,061.76, plus costs and interest; that thereafter execution was issued thereon; that on June 3, 1944, the real property described in the pleadings was sold at public auction to Kirkpatrick who received a certificate of sale which was recorded June 16, 1944; and that said property has never been redeemed.

As to the question of the ownership of the property prior to June 3, 1944, the trial court found "that the deed conveying said property to, and the causing of the same to be placed of record in the name of, plaintiff and cross-defendant John B. Sylvester, was fraudulent as to defendant and cross-complainant W. J. Kirkpatrick and done for the sole purpose of defrauding defendant and cross-complainant W. J. Kirkpatrick and concealing the true ownership of said property by, and secreting the assets of, said cross-defendants Mary Almeida and John Almeida, judgment debtors; that all negotiations and arrangements for the purchase of said property including the closing of the sale thereof, were had and made by cross-defendants Mary Almeida and John Almeida, and that the consideration paid on account of the purchase price of said real property was advanced and paid by cross-defendants Mary Almeida and John Almeida, from their own funds, and that plaintiff and cross-defendant John B. Sylvester paid no part of the purchase price of said real property nor did he give or advance anything of value therefor, and that all subsequent payments on account of any unpaid portion of the purchase price, as well as all taxes and insurance premiums, were paid by cross-defendants Mary Almeida and John Almeida, * * * who, since the purchase by them of said real property and delivery of deed therefor in the name of plaintiff and cross-defendant John B. Sylvester, have resided on said property; that cross-defendants Mary Almeida and John Almeida intended to and had arranged for the execution, delivery and recordation of deed conveying title to said real property to them on or about September 5th, 1941, in joint tenancy, but when they ascertained that an abstract of the judgment rendered against them in favor of defendant and cross-plaintiff had been recorded in the office of the County Recorder of Santa Clara County prior to the date of the contemplated recording of said joint tenancy deed, cancelled their instructions and directions to have said joint tenancy Deed executed by the then owner and seller of the property and arranged for and conspired with plaintiff and cross-defendant John B. Sylvester as hereinbefore set forth to have said Deed placed of record in his name in pursuance of said fraud and for the purpose of concealing the identity of the real owners of said property." The court further found that the disclaimer filed by the Almeidas was "a sham and not made or filed in good faith, but made and filed for the purpose of carrying out and furthering the conspiracy and fraud and attempt to conceal and secrete assets * * *."

The evidence shows that on August 30, 1941, the Almeidas entered into a contract to purchase the property herein involved—improved with a dwelling house—from the previous owners. That agreement shows that the agreed purchase price was $2,800, with $290 being paid as an initial cash payment. The Almeidas were to pay an additional $110 by September 21, 1941, and were to give a note for the remaining $2,400, secured by a deed of trust. They were to pay $24 monthly thereon until the balance was satisfied. There is no dispute concerning the fact that at the time the foregoing contract was made, Kirkpatrick was a judgment creditor of the Almeidas under a judgment taken against them in the San Francisco Municipal Court on June 17, 1939—apparently for $1,061.76, $378.35 interest, and $7.50 costs; nor the fact that an abstract of that judgment had been recorded in Santa Clara County.

On September 5, 1941, the Almeida note and deed of trust were deposited with an escrow company. On September 16, 1941, the deed from the previous owner to the Almeidas was placed with the escrow. Witness S. T. Pereira, an official of the escrow company, testified that before the escrow was closed, the Almeidas were told that the title company would not insure the title without showing the Kirkpatrick judgment lien because the "abstract of judgment appeared on the run-down." The Almeidas then took back the escrow file and receipted for the documents, namely, their note and deed of trust.

By letter dated September 20, 1941, Sylvester sent to the escrow company his note and deed of trust for the purchase of the property. His letter shows that he was taking credit for $290 cash, which amount was admittedly previously paid by the Almeidas. On September 24, 1941, the seller authorized a conveyance to Sylvester instead of to the Almeidas. That the deed from the former owner to Sylvester was the deed prepared for the Almeidas—but with Sylvester's name substituted—is seen from the fact that the deed to Sylvester, a single man, is a "Joint Tenancy Deed," bearing the September 5th date. It was recorded September 24, 1941.

Under date of September 20, 1941, Sylvester executed to the Almeidas, as joint tenants, a deed to the property. Admittedly it was never recorded. There is nothing in the record to indicate that the Almeidas ever executed to Sylvester a reconveyance of the title which he transferred to them by this deed. Sylvester's contention below and before this court is that the conveyance given by him to the Almeidas was not absolute, but only intended as a mortgage. Sylvester testified that he gave the Almeidas the deed as security for a loan of $200 representing part of the money originally paid by the Almeidas on their intended purchase of the property, the remaining portion having been repaid by him to the Almeidas. Sylvester further testified that the Almeidas were to return the deed when the loan was repaid; that the loan was repaid in January, 1942; that the Almeidas returned the deed to him. There is no writing between Sylvester and the Almeidas to evidence the alleged security agreement, nor is there any written evidence of the $200 debt alleged to have been owed by Sylvester to the Almeidas.

At the time of the conveyance to Sylvester, the latter knew of the existence of the judgment against the Almeidas. The record reveals that he was friendly with the Almeidas who lived in the house after Sylvester's purchase thereof, paying $25 monthly rent—the monthly payment on the purchase price was $24. Sylvester never gave Almeida "rent credit" on the alleged $200 debt, but, instead, accepted the rentals and also repaid the alleged debt.

Mr. Almeida testified that after he had paid the initial payment of $290 under his own contract of purchase he "put up" $110 more "to put $400 on the place." A receipt of the escrow holder shows that $100 was paid on the escrow account 65153 under date of September 23, 1941. That date is after the "withdrawal" of the Almeidas from the purchase negotiations; after Sylvester had taken over, in place of the Almeidas, and also after the execution of the joint tenancy conveyance by Sylvester to the Almeidas.

[1] Sylvester maintains that there is no support in the record for the finding that the property had not been redeemed. The court's finding is justified as that finding is not based upon Kirkpatrick's proof of nonredemption, but upon Sylvester's and the Almeidas' failure to sustain the burden of proving redemption.

[2-4] The true subject of inquiry respecting the evidence hereinbefore set out is whether it can support a reasonable inference that the September 20, 1941, instrument from Sylvester to the Almeidas was a deed rather than a mortgage. While it is undenied that a deed absolute on its face, when given only to secure an obligation, will be interpreted as creative of a mortgage, the mere statements of Sylvester and Almeida cannot be conclusive on the matter. As said in 17 Cal.Jur., sec. 41, pp. 735, 739, "Whether or not a deed absolute in form is a mortgage is a mixed question of law and fact to be determined from all the evidence, written and parol; and in determining it, all the facts and circumstances attending the transaction should be considered." Even though the testimony of Sylvester and Almeida that the deed was intended only as a mortgage is not contradicted by other specific testimony, the law is that surrounding circumstances could convince the trial court of the inherent unworthiness of such testimony, and he could resolve the issue contrary to their testimony. Staples v. Hawthorne, 208 Cal. 578, 283 P. 67; Jenks v. Carey, 136 Cal.App. 80, 28 P.2d 91; Shapiro v. Equitable Life Assur. Soc., 76 Cal. App.2d 75, 172 P.2d 725.

[5-9] The trial court's finding that the Almeidas did have title on June 3, 1944, and that Kirkpatrick acquired it at the execution sale held on that date must be sustained. The fact that the Almeidas returned the deed of September 20, 1941 to Sylvester is immaterial in view of Civil Code, sec. 1058, which provides that "Re delivering a grant of real property to the grantor, or canceling it, does not operate to retransfer the title." See, also, 9 Cal. Jur., sec. 95, p. 210. As there is evidence that the Almeidas really owned the property with record title only in Sylvester as a sham to prevent Kirkpatrick from reaching the property with his judgment, that portion of the judgment which decrees that Sylvester "never had and does not now have" any interest in the property, is clearly supported by, and not against, the evidence, the findings or the law. The trial court was correct in its conclusion of ownership, and in restraining and enjoining Sylvester from making any future assertion of title.

Similarly, the trial court correctly enjoined the Almeidas from making any future assertion of right in the property. They maintain that under Code of Civil Procedure, secs. 700 and 702, they had a year after June 3, 1944, namely, until June 3, 1945, in which to assert a right of redemption in the property sold on execution against them. They argue that rights are fixed as of the last day of trial, namely, May 28, 1945, and that it is immaterial that the original judgment is filed November 3, 1945, whereas the modified judgment is filed January 4, 1946. They cite no authority in support of their position that the judgment pronounced long after the statutory right of redemption had lapsed would have to preserve to them such right of redemption merely because the trial of the action was concluded six days before the statutory period closed. There is nothing in the record to indicate that the Almeidas ever attempted to exercise a right of redemption, nor do they accompany their present appeal by any statement that they ever intended or tried to redeem. Their contention, then, is completely and wholly technical, and they fail to show how the provision of the judgment which they now attack could possibly have prejudiced them. The inconsequential legal error may be disregarded.

[10] There is no merit to the Almeidas' contention that the trial court erred in not proportioning the respective interests of Sylvester as record owner, and themselves as beneficial owners. The trial court's finding that the property belonged to the Almeidas with legal title only in Sylvester is equivalent to an apportionment of interests between Sylvester and themselves. In effect it states that Sylvester had no interest in the property.

[11] On appeal, as during the trial, the Almeidas contend that John Almeida was improperly interrogated under Code of Civil Procedure sec. 2055, over the objection of his spouse that he could not be examined "for or against" her without her consent, citing Code of Civil Procedure sec. 1881. The trial court relied upon Johnston v. St. Sure, 50 Cal.App. 735, 195 P. 947, in overruling said objection. In that case a husband and wife, among others, were defendants in an action to quiet title to realty. The husband disclaimed all interest in the property and set up title in his wife. When her deposition was taken the wife refused to answer questions propounded to her upon the ground that she was an incompetent witness under Code of Civil Procedure sec. 1881. In a mandamus proceeding to compel her to testify, the court issued the writ, saying, 50 Cal.App. at pages 737-738, 195 P. at page 948: "* * * the husband having expressly disclaimed any interest in this property, and having joined with his wife in the allegation that she alone was the real party in interest, he cannot now be heard to say that the testimony of his wife would be either for or against him." The wife in the present case, having filed a disclaimer, similarly is in no position to urge that her husband's testimony would be either "for or against" her. The argument that the testimony of the husband could be "for or against" her because it could affect the extent of Kirkpatrick's judgment under which she was liable, overlooks the fact that the subject of inquiry below was not the judgment, but the title to the property involved, and both the Almeidas filed a disclaimer of any claim of title to that property. Furthermore, the filing of said disclaimer raises serious doubts as to the Almeidas' right to appeal. Mono County Irr. Co. v. State, 32 Cal.App. 184, 167 P. 199; Hinton v. Winsor, 2 Wyo. 206; Page v. Havens, 9 Kan.App. 888, 60 P. 1096.

The judgment is affirmed.

PETERS, P. J., concurs.

On Rehearing.

PER CURIAM.

[12] On May 16, 1947, the attorneys for appellants filed an affidavit in this court (without compliance with the Rules on Appeal, rule 12, relating to augmentation of the record) in which it is averred that during the trial of this case one of the attorneys for respondent stipulated that appellants could have sixty days after the judgment became final to redeem. The record reveals that the attorney merely offered such a stipulation. His offer was not accepted It is further averred that on June 2, 1945, appellants paid to the proper constable an amount sufficient to redeem. The last day of trial was May 28, 1945 and there is nothing in the record to show that any of these facts were called to the attention of the trial court prior to the entry of the modified judgment on January 4, 1946. Nothing said in the opinion heretofore filed should be interpreted to affect any rights based on facts not before the trial court. With this explanation both petitions for rehearing are denied.

Hearing denied; TRAYNOR, J., dissenting.

ELEVATOR OPERATORS AND STARTERS' UNION, LOCAL 117, OF SAN FRANCISCO et al. v. NEWMAN.

NEWMAN v. ELEVATOR OPERATORS AND STARTERS' UNION, LOCAL 117, OF SAN FRANCISCO et al.*

Civ. 13037, 13247.

District Court of Appeal, First District, Division 1, California.

May 1, 1947.

Rehearing Denied May 31, 1947.

Hearing Granted June 26, 1947.

1. Mandamus 🔑122

A labor union, whether incorporated or unincorporated, is subject to mandamus in a proper case.

2. Action 🔑37

Where an improper writ is requested but case is tried without objection to the remedy sought and upon the hearing it develops that plaintiff is entitled to the relief sought although under a different form of writ, the court has the power to grant and should grant the proper relief.

3. Mandamus 🔑140

Mandamus does not ordinarily lie where the only question presented is whether alleged salary is due.

4. Mandamus 🔑16(1)

Where plaintiff sought restoration to union office together with salary due, that lapse of time had rendered right to restoration moot at time of judgment and only issue then existing related to salary would not prevent judgment for any salary due, since the right to mandamus is frequently governed by equitable considerations.

5. Equity 🔑39(1)

Where equity has properly assumed jurisdiction, it will retain jurisdiction to grant all or any relief to which the plaintiff may be entitled, including monetary relief.

6. Associations 🔑11, 18
Beneficial associations 🔑11, 14

A court will not interfere to restore to office or to membership a member of a social, beneficial or fraternal association where remedies within the association have not been exhausted, at least where property rights are not involved.

7. Associations 🔑7

Where money or property rights are involved a member of an association is not required to exhaust association remedies before appealing to the courts.

8. Mandamus 🔑13

Where right of appeal to international convention was only permissive and right to salary, past and prospective, as well as right to office was involved, and appeal to international convention was made and denied after institution of action for mandamus, relief should not be denied on ground that there was no exhaustion of remedies in the association before institution of action.

9. Mandamus 🔑13

Where international convention to which an appeal could be taken should have been held in May, 1945, but was not because of wartime travel restrictions, and petition for mandamus for restoration to union office and for past and future salary was filed in July, 1945, right of permissive appeal to international convention to be held in October, 1945, was inadequate, since term of office would expire on December 31, 1945, and exhaustion of remedies within the union was not required.

10. Trade unions 🔑4, 5

Where procedure outlined by constitution of trade union is so complicated and the expense and delay incident to the invoking of such machinery are so great as to amount practically to a denial of justice, a member or officer deeming himself aggrieved may resort to the courts without exhausting remedies within the union.

11. Trade unions 🔑5

Where union constitution and by-laws contained no provision expressly authorizing amendments to provide for the removal of officers from office without cause or termination of the term of office but contained provisions providing generally for the amendment of the constitution and by-laws, an officer elected for a term fixed in the constitution and by-laws could not be removed from office by an amendment subsequently adopted shortening or terminating his term of office.

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* Subsequent opinion 186 P.2d 1.

12. Trade unions 🔑1

Trade unions are no longer comparable to voluntary fraternal orders but are sui generis and approximate corporations in their methods of operation and powers.

13. Corporations 🔑291

Where the term of office of director or trustee is fixed, it cannot be changed or limited by the directors or trustees, nor have the stockholders power to shorten it by any method short of removal for cause, unless the director took office subject to a provision for removal without cause.

14. Mandamus 🔑176

Where no objection to mandamus as proper remedy to try title to union office was made and right to office was rendered moot by lapse of time, but proof showed that plaintiff was entitled to salary as incident to office from which he was wrongfully removed, judgment for salary shown to be due would be entered.

15. Trade unions 🔑5

Where union officer had a vested right to office for fixed term, an amendment to constitution changing qualifications for office would be construed as not applicable to existing positions.

16. Costs 🔑230

Where party was forced to take appeal in another action in order to protect his rights which were vindicated on appeal in a different case, such party was entitled to costs in both appeals although for convenience only one judgment would be reversed. Rules on Appeal, rule 26(a).

◆

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy and Sylvain J. Lazarus, Judges.

Action by Elevator Operators and Starters' Union, Local 117, of San Francisco, California, and others against Frederick Newman to secure possession of certain union books and records and for $5,000 damages, wherein the defendant filed a counterclaim for back salary and a cross-complaint for declaratory and equitable relief. Action by Frederick Newman against Elevator Operators and Starters' Union, Local 117, of San Francisco, California, and others for a writ of mandate to compel the union to admit the plaintiff to the office of treasurer and to compel the union to pay him the salary of such office. From judgments for the union, Frederick Newman appeals.

Judgment in first case affirmed and judgment in second case reversed with instructions to compute amount of salary due to December 31, 1945, and to enter judgment therefor.

Melbert B. Adams, of San Francisco, for appellant.

Albert Picard and Francis McCarty, both of San Francisco, for respondents.

PETERS, Presiding Justice.

Frederick Newman has taken these two appeals involving the same controversy. By order of this court the appeals have been ordered consolidated.

The action in appeal No. 13037 was brought by the Elevator Operators and Starters' Union, Local 117, of San Francisco, against Newman in claim and delivery to secure possession of certain union books and records, and for $5,000 damages. The answer of Newman admitted that the union was the owner of the documents in question, but denied that the union was entitled to their possession, alleging that he, as the qualified treasurer of the union, was the lawful custodian. Newman also counter-claimed for his back salary as treasurer and, in addition, filed a cross-complaint for declaratory and equitable relief. In this cross-complaint it is alleged that Newman was elected treasurer of the union for a two-year term ending December 31, 1945; that after such election the union attempted to amend its constitution in such a way that he was disqualified from holding the office; that such amendment was illegal and void and cannot be applied to him. He prayed for a declaration of his rights and for a judgment for his salary. The trial court found that regardless of whether Newman was or was not the treasurer of the union, the union was entitled to the possession of its records. It thereupon struck the counter-claim and cross-complaint "without prejudice to further procedure," and entered judgment for the union. This judgment was entered July 2, 1945. No direct disposition of Newman's salary demands was made in this judgment. Newman appealed. (No. 13037.)

On the same day that judgment was entered in the first case Newman filed a petition for a writ of mandate to compel the union to admit him to the office of treasurer, and to compel the union to pay to him the salary of such office. The answer of the union set up the adoption of the amendment to its constitution and by-laws under which Newman was disqualified to hold the office, alleged that such amendment was valid, but, if invalid, Newman, for various reasons, was estopped from questioning its validity. Thus, in the mandate proceeding, the identical issues presented by Newman's counter-claim and cross-complaint and the answer to the cross-complaint in the first action, and which the trial court had refused to try in that action, were presented for determination. After a trial on the merits the trial court found that Newman was a member, in good standing, of the union; that on December 14, 1943, he was duly elected to the office of treasurer for a two-year term terminating December 31, 1945; that on April 11, 1944, the union "duly and regularly amended its constitution and by-laws to provide that only members employed as elevator operators could hold union office, and that such amendment provided it was to become effective within thirty days; that Newman was not employed as an elevator operator; that as a result Newman forfeited his office as treasurer and one Spencer was elected to that office on May 23, 1944; that since May 23, 1944, Newman has not been the treasurer of the union and is not entitled to the salary of that office; that at the time of the commencement of the action Newman had not exhausted his union remedies; that for various reasons, set forth in detail in the findings, Newman is estopped to challenge the validity of the amendment; that the amendment "is a legal and valid amendment." Judgment was entered in accordance with these findings, and from that judgment Newman has appealed. (Appeal No. 13247.)

In the pleadings in the two actions, at the trials and in the briefs filed in this court prior to oral argument, Newman strenuously argued that the amendment to the constitution and by-laws in question had been invalidly adopted because, so he claimed, it had not been adopted in accordance with the procedure set forth in the local and international unions' constitution and by-laws. In answer to certain questions by the court asked on oral argument both parties were permitted to file a further memorandum. Newman, in his memorandum, expressly waives his contention that the amendment was invalidly adopted. Thus the trial court having found that the amendment was legally adopted, and the union not having appealed (it urging the amendment was valid), and Newman now admitting that the amendment was validly adopted, this issue is no longer involved on these appeals.

Newman has filed separate briefs on each appeal. The union has filed the same brief in both appeals. In its brief the union properly points out that in both actions Newman desired adjudications that he was entitled to the possession of the books in question, that he was entitled to act as treasurer until December 31, 1945, and that he was entitled to the salary of that office until that date. It is further pointed out that the term of office involved has long since expired, so that all issues involving possession of the books and the right to serve as treasurer are now moot, so that the only issue remaining, and the only issue existing when judgment was entered in the mandate proceeding on January 23, 1946, relates to Newman's right to salary for the period in question. This issue was tried on its merits in the mandate proceeding. This being so, if that issue is passed upon on its merits on the appeal in the mandate action it is unnecessary to pass on any of the special questions presented in the appeal in the claim and delivery action, because, regardless of the correctness of that judgment, if reversed, all that would remain to be adjudicated is the salary issue.

The facts relating to the salary issue are as follows: The local union, as an unincorporated association, was organized over ten years ago, and Newman has been a member in good standing since its organization. He was elected the first treasurer of the union, a part-time position, and served continuously in that office, at various salaries, until the present controversy. He was last elected to the office in December, 1943, to serve a two-year term expiring December 31, 1945. The salary attached to the office all during this last term was $70 per month. Newman was paid that salary up to May 15, 1944.

Newman was not an elevator operator, although properly a member of the union. Prior to April of 1944 it was not required that officers of the union be elevator operators. On April 11, 1944, the local union adopted the following amendment to its constitution and by-laws:

"Only members who are employed as Elevator Operators under the jurisdiction of the Union shall be allowed to hold any office in the Union with the exception of members filling a full time office. This section to become effective (30 days) after passage by the membership."

For reasons already stated, on these appeals it will be presumed that this amendment was validly adopted. Admittedly Newman was not and did not become an elevator operator within thirty days after the adoption of this amendment. The union, purporting to act under the amendment, on May 23, 1944, elected one Spencer treasurer to fill the alleged vacancy, and these several actions resulted. It should be mentioned that Newman challenged the validity of the amendment before the International Executive Board, but his appeal was denied on September 11, 1944.

The union claimed during the trial of the mandate proceeding, among other things, that, in any event, Newman was not entitled to the writ because he had not exhausted his remedies within the union itself, the union constitution providing for a permissive appeal to the International Convention of the union. This issue was raised in the trial in September, 1945, the evidence then showing that the next convention was to be held in October 1945. Based on this showing the union moved for a nonsuit. This motion was taken under submission. In November, 1945, Newman filed a motion for leave to introduce additional evidence, and, when this motion was granted, introduced evidence that his appeal to the International Convention had been denied. The motion for a nonsuit was thereupon denied. Apparently the main question presented to the union and the convention was the validity of the amendment, the question as to whether it could be validly applied to Newman not being presented.

At the threshold of the appeal in the mandamus action there is presented the question, not discussed by any of the parties to this appeal, as to whether mandamus is a proper remedy. This presents three questions, first, whether mandate may be used against an unincorporated association; second, whether mandate may be used against either an incorporated or unincorporated association to try title to an office; and third, whether mandate is proper when at the time of judgment only a money demand is involved.

[1] On the first question it is admitted that this labor union is an unincorporated association. There is substantial authority in other states that one who has been wrongfully expelled from membership in or an office of a corporation may proceed by mandamus to secure his reinstatement, but that if the association is unincorporated the proper remedy to secure such relief is by a suit in equity. 1 Teller, Labor Disputes and Collective Bargaining, pp. 287–289, § 100; Martin's The Modern Law of Labor Unions, p. 394, § 320; see, particularly, Holmes v. Brown, 146, Ga. 402, 91 S.E. 408. However, there is also substantial authority to the effect that a labor union, whether incorporated or unincorporated, in a proper case, is subject to mandamus, and this view has been adopted in this state. In Smetherham v. Laundry Workers' Union, 44 Cal.App.2d 131, at page 135, 111 P.2d 948, at page 951, the union was an unincorporated association, but, nevertheless, the court held that: "Mandamus is a proper proceeding by means of which to compel the reinstatement to membership of one who has been illegally expelled from a duly-organized association." See, generally, annotation 141 A.L.R. 617. Thus, mandamus, in a proper case, can be

used against a labor union that is unincorporated.

[2] On the second question, as to whether mandamus is the appropriate remedy where, regardless of whether the association is incorporated or unincorporated, the relief sought is to be restored to an office which has subsequently been filled, and thus mandate is sought to try the title to an office, there appears to be some conflict in the cases. See cases collected 16 Cal. Jur. pp. 792–795, §§ 22 and 23. The point was directly presented in Gantenbein v. City of Long Beach, 9 Cal.App.2d 726, 51 P.2d 124, 52 P.2d 495, where it was held that an individual seeking to be reinstated as a permanent employee of the city may maintain mandate proceedings where he asks not only for back wages but also to be reinstated, even where the position in question has been subsequently filled by another person. However, even if it be the law that some other remedy rather than mandate is the proper one to try the title to the office of treasurer (see cases collected 16 Cal.Jur. p. 794, § 23) that would not necessarily deny to Newman any relief. The rule is well settled that although a person may request an improper writ, if the cause is tried, as here, without objection to the remedy sought, and upon the hearing it develops that the petitioner is entitled to the relief sought although under a different form of writ, the court has the power and should grant the proper relief. Board of Trustees of Leland Stanford Junior University v. State Board of Equalization, 1 Cal.2d 784, 37 P.2d 84, 96 A.L.R. 775; Fritz v. Superior Court, 18 Cal.App.2d 232, 63 P.2d 872.

[3-5] There is also presented a third question as to the propriety of the writ of mandate, and that is whether the writ can be granted (assuming it a proper means to try the title to the office of an unincorporated association) where, at the time of judgment the term of office has expired and all the trial court could have ordered was the payment of money. Normally, mandamus will not lie where the only question presented is whether or not a salary is due. Northrup v. Haynes, 15 Cal.App.2d 665, 59 P.2d 1056. The rule of that case is not necessarily applicable to the instant case. In that case, when the petition for the writ was filed the petitioner had been reinstated in his position and the sole issue related to his wages. In the instant case when the petition for the writ was filed the main relief sought was the restoration to the office of treasurer, a proper subject for mandamus, and the salary issue was incidental to that. While it is true that because of lapse of time the restoration issue had become moot at the time of judgment, and the only issue then existing related to salary, that fact should not deny to Newman the only relief then available. The right to mandamus is frequently governed by equitable considerations. See cases collected 16 Cal.Jur. p. 769, § 8. It is a familiar principle of equity that once it has properly assumed jurisdiction it will retain it to grant all or any relief to which the plaintiff may be entitled, including monetary relief. See cases collected 10 Cal. Jur. p. 499, § 42; for a good case discussing the problem, see Nissen v. International Brotherhood, etc., 229 Iowa 1028, 295 N.W. 858, at page 871.

[6-8] There is another procedural problem involved in this case and that is what is the legal effect of the fact that when the petition was filed Newman had not exhausted his remedies within the union, although he did exhaust such remedies prior to judgment? At least as to social, beneficial or fraternal associations, and probably as to most unincorporated associations, the rule is settled that a court will not interfere to restore to office or to membership a member who has been expelled until the member exhausts his remedies within the association, at least where property rights are not involved. See Neto v. Conselho Amor etc., 18 Cal.App. 234, 122 P. 973; Levy v. Magnolia Lodge, No. 29, I.O.O.F., 110 Cal. 297, 42 P. 887; Lawson v. Hewell, 118 Cal. 613, 50 P. 763, 49 L.R.A. 400; Bush v. International Alliance, 55 Cal.App.2d 357, 130 P.2d 788; Simpson v. Salvation Army, 49 Cal.App.2d 371, 121 P.2d 847; Ellis v. American Federation of Labor, 48 Cal.App. 2d 440, 120 P.2d 79. In this case, however, there are several reasons why this rule is not applicable. In the first place, by the

provisions of Art. XVI of the constitution of international union here involved the right of appeal to the international convention is permissive and not mandatory. In the second place, when it was called to Newman's attention during the trial that he had not exhausted his union remedies he immediately took the appeal to the convention, and this appeal was denied. Thus, at the time of judgment he had exhausted his union remedies. In the third place, there is a well recognized exception to the rule that association remedies must be exhausted before appealing to the courts, and that is that that rule does not apply to disputes over money or property rights. This exception is discussed as follows in Local Lodge No. 104, etc. v. International Brotherhood of Boiler Makers, etc. 158 Wash. 480, 291 P. 328, 330: "It is also true that the rule which requires members of voluntary associations to exhaust their remedies within the order, before applying to the courts for relief, applies primarily to controversies concerning matters of internal discipline, and not to disputes over money or tangible property, and that in the latter class of cases the right to resort to the courts should be held to be waived only by an express agreement to submit such controversies to some specified method of arbitration." In Nissen v. International Brotherhood, etc., 229 Iowa 1028, 295 N.W. 858, at page 866 the court stated: "Appellants insist that plaintiffs should have exhausted the remedies of appeal afforded by the tribunals within the Union as provided by Section 92 of the constitution. * * * This appeal is permissive only and the plaintiffs did not agree or bind themselves to pursue this remedy. Such remedies need be exhausted before resort to the courts only where the question is purely social, involving discipline or the conduct or standing of a member. But if property rights are involved in the absence of an express agreement to exhaust the remedies provided within the association, the member may resort to the courts without using the within-the-Union remedies. And where property rights are involved the member need not first pursue the remedies within the association, if they would be futile, illusory, or vain."

[9, 10] There is still a fourth and last reason why the rule of exhaustion of union remedies has no application to the instant case, and that is that, when the petition for the writ was filed on July 2, 1945, the next international convention to which Newman could have appealed was not to be held until October, 1945. The convention should have been held in May, 1945, but the Office of Defense Transportation would not allow it because of travel restrictions made necessary by the war. In the mandate proceeding the main relief sought by Newman was restoration to an office, the term of which, in any event, would expire December 31, 1945. It would be most unreasonable to hold that Newman had to wait until October, 1945, before he could file suit, after first appealing to that convention. The right of appeal to the convention would not be adequate, and, under such circumstances, the failure to appeal before filing suit can be excused. The situation is paralleled by the existing in Local Lodge No. 104, etc. v. International Brotherhood of Boiler Makers, etc, 158 Wash. 480, 291 P. 328, at page 330, where it is stated: "It appears from the evidence that the international convention of appellant, which would normally have convened during the year 1928, was regularly postponed, and that no other international convention would convene until some time during the year 1931. Under these circumstances we think this a proper case for the application of the rule laid down in 19 Ruling Case Law, at page 1231, § 41, to the effect that, if the procedure outlined by the constitution of the organization is so complicated, and the expense and delay incident to the invoking of such machinery are so great, as, all being considered, to amount practically to a denial of justice, and indicate clearly that the procedure provided by the organization fails to provide adequate redress, the party deeming himself aggrieved may resort to the courts of the forum in the first instance."

This brings the discussion to the main contention made by Newman on these appeals, and that is that under the constitution and by-laws of the union he had tenure of office for two years, which was a vested right, and that the amendment adopted subsequent to his election by which the qualifications of the office were changed could not apply to that term. It should be here pointed out that the constitution and by-laws of the union contain no provision expressly authorizing amendments to provide for the removal of officers from office without cause or sooner termination of the term of office, but do contain provisions providing generally for the amendment of the constitution and by-laws It is Newman's position that where a labor officer is elected for a term fixed in the constitution and by-laws, and there is no provision in effect at the time of election for removal, such officer can only be removed for cause, and cannot be removed by a subsequently adopted amendment shortening or terminating his term of office.

[11, 12] The rule contended for by Newman is the rule generally applied to corporations, and, in our opinion, is the proper rule to apply to unincorporated labor unions. While there is authority to the effect that the law relating to labor unions is the law applicable to social and fraternal orders (Greenwood v. Building Trades Council, 71 Cal.App. 159, 233 P. 823) that rule by no means is always applicable. This traditional view grew up when labor unions were small unimportant organizations, and is no longer in accordance with the facts. When the tremendous growth of labor unions in recent years is considered, together with their growth in importance and power, it would seem that in many respects labor unions more nearly resemble corporations than they do voluntary social or fraternal orders. In fact, as early as 1888 it was recognized in this state that "Courts will interfere for the purpose of protecting property rights of members of unincorporated associations in all proper cases, and, when they take jurisdiction, will follow and enforce, so far as applicable, the rules applying to incorporated bodies of the same character." Otto v. Journeymen Tailors' P. & B. Union, 75 Cal. 308, 313, 17 P. 217, 219, 7 Am.St.Rep. 156. It is obvious that such organizations are no longer comparable to voluntary fraternal orders, that they are sui generis, and approximate corporations in their methods of operation and powers. This being so, at the procedural level at any rate, wherever it can be done without violation of some rule of law, the ends of justice will be more properly served if the courts apply to such organizations the rules applicable to corporations rather than the rules applicable to voluntary fraternal orders. To consider such organizations under present day conditions as mere social or fraternal orders is to close one's eyes to the realities now existing.

[13] Although there is some conflict in the authorities, under the rules applicable to corporations, the fixed term of office of an officer may not be shortened by a subsequently adopted amendment unless the law or the constitution or by-laws expressly so provide at the time of election to the office. The rule, amply supported by authorities, is stated as follows in 19 C.J.S., Corporations, § 732, p. 66: "Where the term of office of a director or trustee is fixed, it cannot be changed or limited by the directors or trustees; nor have the stockholders power to shorten it by any method short of removal for cause, unless the director took office subject to a provision for removal without cause."

In 3 Thompson on Corporations, 3d Edition, p. 519, § 1924, it is stated: "Where the term of office is fixed by the statute, or by-laws adopted before his election or appointment, an officer cannot be removed except for cause; but in the absence of a special contract, or of a charter regulation or by-law, fixing the term of an officer, the rule would seem to be that he may be removed at any time with or without cause, either by the stockholders or by the officer or officers by whom he was appointed, without liability on the part of the corporation." See, also, 2 Fletcher's Cyc. of Corporations (Perm. Ed.) p. 111, § 355.

One of the leading cases on the subject is Abberger v. Kulp, 156 Misc. 210, 281 N.Y.S. 373, which involved the tenure in office of a corporate director. In that case the court stated (281 N.Y.S. at page 376): "The second reason advanced by the plaintiffs for the granting of the restraining order against the removal of the plaintiff William A. Abberger as a director during the pendency of this action is that the defendant corporation had no right to remove a director during his term of office unless the certificate of incorporation gives authority for removal. From an examination of the cases in this state, the court collates the following rules in reference to the removal of directors by the stockholders of a corporation: (a) That irrespective of the existence of any provision in the certificate of incorporation or of a by-law, a corporation may remove a director during his term of office for cause arising from his acting in a manner inimical to the interests of the corporation; (b) during his term of office, a director may not be removed except for cause unless at the time of his election there existed a by-law that provided for the removal of a director without cause. If such by-law exists, then he has taken office subject to the provisions of the by-law; (c) a corporation may adopt a by-law providing for the removal of a director with or without cause, but such by-law, insofar as it refers to the removal of a director without cause, is of no value for the removal of a director who is in office at the time of the enactment of the by-law; (d) without a by-law which is in force prior to his election and at the time of his election, a director has a vested right to continue in his office to the end of his said term except if he is removed for cause; (e) if a by-law provides for removal, its provisions must be followed before removal can be brought about. [Citing cases.]" See annotation in 63 A.L.R. 776; see, also, In re Automotive Manufacturers' Ass'n, 120 Misc. 405, 199 N.Y.S. 313.

The union contends that an officer of a union has no vested right to the office for the fixed term, and in this connection cites a number of cases which hold that amendments may be passed by a fraternal or social order which reduce or completely eliminate sick benefits payable to members even after the right to such benefits has accrued. Robinson v. Templar Lodge No. 17, I.O.O. F., 117 Cal. 370, 49 P. 170, 59 Am.St.Rep. 193; Bowie v. Grand Lodge of the Legion of the West, 99 Cal. 392, 34 P. 103; Stohr v. San Francisco Musical Fund Society, 82 Cal. 557, 22 P. 1125. The real rule of these cases is illustrated by the following quotation from the Stohr case, 82 Cal. at page 560, 22 P. at page 1126: "In the present case the plaintiff can have no right to have the contract remain unchanged, because, as we have seen, the contract itself provides that it may be changed. Nor has he a right to remain unaffected by any change that may be made; for, if such right be common to all the members, it is merely another way of saying that no change can be made; and, if the right be not common to the other members, it would be to assert a privilege or superiority over them, of which there is no pretense. If the plaintiff has any right which is so fixed that it is not subject to change, we think it can only be to the fruits which ripened before the change was made; in other words, to such sums as became due before the new by-law was adopted. To express it differently, the change could not be retroactive. This is all that we think can be meant by 'vested right' in a case like the present."

[14] None of the arguments offered by the union are convincing while the argument of Newman based on the analogy of corporate officers is both convincing and equitable. We therefore hold that as to unincorporated labor unions, where the term of office of an officer is fixed in the constitution and by-laws at a fixed term, and where at the time of election to the office the constitution and by-laws do not provide for his removal by the membership, he may be removed only for cause, and in the absence of such removal is entitled to remain in his office for the balance of his term, even though the constitution and by-laws are subsequently amended so as to shorten the term of that office. This being so, Newman was entitled to his office of treasurer until December 31, 1945, and is now entitled to the emoluments of that office to that date.

[15] It is not necessary to hold the amendment to the by-laws invalid in order to accomplish the above mentioned result. All that need be done is to hold that the amendment has no application to Newman, but, as to his office, only applies at the termination of his term. Stated another way, the amendment should be interpreted to apply prospectively to officers taking office after its passage. There is nothing in the language of the amendment itself

to indicate that it was intended to apply retroactively to existing officers. Where, as here, Newman had a vested right to his position for the fixed term, the rule is well settled that subsequent amendments should be interpreted as not applicable to existing positions. The cases are collected and commented upon in 6A Cal.Jur. p. 323, § 168, where it is stated: "A by-law, like a statute, will not be construed to operate retrospectively, unless express provision is found therefor in its terms. If the language of the by-law is such that by giving it a retrospective operation it will have the effect of annulling or impairing an existing obligation, it will be held unreasonable and in contravention of existing laws. Thus, the by-laws of a mutual benefit society, while constitute part of its contract with its members, cannot be changed to impair the original contract without the consent of all the parties. Even where the power to alter the by-laws is reserved and is thus a part of the contract, the change cannot be made retroactive so as to impair the obligation. In the case of an ordinary corporation a by-law cannot have a retrospective operation upon a transfer of stock, since such a transfer creates a vested property right."

[16] It would create a confusing situation and would place an unnecessary burden on the trial court to reverse the judgment involved in appeal No. 13037, inasmuch as full relief may be granted in the mandamus action (appeal No. 13247). However, inasmuch as Newman was forced to take the appeal numbered 13037 in order to protect his rights, it is clear that in the interests of justice he is entitled to his costs on that appeal. Rules on Appeal, Rule 26(a). It is therefore ordered that the judgment in appeal No. 13037 is affirmed, Newman to recover his costs, such affirmance to be without prejudice to the maintenance of the mandamus action. The judgment in appeal No. 13247 is reversed with instructions to the trial court to compute the amount of salary due to December 31, 1945, and to enter its judgment accordingly.

WARD and BRAY, JJ., concur.

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79 Cal.App.2d 438

GHISELIN v. JOHN HANCOCK MUT. LIFE INS. CO. et al.

Civ. 13152.

District Court of Appeal, First District, Division 1, California.

May 1, 1947.

Hearing Denied June 26, 1947.

1. Insurance ⚷84(6)

In action for damages based on claim for commission on sale of insurance policies, whether plaintiff pleaded and proved customs of handling life insurance business was immaterial where there was evidence of a written contract.

2. Customs and usages ⚷11, 15(1)

Usage and custom may be introduced as an instrument of interpretation, but may not be used to create a contract.

3. Insurance ⚷73

A "life insurance agent" is one who represents a life insurance company and has a license to do life insurance business. Insurance Code, § 1703.

See Words and Phrases, Permanent Edition, for all other definitions of "Life Insurance Agent".

4. Insurance ⚷84(6)

Evidence justified denial of recovery for damages based on claim for commission on sale of insurance policies, on ground that none of the policies were purchased or issued or written or sold by plaintiff or as a result of any of plaintiff's efforts but were written and sold by defendant general agent of the insurer.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by Horace Ghiselin against John Hancock Mutual Life Insurance Company, a corporation, and others, for damages based on claim for commission on sale of three insurance policies. From an adverse judgment plaintiff appeals.

Judgment affirmed.

William A. White, of San Francisco for appellant.

Keesling & Keesling and Francis Carroll, all of San Francisco, for respondent.

WARD, Justice.

This is a complaint for damages in the sum of $4,646.94 based on a claim for commission on the sale of three insurance policies issued to one George H. Atkinson and a policy on the lives of the employees of California Pacific Utilities Company. Lloyd J. Lynch, president of the corporation of the same name, individually; Lloyd J. Lynch, Inc., general agent of John Hancock Mutual Life Insurance Company; and John Hancock Mutual Life Insurance Company were joined as defendants. Fraud, reasonable value of services performed at defendants' request, and unjust enrichment are alleged, respectively, in three counts. During the trial the court permitted an amendment setting forth usage and custom. Judgment was entered for defendants.

The various paragraphs in the first count, many of which are incorporated in the second and third counts by reference, contain evidentiary allegations, conclusions of law, a narrative of local custom and usage, and charges of concealment of facts with intent to defraud.

In particular, paragraphs XIII and XIV, which are denied in the answer to the amended complaint, allege:

"XIII. That in continued reliance upon all the statements and the conduct of said defendants, and each of them, and in reliance upon the customs of said insurance business, plaintiff induced one George H. Atkinson to purchase a policy of life insurance in the said defendant John Hancock Life Insurance Company; that plaintiff solicited said George H. Atkinson as an officer of the Guy F. Atkinson Company for the purpose of purchasing life insurance in the amount of $100,000.00, and revealed such information and other data regarding the said party to said defendants, and each of them. That thereafter the said George H. Atkinson did purchase a policy of life insurance in the defendant life insurance company in the amount of $25,000.00, and requested that defendants pay to plaintiff the commission on the said policy. That this policy, hereinafter referred to as first policy, was issued by said defendant insurance company on or about the 1st day of June, 1941.

"XIV. That the commission payable to plaintiff for his services in inducing said George H. Atkinson to purchase said first policy was and is in the sum of $336.13 upon the issuance of said policy, and in the sum of $33.61 annually thereafter for a period of nine years."

Thereafter appear similar allegations covering two other Atkinson policies.

The transaction with the California Pacific Utilities Company, with the exception of the amounts involved, is set forth in paragraph XVII as follows: "That in reliance upon the said statements and conduct of said defendants, and each of them, with respect to the placing of business, and in reliance upon the customs and trade usages heretofore set forth, plaintiff induced a corporation known as California Pacific Utilities Company to purchase a policy on the lives of the employees of said company. That plaintiff is informed and believes, and therefore alleges, that said policies were written by the said defendants on or about July 1, 1941."

In relation to the Atkinson policies and the Retirement Annuity Policy covering the employees of the California Pacific Utilities Company, the court found: "That it is true that certain policies of insurance were issued by the defendant John Hancock Mutual Life Insurance Company insuring the life of George H. Atkinson, and that the commissions on said policies amounted to $1,915.86 and that said company issued to the California Pacific Utilities Company, a corporation, a Retirement Annuity Policy covering the employees of said California Pacific Utilities Company and that the commissions on said policy amounted to $1,200.00 and in this connection the court finds *that none of said policies was purchased or issued or written or sold by the plaintiff or as a result of any of his efforts or activities,* and the court further finds in this regard that said policies were written and sold by the defendants Lloyd J. Lynch and Lloyd J. Lynch, Inc., a corporation." (Emphasis added.)

The court found that allegations in the complaint with reference to the defendants' concealment of facts with intent to defraud were not true. It further specifically found that the allegation in the second cause of action as to an amount due plaintiff as the reasonable value of services performed by plaintiff at the special instance and request of defendants, and the allegation in the third cause of action setting forth defendants' unjust enrichment, were untrue.

Plaintiff contends that he pleaded and proved customs of handling life insurance business in San Francisco; that he pleaded and proved the solicitation and obtaining of Atkinson business; that he pleaded and proved fraudulent conduct on the part of defendants after his reliance on custom as to ownership of business and business data; that defendants are estopped to deny plaintiff was their agent; that defendants are estopped to claim plaintiff did not have a license nor an agency contract; that the statute of limitations as pleaded is not a bar to this action; that all the elements of fraud were proven showing plaintiff was entitled to damages; that plaintiff who procured the business is entitled to the commission thereon.

If the italicized portion of the findings—that none of said policies was purchased through the activity of plaintiff—is correct, all other questions relating to such matters as reasonable value, unjust enrichment, concealment, fraud and statute of limitations, fade into insignificance.

[1, 2] Whether plaintiff pleaded and proved certain customs of handling life insurance business is immaterial in view of the fact that there is evidence that the contract between a broker, such as plaintiff, and a general agent for a life insurance company, such as Lloyd J. Lynch, Inc., is a written contract. A witness for plaintiff testified as to the custom of having some sort of an underlying contract where a broker's business is accepted—a single-case agreement, a full-time agency contract, or a so-called surplus broker's contract—which cover the commissions that are to be paid. In answer to the question, "When are these contracts obtained * * *?" he answered: "At the time the man makes the original connection, if it is a blanket contract, and if it is an original contract, it would be given at the time he submits the application, or it can be given when the policy is issued * * *." There is no evidence that such a contract was entered into by plaintiff and Lloyd J. Lynch, Inc. Usage and custom may be introduced as an instrument of interpretation, but may not be used to create a contract. Hanley v. Marsh & McLennan—J. B. F. Davis & Son Ltd., 46 Cal.App.2d 787, 117 P.2d 69.

[3] Throughout the transcript appear the words "broker" and "agent." The distinction between the two terms as applied to the facts of this case appears in testimony that plaintiff is an independent broker, whereas an agent is one who represents a life insurance company and has a license to do life insurance business. Insurance Code section 1703 requires "a life agent of any life insurer" to obtain such a license. The record contains testimony to the effect that a license is generally only procured for a broker upon his bringing an application for a policy of life insurance.

The casual nature of the relationship of the parties is made evident by a review of the evidence. In the latter part of 1940, in a corridor of the building in which the offices of Lloyd J. Lynch, Inc., are located, plaintiff and Kenneth L. Dunbar, brokerage manager with Lloyd J. Lynch, Inc., engaged in a conversation. Dunbar testified that he solicited any business that plaintiff was not placing elsewhere, in the same manner that he solicited business from about two hundred brokers a week; that he gave plaintiff a kit similar to the five hundred which he gave to other brokers to convey information regarding the John Hancock company, and that he gave plaintiff permission to use, along with other brokers, the telephone and typewriting facilities of the Lynch office.

The evidence relating to the procurement of the Atkinson policies reveals that plaintiff visited the Atkinson company office in 1940 and left his card with J. Robert Harris, an employee of the company. In the latter part of 1940 he again contacted the company, and in April, 1941, he supplied the Atkinson company with financial data on the Hancock insurance corporation. Plaintiff testified that when he was offered Lynch's assistance, he replied: "I needed no assistance of anybody."

Lynch himself heard through a friend that Atkinson wanted insurance. He asked Dunbar to find out if any one in his office was working on a $50,000 policy for a person of Atkinson's age. When interviewed plaintiff answered in the affirmative, but refused to give the name of the prospect. To the direct question—Was it Atkinson?—plaintiff answered "Yes," but stated there was no use proceeding further because Atkinson would not talk to any one. Thereafter Lynch contacted Atkinson and obtained from him an application for a $20,000 policy. The home office turned down this application, and a different form of policy for $25,000 was issued. The commission for obtaining this policy was $336.13, whereas the commission for obtaining a $20,000 policy would be $225. Lynch paid plaintiff $268.90 as the commission on a $20,000 policy, explaining that he was keeping the balance of $67.23 on the remaining $5,000 of the policy as reimbursement for expenditures in procuring the $25,000 policy. Lynch testified that plaintiff said to him, "You are more than fair." Evidence of the insured's view as to who would be entitled to the commissions on his insurance is found in Atkinson's testimony that he thought plaintiff merited the commission on the first policy, but not on future business. The evidence indicates that the policies were issued through legitimate efforts of the Lynch company.

In an attempt to effect a sale of a policy to California Pacific Utilities Company, plaintiff interviewed its president, James A. Ward, in January, 1941, and suggested a form of group life insurance. Ward was gracious, but dismissed the matter by saying he was not ready. Subsequently C. E. Bramble, who became vice-president of the utilities company, suggested a John Hancock company retirement annuity policy. Ward called Lynch on the telephone, with the result that an application was filed and subsequently the issuance of a retirement annuity policy was effected. The policy plaintiff suggested was not the same kind of a policy Lynch sold to the utilities company.

[4] Plaintiff asserts that defendants are estopped to deny that plaintiff was their agent, and to claim that plaintiff did not have a license or an agency contract. The only evidence to support this assertion is that plaintiff was granted the privilege to use the telephone and typewriting facilities of the offices of the Lynch company. Whether an estoppel arose in this case depends upon whether, as a matter of fact, the plaintiff procured the business. The trial court found that he did not, and there is substantial evidence upholding that finding.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur

79 Cal.App.2d 330

STANDARD FIREPROOF BLDG. CO. et al. v. CARPENTER et al.

Civ. 15578.

District Court of Appeal, Second District, Division 1, California.
April 24, 1947.

1. Landlord and tenant 🔑208(2, 4)

In absence of any provision in a lease to the contrary, where lease contains an express covenant by lessee to pay rent, original lessee of an assigned lease and each succeeding lessee who assumes its obligation would remain in privity of contract and be liable on the covenant as sureties in event current assignee failed to perform any obligation under the terms of lease.

2. Constitutional law 🔑148

Where plaintiff as owner of lessee's interest was required to pay charitable trust all of the lessee's income from the lease and proposed to eliminate itself by conveying the leasehold interest to the trustee, and the lease required every assignee to covenant to assume all conditions of lease including payment of rent, decree granting relief was erroneous as impairing obligation of contract where there were no assets in trust estate to pay rent so that, if leased property failed to earn enough to do so, lessors would be deprived of the right to collect rent in any event.

◆

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Standard Fireproof Building Company, a corporation, and others, against Harry B. Carpenter and another, and the Attorney General of the State of California, for authorization to assign a lease to a trustee. From a judgment for plaintiffs, defendant Harry B. Carpenter and another appeal.

Reversed.

Tanner, Odell & Taft, of Los Angeles, for appellants.

Cruickshank, Brooke, Dunlap & Ross, of Pasadena, for respondents.

Robert W. Kenny, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent Attorney General.

DRAPEAU, Justice pro tem.

In 1912 the then owner of valuable business property on West Seventh Street in the City of Los Angeles leased it for the term of 99 years. In this action the present lessee, successor to the original lessee, seeks authorization to assign the lease to a trustee.

To understand the situation, it is necessary to set forth some of the history of the lease. The plaintiff, Standard Fireproof Building Company, a corporation, is the present owner of the lessee's interest. This is a bare legal title, the corporation being required to pay to a charitable trust all of the lessee's income from the lease, after payment of the reserved rental to the lessors. And this lease is the only property owned by the corporation.

As time has gone on, the net income payable to the trust has been materially diminished because of ever increasing payments by the corporation of franchise, income, and capital stock taxes, and expenses of its operation.

Being a mere conduit for the payment of lessee's share of the earnings of the leased property, as a practical matter it is highly desirable in the interest of the trust to eliminate the corporation. This the plaintiff proposed to do by conveying the leasehold interest to the trustee. By so doing, moneys devoted to charitable purposes will go to the trust, without diminution. This was unquestionably the thought in the mind of the trial judge in finding and adjudging that the lease be assigned to the trustee.

Appellants point out, however, that the lease requires that every assignee must covenant to assume all of the conditions of the lease. One of these is payment of the rent. It is a possibility that during the term of the lease the lessee may be required to pay the rent even though there are no earnings of the property to be used for that purpose.

[1] The lease contains an express covenant on the part of the lessee to pay rent. In the absence of any provision in the lease to the contrary, the original lessee and each succeeding lessee who assumed its obligations would remain in privity of contract and be liable as sureties in the event the current assignee failed to perform any obligation under the terms of the lease. Samuels v. Ottinger, 169 Cal. 209, 146 P. 638, Ann.Cas.1916E, 830; Winter v. Knapp, 90 Cal.App. 75, 265 P. 527. But the lease also contains an agreement that upon assignment thereof and assumption of all of its obligations by each succeeding assignee, the obligations of assignors thereunder shall cease and determine.

We must therefore look to the trust, its terms and powers, and its assets, to determine whether the trustee may lawfully assume the obligations of the lease. The corpus of the trust estate consists only of the capital stock of Standard Fireproof Building Company, and the obligation of the Company to make the payments described. The declaration of trust contains the usual clause absolving the trustee from any liability beyond the income or corpus of the trust property.

[2] Therefore, the effect of a decree directing the proposed transfer would be to nullify the clause in the lease requiring assumption of its obligations whenever assignment is made. This is so because no assignment may be made except upon condition that the assignee assume and agree to perform all of the conditions of the lease. There being no assets in the trust estate to pay rent, in the event the leased property fails to earn enough to do so, the lessors would be deprived of the right to collect rent in any event. See Bank of America, National Trust & Savings Ass'n v. Moore, 18 Cal.App.2d 522, 64 P.2d 460.

We are not unmindful of the fact that the present relationship of the lessor and lessee differs in no respect from that which would exist if the assignment were made to the trustee, because the corporation has no assets other than its ownership of the leasehold interest. However, this situation was not the result of judicial decree. Under the facts of this case, the judgment of the trial court assumes a power to impair the obligation of a contract, and may not stand.

The judgment is reversed.

YORK, P. J., and WHITE, J., concur.

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79 Cal.App.2d 536

FARMER v. FARMER.

Civ. 3548.

District Court of Appeal, Fourth District, California.

May 7, 1947.

1. Appeal and error 🔑1011(1)

Conflicts in evidence must be resolved by trial judge, not appellate court, in which lower court's judgment, supported by substantial evidence, is final.

2. Divorce 🔑183½

In husband's action for divorce on ground of extreme cruelty, defendant's argument on her appeal from interlocutory divorce decree, that plaintiff's drinking of intoxicating liquors with defendant and furnishing of such liquor to her caused their difficulties and established defense of recrimination, was defective as based on evidence rejected by trial court as untrue and contradicted by evidence accepted thereby as true.

◆

Appeal from Superior Court, Tulare County; Glenn L. Moran, Judge.

Action for divorce by Vance Farmer against Grace Farmer, who filed a cross-complaint for separate maintenance. From an interlocutory judgment granting plaintiff a divorce after lapse of proper time, defendant appeals.

Affirmed.

Jamison & Jamison, of Porterville, for appellant.

Waldo E. Burford, of Porterville, for respondent.

MARKS, Justice.

This is an appeal from an interlocutory decree entitling plaintiff to a divorce from defendant after the lapse of the proper period of time.

Plaintiff filed his complaint seeking a divorce on the ground of extreme cruelty. Defendant answered denying the cruelty and filed a cross-complaint seeking separate maintenance on the ground of plaintiff's cruel treatment of her, but not for a divorce.

The evidence introduced by the respective parties is conflicting and irreconcilable.

The parties were married in 1921 and finally separated in 1945. Their married life, especially the last years of it, was a stormy one. The evidence produced by plaintiff shows that defendant had a quick and ungoverned temper; that she continually nagged him and frequently quarreled with him calling him vile names; that she threatened to ruin him financially, to "bury him" and to kill him and members of his family. It is also shown that defendant often drank whiskey, wine and beer to excess and became intoxicated; that during such periods of intoxication she was very abusive of plaintiff and her actions were so immodest as to cause plaintiff great humiliation; that her treatment of him caused him mental anguish and suffering.

Defendant's evidence indicates that she did drink, very occasionally to excess, but that the liquor was furnished to her by plaintiff; that plaintiff himself drank to excess and on occasions became very drunk; that plaintiff struck her with his fist and slapped her with his open hand and otherwise was cruel to her so that her life with him, at least during the five years preceding their last separation, was unendurable.

[1] It is obvious that the evidence would have supported a judgment in favor of plaintiff on his complaint, or of defendant on her cross-complaint, whichever evidence the trial court accepted as true. The trial judge found in favor of plaintiff and against defendant and entered judgment accordingly. Thus we have here the familiar situation of sharply conflicting evidence, which conflicts the trial judge has resolved in favor of plaintiff and against defendant. This is a duty imposed upon a trial judge, and not upon an appellate court. Keener v. Keener, 18 Cal.2d 445, 116 P.2d 1; Tomaier v. Tomaier, 50 Cal.App.2d 516, 123 P.2d 548; McFall v. McFall, 58 Cal.App.2d 208, 136 P.2d 580.

[2] In the face of this firmly established rule that conflicts in the evidence are finally settled in the trial court, counsel for defendant advance the argument that it is not controlling here. They state that defendant did not use intoxicating liquor before her marriage, but that plaintiff did and continued to use during their entire married life; that he kept liquor on hand, gave it to defendant and offered no objection to her drinking; that plaintiff knew defendant became irritable and cross when drinking and that he did not object to her consuming intoxicants; that all the difficulties between them arose when they were drinking together and that his drinking with her and furnishing her liquor was the cause of their difficulties; that this amounted to the defense of recrimination which should have defeated plaintiff's action for divorce.

In support of this argument they cite such cases as Popescu v. Popescu, 46 Cal. App.2d 44, 115 P.2d 208, 211, where it is said: "The law is clear that acts which might otherwise constitute grounds for divorce may be non-actionable where provoked by the party seeking the divorce. Harp v. Harp, 204 Cal. 193, 267 P. 101; Jones v. Jones, 48 Cal.App. 771, 192 P. 463; Johnson v. Johnson, 14 Cal. 459. 'Cruelty, as a foundation for divorce, must be unmerited and unprovoked.' Madden on Domestic Relations, p. 274; see, also, 17 Am. Jur. 192; 19 C.J. 77-79; note, Ann.Cas. 1918B, 496. Since the defense of recrimination consists of establishing cause for divorce in favor of the defendant, sec. 123, Civ.Code, it follows, of course, that if the cause relied on by the defendant was provoked by him, it is unavailable by way of defense in the same manner as it would be as where it is made the basis of a prayer for divorce."

The main defect in this argument of defendant is that it is based on that portion of conflicting evidence which evidently was rejected by the trial court as untrue and is contradicted by other evidence which evidently was accepted as true.

Plaintiff admitted drinking in moderation and of having furnished liquor to defendant but testified that he repeatedly objected to her drinking to excess and repeatedly reasoned with her to get her to abandon that habit. He denied drinking to excess himself but admitted that he "passed out" after taking one drink of liquor which defendant gave him. According to his version this occurred at the end of a temporary separation and when defendant was attempting to get him to return to her. He testified that she gave him a "Mickey Finn" and he became unconscious; that when he regained consciousness next morning he was in the bed of defendant. According to plaintiff many of the acts of cruelty complained of by him were not committed when defendant was intoxicated. There is no evidence she was under the influence of liquor when some of the incidents happened. This merely illustrates the conflicts in the evidence on which defendant bases her argument. There are many others which we need not particularize.

As was said in Sherman v. Sherman, 81 Cal.App. 406, 253 P. 945, 946: "Appellant presents the further points that defendant should have been granted a decree of divorce on his cross-complaint, or at any rate that the evidence 'shows recrimination in bar of plaintiff's cause.' With reference to such matters, it need only be said that the entire evidence in this action was before the judge of the trial court, and that it was his exclusive province to determine where lay the truth. His findings of fact on the evidence were entirely against the contention of defendant. They are conclusive on this court."

In the final analysis this case resolves itself into one where there are conflicts in the evidence which were resolved in favor of plaintiff by the trial judge. This is final here. As there is substantial evidence supporting the judgment we cannot reverse it.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

79 Cal.App.2d 470

WRIGHT v. DELTA PROPERTIES, Inc., et al.

Civ. 13105.

District Court of Appeal, First District, Division 2, California.

May 5, 1947.

1. Joint adventures 🔑1

Evidence sustained finding of trial court that alleged oral agreement for a joint enterprise did not exist.

2. Evidence 🔑588

The credibility of a witness and the weight to be given his testimony are questions for the trial judge, who under proper circumstances may accept all or such part of the testimony of any witness as he believes to be true or may reject all or any part which he believes to be untrue.

3. Evidence 🔑265(18)

Where the only person who could successfully contradict plaintiff's testimony was dead, the trial court was justified in considering appellant's uncorroborated testimony with respect to conversations with decedent as weak and unsatisfactory.

4. Appeal and error 🔑1011(1)

Where there is substantial conflict in the evidence, the findings of the trial court will not be disturbed.

5. Appeal and error 🔑1008(1)

Whether agreement of joint adventure would be implied was for the trial court.

6. Appeal and error 🔑996

Where there is a conflict in the inferences reasonably deducible from the evidence, the decision of the trial court is as conclusive as where the conflict arises directly from the evidence.

Appeal from Superior Court, Contra Costa County; Harold Jacoby, Judge.

Action by W. Q. Wright against Delta Properties, Inc., and others for an accounting and for the establishment of a trust in real property based on a joint venture allegedly existing between plaintiff and Theodore V. Halsey, the predecessor of the defendants. From a judgment for defendants, the plaintiff appeals.

Judgment affirmed.

James F. Hoey, of Martinez, and Linforth, Cannon & Miller, of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for appellant.

Byrl R. Salsman, of Palo Alto, for respondents.

NOURSE, Presiding Justice.

This is an action for an accounting and for the establishment of a trust in real property based on a joint venture allegedly having existed between plaintiff W. Q. Wright and Theodore V. Halsey, the predecessor of defendants. The trial court found against the existence of a joint venture and plaintiff appeals.

In the early nineteen twenties appellant, W. Q. Wright, a civil engineer, organized the Wright Corporation for the exploitation of certain tracts of Delta land which had belonged to his father. Appellant was at all times president and general manager and, after he had taken over on credit the interest of his sister, who married Theodore V. Halsey, was also the majority stockholder of the corporation, holding 80% of its stock. The Wright Corporation issued to the public $600,000 bonds secured by most of the real property of the corporation. When in the 1929 depression the bonds defaulted there were still $441,500 outstanding; moreover there were at that time unsecured debts amounting to some $100,000. A Bondholders' Protective Committee and a Board of Trade Committee for the unsecured creditors were formed; appellant was continued in his position. For several years, during which these conditions prevailed unchanged, appellant tried to interest his brother-in-law T. V. Halsey in different plans for the reorganization of the company. Although T. V. Halsey in the course of time loaned the corporation more than $100,000 on security not subject to the bonded loan, it was not until late in 1935 that plans for decisive changes took shape. Under date of December 18, 1935, a memorandum of an agreement between appellant and T. V. Halsey was prepared by Mr. Gray, then T. V. Halsey's attorney, for signature by the parties. It provided in part that Halsey would offer to buy the outstanding bonds of the Wright Corporation at 20% of their face value, that he would advance $7500 for certain expenses and as security, that appellant would aid Halsey to obtain the bonds, and if the same were acquired, to organize a new corporation which would purchase and operate the properties which secured the bonds and that the common stock of the new company would be divided 49% to appellant and 51% to Halsey. It does not provide how the means to finance the operation would be obtained. This memorandum was never signed. Nevertheless it plays an important role in this suit.

On January 10, 1936, T. V. Halsey made to the Bondholders' Protective Committee an offer the provisions of which were in accord with those of the unsigned memorandum. It is stated that Halsey in making this offer was acting for unnamed principals friendly to the Wrights. The Protective Committee submitted the proposal to bondholders but the completion of the transaction was delayed by the fact that on April 14, 1936, T. V. Halsey suffered a stroke which kept him away from his office until August. On May 29, 1936, A. E. Halsey, who was employed by his brother T. V. Halsey as an assistant with respect to his real estate interests—T. V. Halsey was primarily a telephone corporation executive—asked appellant's cooperation in getting extension of the terms within which tendered bonds had to be paid. Appellant complied. At the time that T. V. Halsey made his extension request to the Bondholders' Protective Committee offering a further advance of $5000, appellant made available a quitclaim deed of his corporation to the properties covered by the bonds and that corporation waived any remedy by which it could impede execution in case the purchase of the bonds would not be timely consummated. The extension was granted and the purchase of the bonds consummated. The funds required for the transaction were obtained by T. V. Halsey by means of a personal loan from the Bank of America. The letter in which he applied for this loan mentions a required amount of $165,000. He promised as security a first mortgage on all the properties of the corporation after foreclosure. Appellant had also made available to T. V. Halsey 90% of the stock of the corporation to serve as security. At different times in the year 1936 appellant claimed in conversations that he had an interest in the properties to be acquired.

On August 20, T. V. Halsey sent appellant a letter in which he informed appellant in substance that he had acquired 80% of the outstanding bonds and had demanded a trustee's sale, that he intended to purchase all the property covered by the bonded loan and that he put appellant on notice that if he would be the successful bidder he had no intention of giving any participation in the properties to the Wright Corporation or any of its stockholders. This, however, would not prevent him from employing appellant on a salary or on another basis to supervise engineering and other matters.

The trustee's sale took place September 19, 1936, and T. V. Halsey was the successful bidder. He had organized a corporation under the name Delta Properties, Inc., without any cooperation of appellant but this first corporation never functioned and did not take over the purchased properties. T. V. Halsey operated these under the fictitious name "Delta Properties Company." A letter of appellant of September 19, 1936, in which he reports to A. E. Halsey on a meeting of the Board of Trade Committee for the unsecured creditors contains the following sentence: "I repeated that there was no agreement between Mr. Halsey and myself regarding the equity, but it was my hope that something could be arranged in the future."

Beginning September 1, 1936, T. V. Halsey paid appellant a monthly salary of $450. This salary was cut to $250 monthly by a letter of September 30, 1939, to $175 monthly by a letter of July 31, 1940, and eliminated completely by a letter of July 21, 1941, after which date appellant still performed engineering services for T. V. Halsey or his second corporation, which services were each paid for separately. The letter of July 21, 1941, uses the term "you and other employees."

The second corporation under the name Delta Properties, Inc.—the first had been dissolved—was organized by T. V. Halsey, his son, T. V. Halsey, Jr., and A. E. Halsey; the articles dated August 22, 1940, were filed October 30, 1941. This corporation is the respondent of that name. One of the properties sold at the trustee's sale, Jersey Island, was transferred by T. V. Halsey to it and this respondent still held title to it at the time of the trial. All other properties purchased at the trustee's sale were disposed of prior to the trial. As to these sales and the conditions of them, appellant was never consulted. One of the properties, the Wright tract, was sold in 1941 for $190,000. Also during these years appellant sometimes claimed in conversations that he had an interest in the properties sold, but until after the death of T. V. Halsey on March 10, 1943, he took no legal action nor is there any evidence that until that time he ever asserted his claim in writing. Theodore V. Halsey, Jr. the other respondent in this action was duly appointed executor of his father's last will. This action was commenced July 17, 1943.

The complaint is in two counts of which the first alleges an oral agreement of joint venture between appellant and T. V. Halsey for the acquisition of the outstanding bonds of the Wright Corporation and the properties covered by them, whereas the second count alleges a written agreement to the same effect. The answer as amended denies the material allegations of the complaint and alleges affirmatively that the action is barred by the statute of limitations and the statute of frauds, that T. V. Halsey had bought the bonds and the properties covered by them for his sole account and had notified plaintiff in writing to that effect before the trustee's sale and that at the time of the purchase of the bonds and of the trustee's sale appellant was president and general manager of the Wright Corporation and therefore in a position of trust with respect to the shareholders, bondholders and unsecured creditors of which shareholders and unsecured creditors remain wholly unsatisfied and without possibility of recourse to any asset of the Wright Corporation.

At the trial appellant testified that in a conversation with T. V. Halsey, at which so far as he remembers nobody else was present, Halsey told him that he could not have a record interest, because the bank would not loan the money needed for the operation if appellant who was president of the corporation which issued the bonds would participate, that therefore the memorandum would not be signed but that the provisions outlined in it would form the agreement upon which they would operate. This was the alleged oral agreement according to appellant's theory. Moreover he testified that in the early part of January, 1936, T. V. Halsey had promised him something in writing to protect his interest, since the memorandum was not signed, and sent him a typewritten letter reading in substance like this: "In accordance with our understanding, I am holding in trust for you 49% of the properties which will be foreclosed under the Wright Corporation Bond Issue." However, this letter, which according to appellant's theory constituted the written agreement, could not be produced at the trial because it was said to have been lost. Appellant testified that two or three years after the trustee's sale A. E. Halsey had borrowed the letter and had never returned it. Appellant had never asked him to return it. (Appellant's secretary, Miss Cox, also testified that she had seen the letter.)

Appellant testified further that when he received the letter of August 20, 1936, which excluded him from participation he went to T. V. Halsey's office to ask for an explanation and that T. V. Halsey told him that the Bank of America had required his exclusion but that he was protected by the letter Halsey had given him—the letter afterwards allegedly lost. After this explanation he had continued his cooperation in absolute confidence in T. V. Halsey. Only when after the sale of the Wright tract for a price exceeding all the money invested in the operations appellant asked an accounting and T. V. Halsey referred him to his attorney, this confidence was shaken and appellant allegedly consulted his own attorney.

However A. E. Halsey testified that in July, 1936, he was present at a discussion between appellant and T. V. Halsey in which appellant demanded that Halsey sign the memorandum but Halsey refused and denied that appellant had any right to the property. The letter of August 20, 1936, was drafted by the attorney Dahlquist in consultation with the witness in accordance with orders of T. V. Halsey for the purpose of repudiating any claimed interest on the part of appellant. In the middle of 1937 he was again present when appellant endeavored to have T. V. Halsey sign a typewritten letter recognizing a 49% interest of appellant in the foreclosed property; T. V. Halsey again refused to sign, denying appellant's interest and referring to the letter of August 20, 1936. This witness denied that he had seen the so-called lost letter or had received it from appellant. He was told by appellant and Miss Cox of the existence of such a letter but it was never shown to him. Mr. Maxwell, T. V. Halsey's secretary, who handled all of his confidential correspondence did not remember any such letter. Mr. Dahlquist the attorney who drafted the letter of August 20, 1936, testified that not only was the bank opposed to participation by appellant but that he, the witness, had advised against such participation in connection with the Boyd case, Northern Pac. R. Co. v. Boyd, 228 U.S. 482, 33 S.Ct. 554, 57 L.Ed. 931, on which unsecured creditors and bondholders whose interests were scaled down might base litigations. He had given as his opinion that appellant could however be employed as an engineer.

The trial court found in substance that there never was any agreement, oral or written, express or implied, between appellant and T. V. Halsey creating a joint venture or a trust with respect to the foreclosed properties; that T. V. Halsey in his lifetime had denied appellant's claims, that appellant all the time had notice that Halsey with respect to these properties acted only for his own benefit and that appellant's connection with the operation of them was purely as an employee of T. V. Halsey or of defendant Delta Properties Inc.

Appellant concedes that with respect to the existence of the written agreement, the so-called lost letter, there was sufficient conflict in the evidence that the finding of the trial court in that respect should be sustained. However, he contends that there is no such conflict in the record with respect to the existence of an oral agreement for a joint enterprise.

[1] There is no merit in this contention. Evidently there is a substantial conflict in the evidence. Even if we do not consider any of the testimony of respondents' witnesses with respect to the attitude of T. V. Halsey—some of which might be hearsay, though competent so far as it came into the record without objection—from the undisputed facts alone that the memorandum prepared as to a possible joint venture was not signed, that T. V. Halsey wrote and appellant received the letter of August 20, 1936, which excluded appellant from participation but opened the possibility of a position as employee, and that for several years thereafter he drew salary as an employee, which salary was not foreseen in the unsigned memorandum, without reserving in any writing his pretended rights of participation or possessing any written proof of such participation, an inference can reasonably be drawn that any plan of a joint venture was abandoned and that instead appellant became a paid employee.

[2] Appellant's testimony as to the oral promises and explanations allegedly given to him by T. V. Halsey, without the presence of any third person, might, if believed, have explained these facts in a way not inconsistent with appellant's allegations, but the credibility of a witness and the weight to be accorded his testimony are questions directed to the trial judge, which under proper circumstances may accept all or such part of the testimony of any witness as he believes to be true, or may reject all or any part which he believes to be untrue. Bechtold v. Bishop & Co., Inc., 16 Cal.2d 285, 291, 105 P.2d 984. In view of the fact that the only person who could successfully contradict his testimony was dead, the trial court was justified in considering appellant's uncorroborated testimony with respect to these conversations as weak and unsatisfactory. Olson v. Olson, 4 Cal.2d 434, 437, 49 P.2d 827. Moreover appellant's admission in the letter to A. E. Halsey of September 19, 1936, that there was no agreement between T. V. Halsey and himself regarding the equity creates in itself a substantial conflict in the evidence.

Appellant's main argument is that the services he rendered to T. V. Halsey in giving up his holding of stock in the corporation and of some salary claims against it, in assisting to convince the Bondholders' Protective Committee to communicate and the individual bondholders to accept the offer and the request for extension of time, in facilitating the execution of the plan by making the Wright Corporation give a quitclaim deed and waive all remedies against the sale, and in rendering more extensive services than could be expected from an engineer, were of so valuable a character that it was inconceivable that he would have acted so without relying on the alleged oral agreement of joint venture. The evidence as to the extent and especially as to the value of the rights given up and the services rendered is conflicting.

[3] To review the evidence as to this point would serve no purpose. It is certainly not inconceivable as a matter of law that appellant should give up shares in a corporation which for many years had been in default both with respect to its bonded loan and its unsecured creditors and should give assistance to his wealthy brother-in-law in acquiring the properties of that corporation without being promised a participation as joint venturer but in reliance on a promise of employment or merely in the hope that something advantageous might be arranged in the future. Even for any improbability of such an attitude as a matter of fact a showing would be required that appellant would have been able to keep his hold on the assets of the corporation if he had not cooperated with his brother-in-law. No such showing has been made. Clearly this whole argument is purely factual in character and can not successfully be addressed to an appellate court. The evidence as to the rights given up and the services rendered by appellant is nothing more than a part of the conflicting evidence to be weighed by the trial court in deciding the existence or non-existence of a joint venture agreement. Performing this function, the trial court found against appellant. That where there is a substantial conflict in the evidence, the findings of the trial court will not be disturbed is too basic a principle of our law to require citation of authority.

[4, 5] Appellant further argues that even if no precise express agreement of joint venture was proved, such an agreement should be implied from the acts and conduct of the parties. He cites in support of this argument Universal Sales Corporation v. California Press Mfg. Co., 20 Cal.2d 751, 128 P.2d 665, and other cases to the same effect. However, these cases only hold that such a contract may be implied. Whether such a contract should be implied in the present case remained a question of fact for the trial judge. "Whether a particular inference can be drawn from certain evidence is a question of law, but whether the inference shall be drawn, in any given case, is a question of fact for the jury." Blank v. Coffin, 20 Cal. 2d 457, 461, 126 P.2d 868, 870; 10 Cal.Jur.

738–739. In our case the trier of fact decided that the evidence did not warrant the inference of an implied agreement of joint venture. Where there is a conflict in the inferences reasonably deducible from the evidence the decision of the trial court is as conclusive as where the conflict arises directly from the evidence. Mentone Irr. Co. v. Redlands etc. Co. 155 Cal. 323, 331, 100 P. 1082, 22 L.R.A.,N.S., 382, 17 Ann. Cas. 1222; 2 Cal.Jur. 934.

In view of our conclusion that the findings and conclusions of the trial court against the existence of any joint venture agreement must be sustained, it is unnecessary for us to discuss the questions raised by the other defenses of respondents as to which the trial court did not make any findings.

The judgment is affirmed.

GOODELL and DOOLING, JJ., concur.

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MULROONEY v. PIETRO et al.

Civ. 15465.

District Court of Appeal, Second District, Division 2, California.

April 22, 1947.

1. Trover and conversion 🔑**40(4)**

Evidence was insufficient to support finding that defendants were guilty of conversion or of unlawfully detaining plaintiff's automatic screw machine.

2. Contracts 🔑**254**

An oral agreement to rescind a written contract is ineffectual unless such oral agreement is consummated.

3. Evidence 🔑**384**

The parol evidence rule is not merely a rule of evidence but a principle of substantive law.

4. Evidence 🔑**465**

In action for conversion of screw machine, wherein plaintiff contended that he and defendants had terminated contracts under which defendants had come into possession of machine, only evidence of mutual rescission of contract, which the court could consider, was either a written agreement signed by parties or an executed oral agreement terminating their written contract, and not an unconsummated oral agreement.

5. Trial 🔑**105(5)**

Parol evidence, which was admitted in violation of the parol evidence rule, should have been disregarded, even though it may have been received without objections.

6. Bailment 🔑**22**

Where written contract, under which defendants were given possession of plaintiff's screw machine, provided that time limit for retention of the machine was not to exceed certain date, the reasonable interpretation of such language was that defendants should continue use of the machine until such date without being liable for conversion.

WILSON, J., dissenting.

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Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by Tom Mulrooney against P. N. Pietro and others for recovery of an automatic screw machine, and for damages for conversion of the machine. From a judgment for plaintiff, defendants appeal.

Judgment reversed.

Chester C. Kempley, of Los Angeles, for appellants.

E. H. Delorey and P. T. Howe, both of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury for the alleged conversion of a number "55" automatic screw machine, defendants appeal.

So far as material here the complaint was in two causes of action, one for the recovery of a number "55" automatic screw machine, and the other for damages for conversion of the machine. In paragraph seven of the first cause of action, it is alleged that plaintiff was damaged in the sum of $4,000 bv reason of the alleged detention of the machine. In paragraph three of the second cause of action, it is alleged that plaintiff was damaged in the sum of $9,576 by reason of the detention of the machine. Both of the foregoing allegations were found by the trial court to be true and in addition, the trial court found "that ever since the 9th day of August, 1943, the defendants and each of them have unlawfully detained and converted that certain number '55' Acme Automatic Screw Machine * * *."

This is the single question necessary for us to determine:

Was there substantial evidence to sustain the trial court's findings that defendants unlawfully detained or converted a number "55" automatic screw machine from plaintiffs?

[1] This question must be answered in the negative. The only evidence introduced upon this issue was given by plaintiff and defendants. Plaintiff testified that on August 9, 1943, he took the number "55" machine to defendants' place of business pursuant to an oral agreement that the defendants would operate the machine upon the same terms and provisions as appeared in a written agreement between the parties dated July 9, 1943, covering two "53" automatic machines; that in the latter part of November, 1943, he served upon defendants ten days' oral notice of the termination of the oral contract, but that on November 29, 1943, a writing was executed by the parties for their governance in relation to the "55" machine. By such instrument plaintiff agreed to leave the acme number "55" machine with defendants "for the period necessary to run such contracts that have been placed * * * from the Collins Engineering Company * * * time limit not to exceed March 15, 1944 * * *"; plaintiff "to receive 45% of all net profits earned on the above machine. * * *" The writing was thereafter acted upon by defendants as constituting the terms of their understanding with reference to defendants' possession of the number "55" machine. On the other hand defendants testified that the number "55" machine had been brought to them by plaintiff in the month of August, 1943, for the purpose of having it repaired. Whether the trial court believed plaintiff or defendants neither furnishes support for the finding that defendants were guilty of conversion or of unlawfully detaining the number "55" machine from plaintiff. There is no testimony that predonderates against the writing of November 29, 1943. It follows that the findings of the trial court are without substantial support.

[2-5] By certain parol testimony plaintiff claimed that he and defendants had orally agreed to terminate their contract in January, 1944. By such oral agreement he contends that a mutual recission was effected notwithstanding the fact that according to his own testimony defendants declined to make delivery of the number "55" machine to him. It is elemental that an oral agreement to rescind a written contract is ineffectual unless such oral agreement is consummated. It is now established that the parol evidence rule is not merely a rule of evidence but a principle of substantive law. (Estate of Gaines, 15 Cal.2d 255, 264, 100 P.2d 1055; Nourse v. Kovacevich, 42 Cal.App.2d 769, 771, 109 P.2d 999.) The only evidence of a mutual recission of the contract of November 29, 1943, which the court could legally have considered was either a written agreement signed by the parties or an executed oral agreement terminating their written contract. Unless so rescinded the rights of the parties were determinable solely by the writing of November 29. The parol evidence of such attempted recission should have been disregarded even though it may have been received without objections. (Gore v. Bingaman, 29 Cal.App.2d 460, 479, 85 P.2d 172; Fogler v. Purkiser, 127 Cal.App. 554, 560, 16 P.2d 305.)

[6] The writing of November 29 contained the statement "the time limit not to exceed March 15, 1944." A reasonable interpretation of such language is that defendants should continue use of the ma-

chine until the specified date. But viewing the contract most favorably to plaintiff he would have no right to a return of the machine until the expiration of the "period necessary to run such contracts that have been placed" with defendants from the Collins' Engineering Company. There is no proof that any contracts had been placed with defendants by the engineering company; neither is there proof that all of such contracts had been "run." It follows that in the absence of proof that the period necessary to "run" such contracts had expired plaintiff could not reasonably contend that his obligation to leave the machine until March 15, 1944, had been satisfied.

The judgment is reversed.

MOORE, P. J., concurs.

WILSON, Justice (dissenting).

I dissent. I disagree with the majority decision holding (1) that the evidence is insufficient to sustain the findings and judgment in favor of plaintiff for the return of his machine under the cause of action for replevin; (2) that the written contract between plaintiff and defendants relating to the possession of the machine could not be and was not abrogated by their oral agreement and that evidence was inadmissible to prove the oral termination of the contract; (3) that defendants were entitled to retain possession of the machine in any and all events until March 15, 1944.

(1) The complaint consists of two causes of action. The first is for the replevin of a No. 55 automatic screw machine, with the conventional allegations required in such an action; the second is for damages for the conversion of the same machine. Judgment was rendered for plaintiff on each cause of action.

The allegations of the first cause of action are as follows: (1) That before and at the time of the commencement of the action plaintiff was the owner and entitled to the immediate possession of one No. 55 Acme Automatic Screw Machine; (2) that its value was $4,000; (3) that on August 9, 1943, defendants came into possession of the machine and still retain possession of it; (4) that on January 31, 1944, plaintiff demanded possession of the machine and defendants refused to deliver it; (5) that defendants withheld possession at the time of the commencement of the action to plaintiff's damage in the sum of $4,000.

The denials, admissions and evidence relating to the foregoing allegations are as follows: Allegation (1) was denied by the answer. Plaintiff testified that he was the owner of the machine and we are not referred to any contrary evidence. Defendants admitted that they obtained it from plaintiff, and do not claim that any other person owned it. Allegations (2) and (3) were not denied and defendants expressly admitted that the machine was and had been in their possession since August 8, 1943. Allegation (4) was denied. Plaintiff testified that he made the demand on the date alleged in the complaint and that defendants had not delivered the machine to him. Defendants alleged that they were retaining possession of it under a claim of lien for repairs. This is an admission of plaintiff's allegation of nondelivery. Allegation (5) was denied. By failing to deny allegation (2) as above stated the value was admitted, and plaintiff's damage was in that amount since no other sum is suggested by the pleadings or the evidence.

In connection with their denial of allegation (5) and with their admission that they had had possession of the machine since August 8 (plaintiff alleged August 9), 1943, defendants asserted that they had made repairs on it at plaintiff's request and claimed a mechanic's lien for the value of their labor and material. Defendants testified that the machine was brought to them by plaintiff in July, 1943, for the purpose of having it repaired. Plaintiff denied this contention and testified that he had delivered it to defendants first under an oral contract by which the purpose for which it was to be used was agreed upon; that subsequently he served on defendants a notice terminating the oral agreement; that thereafter under date of November 29, 1943, a written agreement was entered into concerning its use. His testimony was that under the oral agreement the machine was to be used according to the terms of a written lease agreement previously made between him and defendants relating to the use of two other machines owned by plaintiff that are not involved in this action.

The former agreement relating to the two machines and the written agreement relating to machine No. 55 are pleaded in defendants' amended answer with an allegation that by reason of the latter agreement defendants were entitled to possession of machine No. 55 until March 15, 1944. They further allege that they have a lien on the machine for repairs which they made on it.

The former agreement provided that the cost of repairs of the two machines and other expenses should be deducted before division of profits for work performed by the machine was made between plaintiff and defendants. By reason of said provision defendants would not have had a lien for repairs on the two machines. The same condition was adopted by the oral agreement when machine No. 55 was delivered into the possession of defendants. The agreement covering the two machines need not be considered except for the purpose of showing that its adoption by the oral agreement deprived defendants of the right to claim a lien for repairs on No. 55.

The oral agreement was terminated and was superseded by the written agreement of November 29, 1943. Under its terms plaintiff agreed to leave the machine with defendants for the period necessary "to run" contracts placed with defendants by Collins Engineering Company, "time limit not to exceed March 15th, 1944." Plaintiff was to receive 45 per cent of the net profits earned on the machine after deducting repairs, replacements, labor, tooling and other expenses involved in operating the machine.

Since the agreement provides for a division of the profits after deducting the cost of repairs and other expenses, defendants have no lien for the repairs and are not entitled to retain possession of the machine on that ground.

In January, 1944, a controversy arose between the parties. Defendants contended that plaintiff was preventing them from finishing the contracts for which they were using the machine. Plaintiff asserted that defendants "were not running the job," apparently meaning that they were not using the machine to its capacity, thus depriving him of the royalties to which he was entitled under the agreement. Plaintiff testified that defendants said "Let's call this whole thing off, you take your machine out of here and we will have a clean bill of health and we will call this whole thing off." He further testified that defendant Peitro said "I wish you would take it out tomorrow because we have a lot of other machinery coming in here and we need the space. I would consider it a favor if you would take it out tomorrow." Plaintiff signified his acquiescence in and expressly agreed to comply with this suggestion but when he sent men to remove the machine defendants refused to permit them to take it.

Notwithstanding the controversy as above related, there is no evidence that defendants had any contracts for work on which the machine could be used or any uncompleted contracts previously entered into when the dispute arose in January, 1944. It is not clear that they had any contracts with the Collins Engineering Company or with anyone else when the contract of November 29, 1943, was signed by plaintiff and defendants. As far as the evidence shows the parties were quarreling about a nonexistent matter. In any event they agreed to and did terminate and conclude the contract and their relations with each other.

Since defendants were without right to hold the machine for repairs and since they agreed to terminate the contract, plaintiff was entitled to recover the machine under the cause of action for replevin.

(2) The majority of this court are in error in holding that the oral evidence relating to the termination of the contract was inadmissible and must be ignored on this appeal. The contract was "called off," cancelled and terminated by mutual consent, and each party was relieved from further liability and obligation under it. The contract was rescinded by consent of all parties to it (Civil Code, sec. 1689) and oral evidence was admissible to prove the fact. Restatement, Contracts, sec. 407.

A written contract may be discharged by a subsequent oral agreement and the parol evidence rule does not exclude oral evidence of the agreement terminating the contract. It may be shown by oral evidence that "by mutual oral agreement between the parties, the performance was waived and the contract orally canceled." Hooke v. Great Western Lumber Co., 54 Cal.App. 681, 682, 202 P. 492; Bevans v. Huntington, 65 Cal.App. 266, 268, 223 P. 572; Haberman v. Sawall, 72 Cal.App. 576, 581, 237 P. 776. Evidence is admissible "to show that [the parties] mutually agreed to call the transaction off" and that they intended that each should be released from its provisions. Gardiner v. McDonogh, 147 Cal. 313, 322, 81 P. 964, 967; Tompkins v. Davidow, 27 Cal.App. 327, 335, 149 P. 788. A written agreement may be abrogated by an oral contract and in such case section 1698 of the Civil Code has no application. Dugan v. Phillips, 77 Cal. App. 268, 277, 246 P. 566; San Roque Properties, Inc., v. Pierce, 18 Cal.App.2d 379, 380, 63 P.2d 1198; Klein Norton Co. v. Cohen, 107 Cal.App. 325, 332, 290 P. 613; McClure v. Alberti, 190 Cal. 348, 350, 212 P. 204; Producers Fruit Co. of California v. Goddard, 75 Cal.App. 737, 757, 243 P. 686; Arsenio v. Smith, 50 Cal.App. 173, 175, 194 P. 756; Credit Clearance Bureau v. George A. Hochbann Contracting Co., 25 Cal.App. 546, 547, 144 P. 315.

Since there is doubt as to whether any manufacturing contracts ever existed and there is no evidence that if they existed they were uncompleted in January, 1944, the agreement to "call this whole thing off" and to terminate the contract of November 29, 1943, was not an oral modification of an agreement in writing. The evidence relating thereto was not offered nor admitted for the purpose of attempting to vary the terms of a written contract by oral evidence. It was admissible to prove the termination of the contract which could be concluded orally in the circumstances and for the reasons stated.

Counsel for defendants are able lawyers with long experience in the trial of cases. They offered no objection to the introduction of the evidence that the majority opinion declares was not admissible and did not move to strike it from the record. They knew the subject to which the testimony was addressed and knew that it was not offered as a modification of the contract but was properly presented for the purpose of proving the termination of the contractual relations between the parties. Accepting it as legal evidence they called their clients as witnesses who denied much of plaintiff's testimony. The trial court believed and adopted plaintiff's version of the agreement to cancel the written contract and disbelieved the evidence of defendants. This court is without power to decide otherwise or to disregard the evidence so received by the trial court and acted upon by the court and by counsel for both parties.

(3) The language of the contract, "time limit not to exceed March 15th, 1944," cannot be construed to mean that defendants had the absolute right to the possession of the machine until that date. They were to have it for the period necessary "to run" the contracts of the Collins Engineering Company, if they had such contracts, but in no event beyond the date mentioned. In the absence of evidence that such contracts were in existence it cannot be assumed that there were any; and if defendants had had contracts it cannot be assumed, in the absence of evidence, that they were not completed in January, 1944. If there had been such contracts defendants were not entitled to keep the machine after they were completed; and if they had been completed when the dispute arose in January, 1944, plaintiff was within his rights in demanding possession of the machine at that time. He was entitled to it in any event on March 15, 1944, even though contracts, if they existed, then remained unfinished. In other words, the contract did not mean that defendants could retain the machine until that date under any and all circumstances. It measured the maximum time during which plaintiff could be kept out of possession, and such maximum time was shortened to the date of completion of contracts that defendants had on November 29, 1943.

Plaintiff's assertion to defendants that they "were not running the job" was not an admission that they had any unfinished contracts on hand. His contention is to be construed as a complaint that defendants were not doing any work that produced the royalties to which he was entitled by virtue of the written agreement of November 29, 1943. In fact the evidence shows that the machine had been idle for some time before the dispute arose in January, 1944.

The court found that all allegations in the first cause of action were true, from which it is manifest that the court believed plaintiff's testimony that the machine was not delivered to defendants in the first instance for the purpose of repairs but for their use in accord with the oral agreement entered into when the machine was placed in their possession. So believing, the court properly held that defendants had no lien on the machine. By reason of the terms of the written agreement defendants could make no claim of lien for repairs after it was executed. The court believed that defendants were not "running the job," as agreed; that their statements above quoted signified their consent to the termination of and did terminate the contract in January, 1944, and indicated their intent to be no longer bound by it and their desire for the removal of the machine; that plaintiff also agreed to the abrogation of the contract. So believing, the court could not do otherwise than hold that plaintiff was entitled to possession of the machine on the date he demanded its return. It is clear that the court did not believe the evidence given by defendants denying plaintiff's version of the dispute and of the resultant conclusion thereof.

Since the trial court on abundant substantial evidence resolved all conflicts in the evidence in favor of plaintiff this court is bound by the findings.

The evidence and the express admissions of defendants in their answers sustain the findings as to the first cause of action and the findings sustain that portion of the judgment requiring the return of the machine to plaintiff or the recovery by him of $4,000 if delivery cannot be had.

The second cause of action is for damages for the alleged conversion of the same machine. The allegations of the first cause of action as to its ownership, its value, its delivery to defendants, their retention of possession, plaintiff's demand for delivery, and defendants' refusal to deliver, were adopted as part of the second cause with the further allegations that defendants had unlawfully detained and converted the machine and that its rental value was $28 per day. Plaintiff sought and is entitled to a judgment for the loss of the rental value of the machine in addition to the recovery of the machine or its value. The court found that plaintiff had suffered damages in the sum of $18,738.74. The evidence shows that plaintiff was damaged by the detention of the machine but the record does not indicate how the court arrived at that figure. Both the evidence and the findings are confusing and neither will support a judgment in that amount. Nor can this court determine the correct sum from the record before us. Upon a new trial the evidence on this phase of the case may be made clear.

That portion of the judgment relating to the first cause of action reading as follows should be affirmed: "[I]t is hereby Ordered, Adjudged and Decreed, that the No. 55 Acme Automatic Screw Machine, Serial Number 18201, as described in paragraph III of Plaintiff's First Cause of Action, be returned to plaintiff, or in lieu thereof the sum of $4,000.00, the value thereof, in case a delivery can not be had."

That portion of the judgment relating to the second cause of action reading as follows should be reversed: "And it is further Ordered, that the plaintiff do have and recover from the defendants, and each of them, damages for the taking and detention of said personal property in the sum of $18,738.74, with interest thereon at the rate of 7% per annum from the date hereof until paid." The case should be remanded for a new trial on the issues of the second cause of action.

79 Cal.App.2d 516

TARASCO v. MOYERS et al.

Civ. 7358.

District Court of Appeal, Third District, California.

May 7, 1947.

1. Appeal and error 🔑786

Rules on appeal do not provide for dismissal of appeal on mere grounds that it is sham, frivolous, or taken solely for delay, and question whether court had inherent power to dismiss appeal on those grounds would not be determined where it clearly appeared that appeal was not taken for sole purpose of delay. Rules on Appeal, rule 1 et seq.

2. Appeal and error 🔑110

Defendant had right to appeal from order granting a new trial. Code Civ.Proc. § 963.

3. Appeal and error 🔑979(2)
New trial 🔑68

In granting a new trial for lack of evidence to sustain verdict for defendants, trial court has wide discretion, with which reviewing court may not interfere on motion to dismiss appeal unless there is a clear and affirmative showing of gross, manifest, and unmistakable abuse.

4. Appeal and error 🔑799

Even though reviewing court has inherent authority to dismiss an appeal for lack of merit or because it was taken solely for purpose of delay, facts should clearly appear on motion to dismiss.

5. Appeal and error 🔑786

In action for injury sustained in automobile collision, where appeal from order granting plaintiff a new trial presented question whether there was any evidence showing that driver of defendants' automobile was operating it in the course of his employment and evidence was conflicting, motion to dismiss appeal on ground that it was frivolous and taken for sole purpose of delay would be denied. Rules on Appeal, rule 1 et seq.

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Personal injury action by Delfina Tarasco against Thurmon Devine Moyers, operating under the firm name and style of Moyers Stages, Christiana Farms Company, a copartnership, and A. E. Christiana, and others. From an order granting a new trial, Christiana Farms Company, a copartnership, and A. E. Christiana appeal. On motion to dismiss appeal.

Motion denied.

Conley, Conley & Conley, of Fresno, for appellants.

Robinson & Cornell, of Merced, for respondents.

THOMPSON, Acting Presiding Justice.

The plaintiff moved to dismiss the appeal of certain defendants from an order granting a new trial. The motion was made on the ground that the appeal is frivolous and that it was taken for the sole purpose of delay. The motion was opposed by the appellants on the grounds that the record discloses that there is merit in the appeal, and that a motion to dismiss an appeal on the mere ground that it is frivolous and was taken for the purpose of delay only, since the adoption of Rules on Appeal, which became effective July 1, 1943 (22 Cal.2d 1,) in effect abrogates former Rule V, Section 3 of said Rules (213 Cal. p. xliii), which then authorized the dismissal of an appeal when it appeared to have been frivolously taken for the purpose of delay. The plaintiff brought suit for damages for personal injuries sustained as a result of an automobile collision. The jury returned a verdict in favor of the defendants. The trial court granted a motion for new trial with respect to the appellants and denied a new trial as to the other defendants. From that order granting the new trial this appeal was perfected. The issue on appeal is the question as to whether there was any evidence showing that the driver of appellant's car was then operating it in the course of his employment. For the purpose of this motion we may assume the evidence was conflicting on that issue.

[1-5] It is true that the present Rules on Appeal do not provide for the dismissal of an appeal on the mere grounds that it is "sham, frivolous or taken solely for

the purpose of delay." The appellants cite Taylor v. Parsons, 39 Cal.App.2d 336, 102 P.2d 1096, and Plecity v. Keilly, 41 Cal.App.2d 206, 106 P.2d 207, in support of their contention that the motion for dismissal of the appeal on the grounds specified does not lie, since the Rules have been changed in that respect. The respondent, however, asserts that the court has inherent power to dismiss an appeal which clearly appears to have been taken frivolously or for the sole purpose of delay, even though no statute or rule of court exists upon that subject. Sonoma Magnesite Co. v. National Magnesite Products Corporation, 189 Cal. 433, 208 P. 962; Stern & Goodman Investment Co. v. Danziger, 206 Cal. 456, 274 P. 748; 4 C.J.S., Appeal and Error, § 1358, p. 1961; 3 Am.Jur. 675, sec. 1164. But in view of our conclusion that it does not clearly appear on this motion that the appeal was taken for the sole purpose of delay and that it has no merit, it is unnecessary for us to determine whether the reviewing court has inherent power to dismiss an appeal on that ground regardless of the existence of a court rule to that effect. In the present case, after a verdict was returned and a judgment rendered in favor of the defendants, the trial court granted a new trial with respect to the appellants, from which they had a right to and did appeal. Sec. 963, C.C.P. In granting the new trial for lack of evidence the court had a wide discretion with which we may not interfere on this motion unless there is "a clear and affirmative showing of a gross, manifest and unmistakable abuse." Gallichotte v. California Mutual Building & Loan Ass'n, 23 Cal.App.2d 570, 576, 74 P.2d 73, 77, 535. Even though this court has inherent authority to dismiss an appeal for lack of merit or because it is taken solely for the purpose of delay, those facts should clearly appear on the motion to dismiss. The merits of the new trial depend on the evidence adduced at the trial involving the question of liability of the appellants for the automobile casualty. The evidence appears to be conflicting on that issue. We therefore think respective parties should be afforded a full and fair opportunity to file briefs and present arguments on that important issue.

The motion to dismiss the appeal is denied, and the plaintiff is granted thirty days within which to file her reply brief upon the merits of the appeal.

PEEK, J. and SCHOTTKY, Justice pro tem., concur.

79 Cal.App.2d 453

MANNEY v. HOUSING AUTHORITY OF CITY OF RICHMOND (two cases). WILLIAMS v. SAME.

SHEPARD v. SAME.

Civ. 13096.

District Court of Appeal, First District, Division 2, California.

May 2, 1947.

Rehearing Denied May 31, 1947.
Hearing Denied June 30, 1947.

1. **Evidence 🔑508**

Opinions of experts are admitted in matters which are not within the common experience of men so that special knowledge and experience in the particular field may enable experts to form an opinion, where men of common experience would not be able to do so. Code Civ.Proc. § 1870, subd. 9.

2. **Evidence 🔑470**

The opinions of nonexpert witnesses are admitted as a matter of practical necessity, where matters which they have observed are too complex or too subtle to be accurately conveyed to court or jury in any other manner.

3. **Evidence 🔑474(1), 550(1), 552**

For a nonexpert to be competent to give an opinion where matters are too complex or too subtle to enable him to convey them to court or jury, nonexpert must be testifying about facts that he has personally observed, but an expert, in any case proper for reception of expert testimony, may give his opinion though he did not personally observe the facts, basing his opinion on the facts testified to by other witnesses, put to the expert in the form of hypothetical questions.

4. Evidence 🔑508

The ultimate question to be determined in every case in which expert testimony is tendered is whether the case is one outside of the common experience of men so that a person of training and experience by reason of his superior knowledge is better able to reach a conclusion from the facts.

5. Evidence 🔑527

Expert evidence is not admissible in all cases to prove the cause of fires generally, but is admissible to prove the cause of a particular fire, if the matter is one which is not within the common experience of men so that the special knowledge of an expert may enable him to draw an inference where men of common experience after all the facts proved, would be left in doubt.

6. Evidence 🔑544

In actions for deaths and injury as result of fire in dormitory when hot air ducts of a composition of cane fiber, treated to raise its ignition or flash point so that it will only ignite at a temperature of approximately 500 degrees, allegedly caught fire, chief of city fire department was properly permitted to give expert testimony that fire originated in the hot air ducts.

7. Evidence 🔑555

In actions for deaths and injuries sustained in dormitory fire that allegedly originated in hot air ducts, it was a question for jury whether dust and lint had accumulated in the hot air ducts, and therefore plaintiffs' expert witness in forming his opinion as to the origin and cause of the fire, was warranting in assuming that there was dust and lint in the ducts.

8. Evidence 🔑555

In actions for deaths and injuries resulting from dormitory fire allegedly originating in hot air ducts made of cane fiber, evidence was sufficient to establish that heat in the ducts had risen to 200 degrees before the fire, and therefore expert witness, in giving his opinion as to the cause of the fire, was warranted in assuming that heat in ducts had risen to 200 degrees.

9. Evidence 🔑555

In actions for deaths and injuries resulting from dormitory fire allegedly originating in hot air ducts made of cane fiber, evidence was sufficient to warrant finding that an explosion occurred, and therefore expert witness, in forming his opinion as to the cause of the fire, was entitled to assume that there had been an explosion.

10. Appeal and error 🔑1058(2)
Evidence 🔑528(1)

In actions for deaths and injuries resulting from dormitory fire allegedly originating in hot air ducts made of cane fiber, refusal to allow expert witness to express opinion whether fire originated in the ducts was error, but such error was cured, where the witness was permitted to give his opinion that there was no explosion in the ducts.

11. Appeal and error 🔑1058(2)

The refusal to permit an expert witness to answer a hypothetical question is harmless error, where the witness, in reply to questions subsequently asked, is permitted to express his opinion fully as to the matter which his reply to the hypothesis would have covered

12. Landlord and tenant 🔑169(5)

In actions for deaths and injuries resulting from dormitory fire allegedly originating in hot air ducts made of cane fiber, evidence that lint and dust were present in the hot air ducts of other similar dormitories after the fire was admissible, though it was incidentally brought out that the lint and dust were found during alterations made in hot air ducts.

13. Landlord and tenant 🔑169(5)

In actions for deaths and injuries as result of fire in dormitory in housing unit, on ground of alleged defective construction of hot air ducts, court properly excluded defendant's evidence of a single isolated attempt at sabotage in another housing unit.

14. Landlord and tenant 🔑169(11)

In actions for deaths and injuries resulting from dormitory fire allegedly originating in hot air ducts made of cane fiber, whether defendant was negligent in failing to remodel the ducts after repeated warnings of the fire hazard was for jury.

15. Municipal corporations ⚿722

Fact that dormitories in housing unit were built by a federal agency would not excuse city's housing authority to which dormitories were leased from attempting to remedy a dangerous fire hazard in the dormitories after city's housing authority was operating them. Gen.Laws, Act 3483, § 8(a).

16. Landlord and tenant ⚿169(11)

In actions for deaths and injuries resulting from dormitory fire allegedly originating in hot air ducts made of cane fiber, whether one of the victims, for whose death recovery was sought, was lawfully on the premises as a guest or tenant was for the jury.

17. Trial ⚿105(2)

Hearsay evidence admitted without objection is sufficient to support a finding.

* * *

Appeal from Superior Court, Contra Costa County; A. F. Bray, Judge.

Consolidated actions by James Manney, Sr., Nancy Williams and John Shepard to recover for wrongful death, and by Henry Manney, Jr., by and through his guardian ad litem, Henry Manney, Sr., for injuries against the Housing Authority of the City of Richmond. From judgments in favor of the plaintiffs, the defendant appeals.

Judgments affirmed.

Harold F. Sawallisch, of Richmond, Cooley, Crowley & Supple and Cooley, Crowley, Gaither & Dana, all of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for appellant.

Clark & Heafey and Edwin A. Heafey, both of Oakland, and Carlson, Collins & Gordon, Robert V. Collins and Frederick Bold, Jr., all of Richmond, for respondents.

DOOLING, Justice.

These four cases were consolidated for trial and are here consolidated on appeal. Three of the actions are for wrongful death and the fourth, that of Henry Manney, Jr., is for personal injuries. The decedents lost their lives in a fire which destroyed a dormitory for the housing of shipyard workers in the City of Richmond, California, and Henry Manney, Jr., received personal injuries in the same fire. The dormitory, known as Dormitory O, was one of 26 identical dormitories designated by letters A to Z. They were built by Farm Security Administration and transferred by that agency to the Federal Housing Authority, and by the latter leased to defendant and appellant, Housing Authority of the City of Richmond.

The actions were based upon the alleged negligence of defendant in maintaining in Dormitory O hot-air ducts of wood or fiber composition which were alleged to be inflammable when subjected to excessive heat.

The dormitory was constructed of wood and plywood, two stories in height, with a central hall running the full length of each floor and rooms opening off the hallway on either side. The furnace which burned oil was located in a room near the center of the building on the ground floor. Cool air was drawn into the system by a fan which forced it, after it was heated, through the ducts to the rooms. The ducts were constructed of celotex, or a similar composition, and ran the full length of each floor as a part of the ceiling. Celotex is composed of cane fiber treated to raise its ignition or flash point and will only ignite at a temperature of approximately 500 degrees. There is evidence that its exposure to alternate heat and cold tends to reduce its flash point.

The witness Cooper, Chief of the Fire Department of the City of Richmond, testified that he had frequently warned the administrative officer of defendant of the fire hazard from these ducts as constructed in this group of twenty-six dormitories. Testifying as an expert Cooper expressed the opinion that dust and lint collected in the ducts had been ignited causing an explosion which in turn ignited the material of which the ducts were composed. He based this opinion upon his own observation of the burning building and the fact that when he arrived at the fire the entire length of the first floor ducts was blazing ("The base of the flames was the full length of the ducts"), and fragments of the ducts were hanging from the ceiling.

The jury returned verdicts for the plaintiffs in the four cases and from the judgments which followed defendant takes this appeal.

Appellant was created pursuant to the "Housing Authorities Law", Stats.1938, p. 9, Deering's Gen.L., Act 3483. It is given the power "to sue and be sued". Sec. 8, subd. (a). In the operation of this dormitory it was engaged in a proprietary and not a governmental function. Any doubt which might have existed as to its liability to suit for negligence while acting in a proprietary capacity has been resolved in People v. Superior Court, 29 Cal.2d 754, 178 P.2d 1. Cf. Housing Authority of Birmingham Dist. v. Morris, 244 Ala. 557, 14 So.2d 527, 535.

The basic attack upon the judgments is that they are without support in the evidence. This attack in turn depends on the claim that the court erred in permitting Fire Chief Cooper to testify as an expert witness to his opinion as to the cause of the fire. It is appellant's position that expert evidence is not admissible as to the cause or origin of a fire. To support this contention appellant relies upon St. Paul Fire & Marine Ins. Co. v. Southern Pac. Co., 30 Cal.App. 140, 157 P. 247. In that case the fire chief of the city of Hollister had given testimony as an expert as to the cause of a fire. The court said at page 142 of 30 Cal.App., at page 248 of 157 P.: "We are of the opinion that the court committed an error in permitting this witness to give his opinion as to the origin of this fire, and that the better reasoned line of authorities holds that the question as to the origin of a fire is not ordinarily one of expert opinion, but is a deduction which the court or jury is equally competent to draw from the visible facts presented in evidence."

Respondents counter by citing Gallichotte v. California Mut. Building & Loan Ass'n, 23 Cal.App.2d 570, 74 P.2d 73, 535. In its opinion on denial of petition for rehearing in that case at page 581 of 23 Cal.App.2d, at page 535 of 74 P.2d the court said: "Furthermore, it may be stated that in our opinion the ruling in the case of St. Paul Fire & Marine Ins. Co. v. Southern Pac. Co., 30 Cal.App. 140, 157 P. 247, cited and relied on by the defendants, cannot be said to be controlling here for the reason that there the witness was called to testify purely as an expert, and the opinion he gave as to the origin of the fire in question there was based solely on a hypothetical case, that is, upon a state of circumstances established by the testimony of others; whereas here, as pointed out by the decision on the former appeal, the witness arrived at the scene of the fire while it was in full progress, and his opinion as to the origin of the fire was based entirely upon his own observation of the conditions existing upon his arrival."

Respondents insist that the net result of the opinions in these two cases is that an expert who has been present at a fire may give his opinion as to its cause or origin but that expert evidence upon that subject may not be given in answer to hypothetical questions by one who was not present at the fire and therefore had no opportunity personally to observe it. Since appellant produced an expert who was not present at the fire the apparent inequity and unfairness of the rule as thus stated is pointed up in this case. Furthermore appellant states that an examination of the record in St. Paul Fire & Marine Ins. Co. v. Southern Pac. Co., supra, 30 Cal.App. 140, 157 P. 247, shows that the witness in that case was present at the fire and based his opinion on what he there observed, and that the case is therefore not subject to any such distinction as that attempted in the opinion on denial of rehearing in Gallichotte v. California Mut. Building & Loan Ass'n, supra, 23 Cal.App.2d 570, 74 P.2d 73, 535.

While the St. Paul Fire & Marine Ins. Co. case was probably correctly decided on its facts we believe that the rule of evidence therein announced is too broadly stated. An examination of the authorities cited by the court in support of its statement "that the better reasoned line of authorities holds that the question as to the origin of a fire is not ordinarily one of expert opinion" shows that no one of such authorities dealt with the subject of expert evidence. They were all cases in which the opinions of nonexperts who had been present and observed the fires were sought to be introduced.

[1, 2] The growth of the rule excluding opinion evidence and the development of the two well recognized exceptions to the rule are learnedly traced by Dean Wigmore in 7 Wigmore on Evidence, 3d Ed., pp. 1 to 29. The two instances in which the opinions of witnesses are permitted in evidence are: 1. The opinions of experts are admitted in matters which are not within the common experience of men so that the special knowledge of a person of skill and experience in the particular field may enable him to form an opinion, where men of common experience would not be able to do so. Code Civ.Proc. § 1870, subd. 9; 10 Cal.Jur., Evidence, sec. 216, pp. 957, 958; 7 Wigmore on Evidence, 3d Ed., sec. 1923, pp. 21, 22; Jones on Evidence, 3d Ed., sec. 367, pp. 553, 554; 1 Greenleaf on Evidence, 16th Ed., sec. 441 b, p. 550; 20 Am.Jur., Evidence, sec. 775, p. 647; 32 C.J.S., Evidence, § 444, page 73, § 520, page 217, § 523, page 221. 2. The opinions of nonexpert witnesses are admitted as a matter of practical necessity when the matters which they have observed are too complex or too subtle to enable them accurately to convey them to court or jury in any other manner. 10 Cal.Jur., Evidence, sec. 236, pp. 978–980; 7 Wigmore on Evidence, 3d Ed., sec. 1924. pp. 22, 23; Jones on Evidence, 3d Ed., sec. 360, p. 542 et seq.; 1 Greenleaf on Evidence, 16th Ed., sec. 441 b, p. 550; 20 Am.Jur., Evidence, sec. 769, p. 540; 32 C.J.S., Evidence, § 444, page 73, § 485, page 144.

[3, 4] For a nonexpert to be competent to give an opinion under the second exception he must be testifying about facts that he has personally observed; but the expert in any case proper for the reception of expert testimony may give his opinion, although he did not personally observe the facts, basing his opinion upon the facts testified to by other witnesses put to him in the form of hypothetical questions. 10 Cal.Jur., Evidence, sec. 222, p. 965. The ultimate question to be determined in every case in which expert testimony is tendered is whether the case is one outside of the common experience of men so that a person of training and experience by reason of his superior knowledge is better able to reach a conclusion from the facts. If the case is one for expert testimony this is so not because the expert has witnessed the facts, but because he is qualified by reason of his special knowledge to form an opinion on the facts while the ordinary juror is not. It is a confusion of the two exceptions to the rule excluding opinion evidence to make the reception of expert testimony dependent upon the fact that the expert has been a personal witness to the facts.

Cases can be mustered to support the proposition that expert evidence is admissible to prove the cause of a fire. See cases collected in the note in 131 A.L.R. p. 1124, col. 1. Cases can be assembled to support the contrary proposition. See cases collected in the same note at p. 1124, col. 2. Such an approach is mechanical rather than logical. The cause of some fires may be so simple as to fall within the common experience of any juror. If that is true the evidence of experts is unnecessary to assist the jury. To give a simple illustration any juror knows from his own experience that the application of a lighted match to dry grass will cause a fire. The cause of other fires may be so foreign to the common experience of the ordinary juror that he cannot know without the aid of expert testimony whether a fire might be expected to result or not. For example whether the combination of two chemical products would result in combustion. In the latter case only the evidence of experienced and trained chemists might enable the jury to arrive at the correct conclusion. The matter was well put by Owen, J., in Baltimore & O. R. Co. v. Schultz, 43 Ohio St. 270, 1 N. E. 324, at page 332, 54 Am.St.Rep. 805: "It must not be supposed that there is any rule of evidence concerning the opinions of witnesses which is peculiar to fences, highways, bridges, or steam-boats, or to any other special subjects of investigation. Where the facts concerning their condition cannot be made palpable to the jurors so that their means of forming opinions are practically equal to those of the witnesses, opinions of such witnesses may be received, accompanied by such facts supporting them as they may be able to place intelligently before the jury."

[5] Nor, may we add, should there be any rule of evidence concerning the opinions of witnesses which is peculiar to fire, flood or other catastrophe. The inquiry should not be is expert evidence admissible to prove the cause of fires generally, but rather is expert evidence admissible to prove the cause of this particular fire; and the answer to that question should depend on the answer to the further question: is the matter involved one which is not within the common experience of men so that the special knowledge of a person of skill and experience in the particular field may "enable him to draw an inference, where men of common experience, after all the facts proved, would be left in doubt." Vallejo N. R. R. Co. v. Reed Orchard Co., 169 Cal. 545, 571, 147 P. 238, 250.

[6] It is our conclusion that the question whether this fire originated in the hot-air ducts is a matter outside the ordinary experience of men and that expert testimony was properly admissible upon the subject. We therefore hold that it was not error to admit the opinion of the witness Cooper.

Appellant complains that Cooper was permitted to express his opinion based partly on hearsay which he gathered from persons not called as witnesses. It is true that during the laying of the foundation for his expert opinion the witness testified that he had conducted an investigation after the fire and that he had formed an opinion based partly upon what he had learned in that investigation; but before he gave his opinion he was admonished by the judge that his opinion must be based on his study and experience bringing them "to focus on the conditions that you found there and not on what somebody else told you or what somebody else may have said was their opinion about the fire." That the witness obeyed this admonition seems clear from the fact that after giving his opinion he testified that it was based on "the condition of the ducts and the fire at the time of my immediate arrival."

[7] It is further urged that in forming his opinion Cooper made certain unwarranted assumptions:

1. *That there was dust and lint in the ducts.* It is argued in this regard that the air leading to the furnace, which after being heated was forced through the ducts, was filtered through spun glass filters. There was evidence that the filters had a tendency to get clogged thus preventing the free flow of air through the heating system, and that in some of the dormitories (although there was no specific evidence as to Dormitory O) tenants had from time to time removed the filters entirely. There was further evidence that within sixty days after the fire, during the course of renovation, dust and lint were found in the hot-air ducts of other dormitories in the same group. It was a question for the jury whether dust and lint had accumulated in the hot-air ducts in Dormitory O.

[8] 2. *That the heat in the ducts had risen to 200 degrees.* It is argued that the furnace which supplied the heat through the ducts was controlled (a) by a thermostat in the lobby which was set at 72 degrees and locked, (b) by a thermostat on the furnace itself which would automatically shut off the furnace when the top of the furnace reached the temperature at which it was set; (c) by two dampers with fusible links which would automatically shut off the air flow if the temperature became excessive. As to the thermostat in the lobby there is testimony that at times the tenants opened it with a screwdriver and set it forward to the maximum of 82 or 83 degrees; and further that the temperature in the furnace and the ducts would be greatly in excess of that in the lobby. As to the thermostat on the furnace itself there is testimony that it could be set as high as 240 degrees. As to the dampers there is testimony that "some of them register 162, some 220." If the links on the dampers were set to fuse at 220 degrees and the thermostat on the furnace at 240 degrees a temperature of 200 degrees would operate neither. There is further testi-

mony that the furnace was fitted with a larger feed pipe than it was designed to use thus feeding it a greater amount of oil than it was intended to burn. There was also an automatic fire signal which sounded a horn when a temperature of 160 degrees was reached, but it was on the ceiling and would only sound when the temperature at the ceiling outside the ducts rose to that point. It is further pointed out that several witnesses testified that they noticed no unusual heat in their rooms before the fire. One witness however testified that his room was very hot so that he had to open his window. We cannot say that the jury could not find on the whole evidence that Cooper's assumption that the heat in the ducts reached 200 degrees was true.

[9] 3. *That there was an explosion.* Although some witnesses testified that they heard no explosion, one witness testified that he did and another testified to hearing a sound which awakened him: "Well, it seemed as if the roof was falling in in the hall." Cooper's conclusion was based on the appearance of the ducts when he first arrived at the fire and the jury on the evidence could have found this conclusion consistent with the facts proved.

[10, 11] Appellant produced an expert witness and offered by him to prove an opinion as to whether the fire could have originated in the ducts based on a hypothetical question from the facts testified to by the witnesses to the fire. The able trial judge feeling himself bound by St. Paul Fire & Marine Ins. Co. v. Southern Pac. Co., supra, 30 Cal.App. 140, 157 P. 247, and Gallichotte v. California Mut. Building & Loan Assn., supra, 23 Cal. App.2d 570, 74 P.2d 73, 535, refused to allow him to answer such a hypothetical question. This we believe was error. The error, however, was cured by this witness' subsequent testimony. Included in the proposed hypothetical question was "whether or not there was any flame or smoke coming out of the registers." Other witnesses testified that they saw no flame or smoke coming out of the registers which conducted the hot air from the ducts to their rooms, and this witness was permitted to give his opinion as an expert that if there had been an explosion in the ducts: "The fire would take the lines of least resistance, which is out the openings rather than through the wall of the duct. Therefore, there would be fire and flame or flame and smoke blow out through the registers would be the first evidence of such an explosion of fire." "The refusal to permit an expert witness to answer a hypothetical question is harmless error where the witness, in reply to questions subsequently asked, is permitted to express his opinion fully as to the matter which his reply to the hypothesis would have covered." 10 Cal.Jur. 965, 966, citing Kline v. Santa Barbara Consol. Ry. Co., 150 Cal. 741, 90 P. 125.

[12] Complaint is made that respondents were permitted to introduce evidence of alterations made in the hot-air ducts of other similar dormitories after the fire. We do not so read the record. The fire occurred on January 10, 1944. Commencing on February 23, 1944 alterations were made in the hot-air ducts in other dormitories in the same project. To establish that lint and dust were present in the other ducts when they were opened, and only as a foundation for such proof, the fact of alteration was established, but without in any way showing the nature or character of the alterations. The dormitories being identical in construction and general operation proof of the presence of dust and lint in the ducts of other dormitories within such a short space of time after the fire was admissible as tending to prove a similar condition in the ducts of Dormitory O. "Since the observed uniformity of nature raises an inference that like causes will produce like results * * * an issue as to the existence or occurrence of a particular fact, condition, or event, may be proved by evidence as to the existence or occurrence of similar facts, conditions, or events, under the same, or substantially similar, circumstances." 32 C.J.S., Evidence, § 584, pages 438, 439; 20 Am.Jur., Evidence, sec. 308, p. 286; 2 Wigmore on Evidence, 3d Ed., sec. 438(c), p. 419; Bone v. Hayes, 154 Cal. 759, 99 P. 172; Dennis v. Crocker-Huffman Land & Water Co., 6 Cal.App. 58, 65, 66, 91 P. 425; Moody v. Peirano, 4 Cal.App. 411, 415–421, 88 P. 380; Yick Sung v. Herman, 2 Cal.App.

633, 636, 637, 83 P. 1089, 1091. The court carefully limited the proof to this narrow issue and admonished the jury that they were not concerned with the fact of whether alterations were made in other dormitories. Appellant asked for no further instruction on the subject. We find no error in the action of the court in this regard.

[13] Appellant offered to prove that an attempt had been made to burn another housing unit outside of this particular project at a time before this fire. We find no error in the exclusion of evidence of a single isolated attempt at sabotage in this other unit.

[14, 15] Appellant operated this dormitory under a written lease from Federal Public Housing Authority. No money was available under the terms of this lease for alterations or extraordinary repairs unless included in a budget estimate approved by the lessor. Critical materials, such as metals, were also hard to procure during this period. Appellant argues that its failure to remodel the ducts in Dormitory O under these circumstances cannot be held to be negligent. However the project manager had been repeatedly warned of the fire hazard created by the ducts and in the year and a half that appellant had operated these dormitories no item was included in the budget for remodeling the ducts nor any effort made to secure the necessary materials. The question of negligence in this regard was one for the jury. The fact that the dormitories were built by a federal agency would not excuse appellant from attempting to remedy a dangerous fire hazard in the dormitories after it was operating them, if one existed.

[16] Finally appellant contends that there was no evidence that James Shepard, one of the victims burned to death in the fire, was lawfully on the premises as guest or tenant. The evidence shows that in December James Shepard and his brother Fred took a vacation trip to their home and returned to Richmond a few days before the fire. Prior to their vacation both had been tenants in Dormitory O. On their return Fred was readmitted as a tenant. James' status depends on the following testimony: At the coronor's inquest following the fire, the witness Caudle, in charge of the dormitory project, gave the following testimony concerning James: "A. Neal McDowell and Fred Shepard of 043 apparently were never seen by anyone after the fire. They were known to be in the room by other tenants and they were never found outside of the building. Just about three days before the fire, James Shepard came from his home in Little Rock, Arkansas, and asked for a room. He wanted to be with his brother and the girl told him we were full up and didn't have a room and he said 'Well, would it be all right to stay with my brother?' and she said 'Yes'."

On the trial Caudle was examined by respondents under Code Civ.Proc. § 2055. He was asked: "Q. Now isn't it a fact that you also know that James Shepard was in the building at the time of the fire and that he was a tenant there, and I will show you your testimony on Page 15 (referring to the transcript of the coroner's inquest) where you refer to James Shepard."

The witness replied:

"A. Oh, yes, sir, that's the story. If you want to read that I can."

The testimony above quoted from the coroner's inquest was then read and the following occurred:

"Q. That is what you were referring to, is that right? A. Yes, sir.

"Mr. Dana (attorney for appellant): Just a moment. The last portion of the answer read by counsel 'They were known to be in the room by other tenants' is hearsay and not known by this defendant, and we will ask that it be stricken from the record.

"The Court: It will be stricken from the record and the jurors will disregard it."

[17] It is now claimed that the evidence concerning James Shepard was not substantive evidence, but only impeachment, and therefore cannot stand as proof of the fact that he was permitted by the woman in charge of the dormitory to stay temporarily with his brother. The record contradicts this construction. It is clear

that Caudle reaffirmed his testimony given before the coroner's jury and the motion of appellant's counsel to strike another portion of the testimony indicates that that was his understanding at the time. It is true that much later in the trial Caudle testified that his testimony that James had received permission to stay temporarily with his brother was hearsay, but when this developed no motion to strike the testimony above related was made, and hearsay evidence admitted without objection is sufficient to support a finding. Powers v. Board of Public Works, 216 Cal. 546, 552, 15 P.2d 156.

Caudle testified later in the trial that when he learned that James was in the dormitory he ordered him to leave. He gave more than one version of this conversation. One version was: "I didn't countermand those instructions at the office, but I told him 'You understand that we told you you couldn't stay in the dormitory no longer'." Whether, if this version of the transaction was accepted by the jury, it amounted to a refusal to allow Shepard to remain temporarily under the permission given by the woman in charge, would be a question of fact for the jury's determination. The jury was also entitled to consider that Caudle did not mention this conversation with James Shepard in his testimony before the coroner's jury. We find no error in the court's instruction to the jury that it was for them to determine whether James was in the building at the time of the fire as "a tenant or guest."

The cases were fairly tried and we find no reversible error in the record.

The judgments are affirmed.

NOURSE, P. J., and GOODELL, J., concur.

ORLOFF v. LOS ANGELES TURF CLUB, Inc., et al.

L. A. 19726.

Supreme Court of California, in Bank.

May 16, 1947.

Rehearing Denied June 12, 1947.

1. Statutes 231, 239

The rule that statutes in derogation of the common law will be strictly construed does not prevail in California as to the provisions of the four original codes. Civ.Code, § 4.

2. Injunction ⚷94

In determining whether the statutory remedy of $100 and compensatory damages for violation of statute prohibiting proprietor of places of public amusement from refusing admission to person over 21 years of age who tenders admission price and demands admission is exclusive or whether injunctive relief could be granted, the adequacy of the remedy is an important factor. Civ.Code, §§ 53, 54.

3. Injunction ⚷94
Mandamus ⚷3(8)

The statute authorizing recovery of $100 plus compensatory damages by person refused admission to places of public amusement contrary to statute prohibiting proprietors of places of public amusement from refusing admission to person over 21 years of age who tenders admission price and demands admission does not exclude all other remedies for violation of the conferred right, and preventative relief such as injunction or mandamus may be granted. Civ.Code, §§ 53, 54; Code Civ.Proc. § 526, subds. 2, 4, 5.

4. Injunction ⚷94

Plaintiff who had been ejected from a horse racing course to which the public was invited in violation of statute prohibiting proprietor of places of public amusement from refusing admission to person over 21 years of age who tenders admission price and demands admission, was entitled to injunctive relief against ejection notwithstanding the right was a personal right or that the statutory remedy specifically provided authorized recovery of damages only. Civ.Code, §§ 53, 54; Code Civ. Proc. § 526, subds. 2, 4, 5.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Morris Orloff against the Los Angeles Turf Club, Inc., and others, to enjoin ejection of plaintiff from race track premises. From a judgment of dismissal, plaintiff appeals.

Reversed.

Prior opinion, 172 P.2d 355.

William Katz and David S. Smith, both of Los Angeles, for appellants.

Victor Ford Collins, of Los Angeles, for respondents.

CARTER, Justice.

Plaintiff commenced this action for injunctive relief, alleging in his complaint that defendant Los Angeles Turf Club, a corporation, is engaged in operating a horse racing course and enterprize and a gambling establishment in connection therewith, and invites the public to attend. In January, 1946, plaintiff, an adult, purchased a ticket for admission to the defendant's place of business and was admitted thereto. Thereafter plaintiff was ejected from the establishment by defendant and its employees. In February he was again admitted thereto and was again ejected. The ousting of plaintiff was without cause, he being of a good moral character and having conducted himself properly at all times. At the time of the ejections above mentioned "defendants and each of them unlawfully ordered plaintiff not to return to said race course thereafter, and unlawfully threatened to thereafter refuse to admit plaintiff thereto, or if admitted to forcibly remove and eject plaintiff therefrom." By reason of defendant's conduct, plaintiff was humiliated and embarrassed and sustained mental anguish.

Defendant's demurrer was sustained with leave to plaintiff to amend his complaint to claim only damages. Upon his refusal so to do, a judgment dismissing his action was entered and he appeals therefrom.

Plaintiff's action is based upon the so-called civil rights statutes. Generally it is provided that all citizens are entitled to full and equal accommodations, advantages, facilities, and privileges of places of amusement and accommodations subject to conditions and limitations established by law applicable to all alike. Civil Code, sec. 51. And whoever denies the privileges accorded by the foregoing, except for reasons applicable alike to every race and color, or discriminates on the latter ground, is liable in damages for not less than $100, which may be recovered in an action at law. Civil Code, sec. 52. But in addition to those provisions (and in view of the results reached herein, we do not decide whether or not they are available in the case at bar), there are specific statutory mandates which are here applicable. "It is unlawful for any corporation, person, or association, or the proprietor, lessee, or the agents of either, of any opera-house, theater, melodeon, museum, circus, caravan, *race-course,* fair or other place of public amusement or entertainment, to refuse admittance to any person over the age of twenty-one years, who presents a ticket of admission acquired by purchase, or who tenders the price thereof for such ticket, and who demands admission to such place. Any person under the influence of liquor, or who is guilty of boisterous conduct, or any person of lewd or immoral character, may be excluded from any such place of amusement." [Emphasis added.] Civil Code, sec. 53. The following section reads: "Any person who is refused admission to any place of amusement contrary to the provisions of the last preceding section, is entitled to recover from the proprietor, lessee, or their agents, or from any such person, corporation, or association, or the directors thereof, his actual damages, and one hundred dollars in addition thereto." Civil Code, sec. 54. And it is that section which is invoked by defendant as establishing the exclusive remedy for the violation of section 53. It is argued that the right established by section 53 was unknown at common law (a question we do not decide); that it is therefore in derogation of the common law, and hence must be strictly construed to the end that the remedy provided by section 54 is exclusive. Thus preventative or specific relief such as injunction or mandamus is not available in the instant case inasmuch as $100 and compensatory damages are the only remedies available.

[1] Defendant relies upon the rule of statutory construction, that where a new right,—one not existing at common law, is created by statute and a statutory remedy for the infringement thereof is provided, such remedy is exclusive of all others. See Weber v. Pinyan, 9 Cal.2d 226, 70 P.2d 183, 112 A.L.R. 407; Walker v. Chanslor, 153 Cal. 118, 127, 94 P. 606, 17 L.R.A., N.S., 455, 126 Am.St.Rep. 61; Russell v. Pacific Railway Co., 113 Cal. 258, 45 P. 323, 34 L.R.A. 747; Lynch v. Butte County, 102 Cal. 446, 36 P. 806; County of Monterey v. Abbott, 77 Cal. 541, 18 P. 113, 20 P. 73; Reed v. Omnibus R. R. Co., 33 Cal. 212; Latham v. Blake, 77 Cal. 646, 655, 18 P. 150, 20 P. 417; State of California v. Poulterer, 16 Cal. 514; Roberts v. Landecker, 9 Cal. 262; Ward v. Severance, 7 Cal. 126; People v. Craycroft, 2 Cal. 243, 56 Am.Dec. 331; Wilkes v. City and County of San Francisco, 44 Cal.App.2d 393, 397, 112 P.2d 759; Cook v. Superior Court, 12 Cal.App.2d 608, 55 P.2d 1227; County of Alameda v. Freitas, 8 Cal.App.2d 653, 48 P.2d 165; Estate of Troy, 1 Cal.App.2d 732, 37 P.2d 471; Estate of Ward, 127 Cal.App. 347, 354, 15 P.2d 901; 1 Cal.Jur. 381; 59 Cal.Jur. 1110, 1129; 1 C.J.S., Actions, § 6; 50 Am.Jur. Statutes, sec. 596; 1 Am.Jur. Statutes, sec. 2. We are not concerned in the instant case (as is true in many of the cases above cited) with a situation where the statute conferring the right imposes conditions precedent to be met in order to protect the right, or establishes specialized and detailed procedure for enforcing it, or special procedure for enforcing a penalty or forfeiture provided for therein. The statute (sec. 54) merely provides that $100 as well as compensatory damages may be recovered. These are not conditions precedent nor do they constitute any form of unusual procedure required to obtain relief. They certainly do not expressly exclude the availability of preventative—specific—injunctive relief. The only basis for holding that such an exclusion was intended, would be an assumption by this court that other remedies are excluded, or the drawing of an inference to that effect by reason of some rule of statutory construction. The rule of statutory interpretation here invoked is a corollary of, a consequence flowing from, or a specific appli-

cation of, the general common-law rule of statutory construction that statutes in derogation of the common law will be strictly construed. Thompson v. Thompson, 218 U.S. 611, 31 S.Ct. 111, 54 L.Ed. 1180, 30 L.R.A.,N.S., 1153, 21 Ann.Cas. 921; Crawford, Statutory Constructions, sec. 265; Sutherland Statutory Constructions, 3d Ed., Horack, sec. 5812. But that rule does not prevail in this state, at least, as to the provisions of the four original codes. The statute in the instant case is in the Civil Code and it is provided therein: "The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. The code establishes the law of this state respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to *effect its objects and to promote justice*." [Emphasis added.] Civil Code, sec. 4.

[2] A factor of importance in interpreting the statute and in applying the above-mentioned rule of statutory construction is the adequacy of the remedy provided by the statute. It has been intimated in regard to the rule of statutory interpretation here discussed, that it should not apply when the remedy provided by statute is inadequate. See Lynch v. Butte County, 102 Cal. 446, 36 P. 806; Steves v. Robie, 139 Me. 359, 31 A.2d 797; Ohio Valley Fire & Marine Ins. Co. v. Wash, 205 Ky. 819, 266 S.W. 921; Grimes v. Central Life Ins. Co., 172 Ky. 18, 188 S.W. 901; Hickman v. City of Kansas, 120 Mo. 110, 25 S.W. 225, 226, 23 L.R.A. 658, 41 Am.St.Rep. 684. A recovery of compensatory damages and $100 is plainly inadequate relief in a case of this character. See, discussion, 29 Harv.L.Rev. 93; 29 Harv.L.Rev. 640; 39 Ill.L.Rev. 144; 30 Cal.L.Rev. 563, 567. Compensable damages would be extremely difficult if not impossible to measure and prove. The sum of $100 is a relatively insignificant recovery when we consider that a positive and unequivocal right has been established and violated. It has been held (although dealing with exclusions from public places where there are discrimination on the basis of race or color) that preventative—specific relief is available where a public agency operates the public place. Stone v. Board of Directors of City of Pasadena, 47 Cal. App.2d 749, 118 P.2d 866, in which mandamus was allowed. Constitutional basis may exist for preventing such discrimination but that is not a factor of sufficient force to deny similar relief where such discrimination does not exist. The right of admission to the places designated is clearly and positively stated (Civil Code, sec. 53) and the inadequacy of the remedy provided in section 54 is manifest in both cases. If the objects of the Civil Code are to be effectuated, and justice promoted as required by section 4 thereof, certainly specific relief should be available where the object is to prevent the exclusion of persons from certain places and there are no valid reasons why such relief should be denied.

Reliance is placed upon Woolcott v. Shubert, 169 App.Div. 194, 154 N.Y.S. 643, and White v. Pasfield, 212 Ill.App. 73, holding that a similar statutory remedy provided for in civil rights statutes is exclusive. Those cases failed to take into consideration the factors herein discussed which we believe are of controlling significance and should therefore not be followed.

It is urged that the allowance of the recovery of $100 in addition to actual damages is a penalty (a question we need not decide) and that therefore it is the exclusive remedy. That is merely another application of the rule of construction heretofore discussed. The statute does not purport to fix a certain procedure to be followed to recover a penalty. In Greenberg v. Western Turf Ass'n., 140 Cal. 357, 73 P. 1050, the court dealt with a statute (Stats. 1883, p. 220), the forerunner of the Civil Code sections here pertinent, the provisions of which with respect to remedies were identical. In that case plaintiff claimed that he could recover punitive damages as well as actual damages and the $100 penalty provided in the statute. This court agreed, stating at page 363 of 140 Cal., at page 1051 of 73 P.: "The court instructed the jury in accordance with section 3294 of the Civil Code, to the effect that if they found the defendant had been guilty of oppression, fraud, or malice, actual or presumed, they might, in addition to actual damages, give damages for the sake of example, and by way of punishing the defendant. It is contended that as the statute [like section 54 of the Civil Code] itself provides that the plaintiff for his wrongful ejectment, may recover $100 in addition to his actual damage, this was error, *in that the law itself* had fixed the amount, and thus liquidated the punitive damages which might be permitted, and that the instruction thus authorized the jury *to give additional punitive damages in excess of those permitted by the law.* We think, however, that this objection is not well taken. The statute, it is true, allows to the plaintiff $100 in addition to his actual damage. This sum is unquestionably a penalty which the law imposes, and which it directs shall be paid to the complaining party. But it will be noted that it is a penalty imposed in any and in every case, whether the rejection or refusal of admission was or was not done under circumstances of oppression or violence. The courteous refusal as much exposed a defendant to this penalty of the law as would a brutal expulsion. Moreover, while the law has seen fit to declare that it shall be paid to the complaining party, it might as well have directed that it be paid into the common school fund. The imposition is in its nature penal, having regard only to the fact that the law has been violated and its majesty outraged. It is a matter aside and apart from any consideration of the plaintiff's feelings. *It does not, therefore, exclude the operation of section 3294 of the Civil Code, but that section runs current with it,* and notwithstanding the imposition of the $100 penalty, in any proper case a plaintiff may recover damages given by way of example for the personal indignity and wrong which have been put upon him." [Emphasis added.] Likewise we see no valid reason why equitable relief is excluded by the provisions of the existing statute.

[3] We conclude, therefore, that the statutes here involved do not purport to exclude all other remedies for the violation of the right conferred. There remain, however, questions of the propriety of injunctive relief in the case at bar, a matter hinging upon the general principles circumscribing relief in equity.

It has been said in many cases, following without particular analysis or consideration of the justice, expediency, or basis, if any, of the rule, a casual remark of Lord Eldon, in Gee v. Pritchard, 2 Swanst. 402, 36 Eng. Rep. 670, that equity only protects property rights not personal rights. See Kerr, Injunctions, 2d Ed. 1880, secs. 1, 2, 13; Bisphan, Principles of Equity, 5th Ed. 1893, 584, n. 2; 1 High, Injunctions, 4th Ed. 1905, 34; Ex parte Badger, 286 Mo. 139, 226 S.W. 936, 14 A.L.R. 286, 295; Itzkovitch v. Whitaker, 115 La. 479, 39 So. 499, 1 L.R.A., N.S., 1147, 112 Am.St.Rep. 272; Chappell v. Stewart, 82 Md. 323, 33 A. 542, 37 L.R.A. 783, 51 Am.St.Rep. 476; 34 Harv.L.Rev. 388, 407; 29 Harv.L.Rev. 640; 33 Yale Law Journal 115. But it has also been stated that:

"It is clear that equity protects many rights of a personal character whenever they are rights of substance, often classifying them as property rights in order to bring them within the earlier cases holding that equity will protect property rights only. Business rights of all kinds discussed in the preceding chapter are not property in the legal sense. Nevertheless they are valuable rights of economic value, and the reasons for protecting them are identical with the reasons for protecting property rights in lands or chattels. In the usual cases of torts arising from violations of purely personal rights the reasons for denying relief in equity are clear. It is obvious that the injunction is not needed to restrain threatened assaults, disturbances of the peace, and other petty interferences with the person. The criminal law and the police afford all the relief required in such cases. It is clear that injunctions in negligence cases would be absurd.

[4] "We have seen that equitable relief against torts involving injury to property is comparatively a modern development, and protection of rights of substance in business is a development of the immediate past which is still in full motion. After centuries of inaction equity has slowly but steadily extended specific relief in tort cases, at first in protecting strictly property rights, later extending this protection to business rights as rights of substance though not constituting property in the strict sense. It is not surprising that the principle should have been laid down re-

peatedly by the courts that equity will never interfere to protect purely personal rights. Where relief at law is just as inadequate in cases of personal torts as is such relief in cases of torts to property, there is a strong tendency in the later cases to extend equitable relief to those cases just as such relief has been extended to protect property rights and rights of substance." Walsh, Equity, p. 259. See, also, 29 Harv.L.Rev. 640; 39 Ill.L.Rev. 144; 28 Am.Jur. Injunctions, sec. 71; 17 Cal.L.Rev. 681; 33 Yale L. Journal 115; 34 Harv.L.Rev. 388, 407; 30 C.J.S., Equity, §§ 51, 58; McClintock, Equity, sec. 152 et seq.; Ex parte Badger, 286 Mo. 139, 226 S.W. 936, 14 A.L.R. 286, 295; Rest., Torts, sec. 937. And there are many instances in which equity has protected purely personal rights (see above references) though in some the courts have reached that result by finding fictional property rights—declaring things property rights which were in truth not of that character. See references, supra. On principle it is difficult to find any sound reason for the enunciation of a broad principle that equity will not protect personal rights. There may be situations involving personal rights in which equity will not act. Such situations may arise where the legal remedy is adequate or they may involve a prior restraint on freedom of speech or press (see Dailey v. Superior Court, 112 Cal. 94, 44 P. 458, 32 L.R.A. 273, 53 Am.St.Rep. 160; Magill Bros. v. Building Service Employees' International Union, 20 Cal.2d 506, 127 P.2d 542) or where there is no established legal right to be protected or some other recognized ground for refusing an equitable remedy is present. The issue should not in logic or justice turn upon the sole proposition that a personal rather than a property right is involved. To so reason, is to place property rights in a more favorable position than personal rights, a doctrine wholly at odds with the fundamental principles of democracy. These concepts of the sanctity of personal rights are specifically protected by the Constitution, both state and federal, and the courts have properly given them a place of high dignity and worth of especial protection. See Carter v. Bradshaw, Tex.Civ.App., 138 S.W.2d 187; Hawks v. Yancey, Tex.Civ.App., 265 S.W. 233; Foley v. Ham, 102 Kan. 66, 169 P. 183, L.R.A.1918C, 204; Thompson v. Smith, 155 Va. 367, 154 S.E. 579, 71 A.L.R. 604; Stark v. Hamilton, 149 Ga. 227, 99 S.E. 861, 5 A.L.R. 1041.

In California it has been said generally that: "It is doubtless true that jurisdiction in equity is primarily concerned with the protection of civil property rights in those cases wherein the law has failed to provide an adequate remedy. But it is not and never has been strictly limited to this field." In re Wood, 194 Cal. 49, 54, 227 P. 908, 910. And the statutory provision on injunctions states: "An injunction may be granted in the following cases: * * * 2. When it appears by the complaint or affidavits that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury, *to a party* to the action; * * * 4. When pecuniary compensation would not afford adequate relief; 5. *Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief.*" [Emphasis added.] Code Civ. Proc., sec. 526, which rather than limiting injunctive relief to property rights indicates that personal rights as well may be protected.

The positive declaration of the personal right and the importance of its preservation together with the inadequacy of the remedy by way of damages and the $100 penalty furnish sufficient reason for injunctive relief.

The judgment is reversed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

Rehearing denied; EDMONDS, J., dissenting.

30 Cal.2d 20

Ex parte WOLFSON.

Cr. 4757.

Supreme Court of California, in Bank.
April 29, 1947.

1. Criminal law ⚷1202(1)

A prior conviction under law of a sister state can support a California adjudication of habitual criminality only if minimum adjudicated elements of foreign offense meet minimum elements, as defined by California statute in effect on date of commission of foreign crime, of a California offense which was enumerated in habitual criminal statute on date of commission of the California crime. Pen. Code, § 668; § 644, as amended by St. 1941, p. 1082.

2. Evidence ⚷35
Habeas corpus ⚷92(1)

Where an adjudication of habitual criminality is attacked through application for habeas corpus, Supreme Court will look to judicially noticed law of sister state and to documentary proof of foreign conviction to determine what were the adjudicated elements of the foreign offense. Pen.Code, § 668; § 644, as amended by St. 1941, p. 1082, Code Civ.Proc. § 1875, subd. 3.

3. Criminal law ⚷1202(1)

Findings that accused was convicted merely of larceny in Pennsylvania in 1913 and in 1930 were not findings that he suffered prior convictions of California offense denominated "grand theft" within habitual criminal statute, where elements of Pennsylvania offense were those of common-law offense of larceny. Act March 31, 1860, P.L. 382, § 103, 18 P.S.Pa. § 4807 note; Pen.Code, § 668; § 644, as amended by St.1941, p. 1082; § 487, as amended by St.1907, p. 113, and St.1929, p. 365.

4. Criminal law ⚷1202(1)

Where accused in Pennsylvania in 1913 pleaded guilty to theft of postage stamps and money of value of $9.18 and in 1930 pleaded guilty to theft of clothing of value of $38.50, the adjudicated elements of neither the 1913 nor the 1930 Pennsylvania larceny met minimum elements of California offense of grand theft, in determining application of habitual criminal statute. Act March 31, 1860, P.L. 382, § 103, 18 P.S.Pa. § 4807 note; Pen. Code, § 668; § 644, as amended by St.1941, p. 1082; § 487, as amended by St.1907, p. 113, and St.1929, p. 365.

5. Criminal law ⚷1202(3)

Where accused denied 1913 Pennsylvania conviction and fact of such conviction was proved to California trial court by certified copy of Pennsylvania conviction in case No. 929 and it was not proved to or determined by California trial court that accused had suffered a Pennsylvania conviction in case No. 930, the latter conviction was not available to support adjudication of habitual criminality. Pen. Code, § 668; § 644, as amended by St.1941, p. 1082.

6. Criminal law ⚷1202(1)

Where accused had been convicted in Pennsylvania in 1913 of entering building with intent to steal personal property and he was sentenced to imprisonment for two years, the adjudicated elements of offense were identical with those of the then California felony of second degree burglary, and therefore the 1913 Pennsylvania conviction was competent to support determination of habitual criminality. Pen. Code, § 459; §§ 460, 461, as amended by Code Amends. 1875–76, p. 112; § 644, as amended by St.1941, p. 1082.

7. Criminal law ⚷1202(1)

Finding that accused served term for Pennsylvania offense in a penal institution was insufficient to bring the Pennsylvania conviction within the habitual criminal statute. Pen.Code, § 668; § 644, as amended by St.1941, p. 1082.

8. Criminal law ⚷1202(1)

The phrase "penal institution", as used in statute dealing with repeated offenders, refers to a county jail as well as a state prison or federal penitentiary. Pen.Code, §§ 490, 666; § 644, as amended by St.1941, p. 1082.

See Words and Phrases, Permanent Edition, for all other definitions of "Penal Institution".

9. Criminal law 🔑1202(3)

The determination of service of a term of imprisonment, a necessary part of determination of habitual criminality, does not involve validity or finality of a judgment of conviction, as such, and matters outside California judgment roll may be referred to in order to show actual status of accused under habitual criminal statute. Pen.Code, § 668; § 644, as amended by St.1941, p. 1082.

10. Criminal law 🔑1202(1)

Where accused was convicted in Pennsylvania of entering building with intent to steal personal property and was sentenced to undergo imprisonment for term of two years, service of sentence in Philadelphia county prison satisfied requirement of habitual criminal statute. Act April 22, 1863, P.L. 531, § 2, 18 P.S.Pa. § 4901 note; 19 P.S.Pa. § 1021; 61 P.S.Pa. §§ 1 et seq., 636, 644; Pen.Code, § 668; § 644, as amended by St.1941, p. 1082.

11. Criminal law 🔑878(4)

Under Pennsylvania statute, a defendant cannot properly be convicted of both receiving stolen property and larceny of same property in same transaction, but judgments based on such dual conviction are erroneous and not void. 19 P.S.Pa. § 411.

12. Habeas corpus 🔑22(1)

In habeas corpus proceeding attacking adjudication that petitioner was an habitual criminal, petitioner could not go behind Pennsylvania judgment rendered on plea of guilty and show that Pennsylvania charges of larceny and of receiving stolen goods were based on one criminal act of petitioner and that such act amounted to larceny exclusively. 19 P.S.Pa. § 411; Pen.Code, § 668; § 644, as amended by St. 1941, p. 1082.

13. Criminal law 🔑1202(1)

Where jurisdiction of Pennsylvania court which rendered judgment relied on to support determination of habitual criminality was not questioned, the judgment was entitled to full faith and credit. 19 P.S.Pa. § 411; Pen.Code, § 668; § 644, as amended by St.1941, p. 1082.

14. Habeas corpus 🔑92(1)

Where petitioner had pleaded guilty to Pennsylvania indictment charging larceny of described clothing of value of $38.50 and of feloniously receiving the same goods knowing them to have been stolen, in habeas corpus proceeding to determine validity of adjudication of habitual criminality, court could not assume that petitioner was adjudged guilty of the least offense charged in Pennsylvania indictment, but on face of indictment they were distinct offenses and petitioner could have been guilty of both. Act April 23, 1909, P.L. 159, § 1, 18 P.S.Pa. § 4817 note; Pen. Code, § 668; § 644, as amended by St. 1941, p. 1082.

15. Criminal law 🔑27

A California crime which may be punished by imprisonment in state prison, although statute confers a discretion on court to impose a mere county jail sentence, is deemed to be a felony, unless court actually exercises that discretion by imposing only a fine or jail sentence.

16. Criminal law 🔑1202(1)

Where 1930 Pennsylvania crime of receiving stolen goods was denominated a felony regardless of punishment imposed, 1930 Pennsylvania conviction was available to support a California determination of habitual criminality, although, in 1930, punishment prescribed by a judgment of conviction of receiving stolen goods fixed the character of California offense as felony or misdemeanor. Act March 31, 1860, P.L. 382, § 103, 18 P.S.Pa. § 4807 note; Act April 23, 1909, P.L. 159, § 1, 18 P.S. Pa. § 4817 note; Pen.Code, §§ 17, 496, 668, 3048.5; § 644, as amended by St.1941, p. 1082.

17. Criminal law 🔑1211

In habeas corpus proceeding, where petitioner was a person properly determined to be an habitual criminal under statute as it read when he committed the primary offense but he was a person previously determined to be an habitual criminal who could not be determined to be an habitual criminal under present statute, he would be eligible for release on parole, after he had served minimum term of 7 calendar years. Pen.Code, §§ 668, 3048.5; § 644, as amended by St.1941, p. 1082.

Habeas corpus proceeding by Jacob Wolfson to secure release from custody.

Writ discharged, and petitioner remanded to custody.

John R. Golden, of San Francisco, for petitioner.

Robert W. Kenny and Fred N. Howser, Attys. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

SCHAUER, Justice.

By application for relief through the writ of habeas corpus petitioner attacks the adjudication that he is an habitual criminal, punishable under section 644 and related sections of the Penal Code. We have concluded that petitioner is an habitual criminal twice previously convicted and "shall be deemed to be imprisoned for life and shall be eligible for release on parole after he shall have served a minimum term of seven calendar years." (Pen.Code, § 3048.5, ad. Stats.1945, ch. 934, § 4.)

It appears that petitioner was charged with the primary offense of grand theft, allegedly committed on or about August 3, 1943, and with three prior convictions of felony, as follows: "Entering and Larceny" in Pennsylvania in 1913, for which he allegedly served a term of imprisonment "in a penal institution"; "Larceny and Receiving Stolen Goods" in Pennsylvania in 1930, for which he allegedly served a term "in the State Prison"; "Forgery" in New Jersey in 1923, for which he allegedly served a term "in the State Prison." Petitioner pleaded guilty to the primary crime, denied the 1913 prior conviction and admitted the 1930 and 1923 prior convictions as charged. The trial court found that petitioner had suffered the 1913 prior conviction. It rendered its judgment of conviction of the primary offense, recited the three prior convictions suffered by petitioner, and declared that petitioner "is adjudicated to be an habitual criminal." It is such determination of status that petitioner attacks.

Respondent concedes and (it appears from the transcript of the proceedings at time of sentence) the trial court recognized that the prior conviction of forgery (New Jersey, 1923) could not constitute a part of the basis of an adjudication of habitual criminality because when petitioner committed the primary offense (August 3, 1943) the applicable California statute (Pen.Code, § 644, as am. Stats.1941, ch. 106, § 10) did not so provide. Petitioner contends and respondent denies that the 1913 and 1930 Pennsylvania convictions do not conform to the requirements of section 644 of our Penal Code and that petitioner, therefore, is not subject to punishment as an habitual criminal twice previously convicted. These conflicting contentions raise the issues which we must resolve.

The pertinent provision of section 644 of the Penal Code (as am. Stats.1941, ch. 106, § 10) is that "(a) Every person convicted in this State of any felony who shall have been previously twice convicted upon charges separately brought and tried, and who shall have served separate terms therefor in any State prison and/or Federal penitentiary, either in this State or elsewhere, of the crime of * * * burglary, * * * grand theft, * * * feloniously receiving stolen goods, * * * shall be adjudged an habitual criminal and shall be punished by imprisonment in the State prison for life." Section 668 (Stats.1927, p. 1065) provides (now, as in 1943) that "Every person who has been convicted in any other state, government, or country, of an offense which, if committed within this state, would be punishable by the laws of this state by imprisonment in the state prison, is punishable for any subsequent crime committed within this state in the manner prescribed in sections 644, 666 and 667, and to the same extent as if such prior conviction had taken place in a court of this state."

[1] A prior conviction under the law of a sister state can support a California adjudication of habitual criminality only if the minimum adjudicated elements of the foreign offense meet the minimum elements (as defined by the California statute in effect on the date of the commission of the foreign crime) of a California offense which was enumerated in section 644 on the date of the commission of the primary (Cali-

fornia) crime. (In re McVickers (1946), 29 Cal.2d 264, 278, 176 P.2d 40; In re Seeley (1946), 29 Cal.2d 294, 299, 176 P.2d 24; In re Harincar (1946), 29 Cal.2d 403, 404, 176 P.2d 58; earlier California cases are collected in 82 A.L.R. 357; 116 A.L.R. 216-217, 218; 132 A.L.R. 97, 99.)

[2] Where an adjudication of habitual criminality is attacked through application for habeas corpus it is now settled that this court will look to the judicially noticed law of the sister state[1] and to documentary proof of the foreign conviction (authenticated copies of the foreign prison record, commitment, judgment and indictment) to determine what were the adjudicated elements of the foreign offense. (In re McVickers (1946), supra, 29 Cal.2d pages 279, 280, 176 P.2d 40; In re Seeley (1946), supra, 29 Cal.2d page 299, 176 P.2d 24; In re Harincar (1946), supra, 29 Cal.2d page 406, 176 P.2d 58.)

[3] The findings that petitioner was convicted merely of "Larceny" in Pennsylvania in 1913 and in 1930 are not findings that he suffered prior convictions of the California offense denominated "grand theft" and enumerated in section 644 of our Penal Code. "Larceny" in Pennsylvania at the times here mentioned (1913 and 1930) was not defined, but only made punishable, by statute (1860, Mar. 31, P.L. 382, § 103; 18 Purdon's Pa.Stats., § 4807, Historical Note); therefore, the elements of the offense were those of the common law offense of larceny, a crime which was committed when personal property of any value was stolen (2 Wharton's Crim.Law, 12th ed., §§ 1096, 1097, 1192; Com. v. Doran (1941), 145 Pa.Super. 173, 174, 20 A.2d 815). Thus a finding that petitioner was convicted of "Larceny" in Pennsylvania is only a finding that he was convicted of stealing property of no particular value. (In re McVickers (1946), supra, pages 277, 278 of 29 Cal.2d 176 P.2d 40; In re Seeley (1946), supra, page 301 of 29 Cal.2d, 176 P.2d 24.) But under the California statute in effect in 1913, to constitute the offense one within the purview of section 644, the property stolen (unless it was of certain kinds not here involved) must have been of a value exceeding $50. (Pen.Code, § 487, as am. Stats.1907, p. 113; In re Harincar (1946), supra, page 407 of 29 Cal.2d, 176 P.2d 58.) And under the California statute in effect in 1930, "grand theft" was committed only when property of a value exceeding $200 (or property of certain kinds not here involved) was stolen. (Pen.Code, § 487, as am. Stats.1929, p. 365.)

[4] Petitioner and respondent have introduced in evidence authenticated copies of the Pennsylvania indictments (which, in accord with Pennsylvania practice, bear notations of the plea of the defendant and the sentence imposed). As to the larcenies these documents show that petitioner, in Philadelphia County, by indictment No. 929, September sessions, 1913, was charged with and that he pleaded guilty to theft of postage stamps and money of the value of $9.18, and that by indictment No. 68, March sessions, 1930, he was charged with and that he pleaded guilty to theft of clothing of the value of $38.50. Therefore, the adjudicated elements of neither the 1913 nor the 1930 Pennsylvania larceny meet the minimum elements of the crime defined by the pertinent California statute (Pen.Code, § 487, supra).

[5] Respondent has introduced in evidence a certified copy of Philadelphia indictment No. 930, September sessions, 1913. He urges that this document shows a prior conviction of grand larceny within the purview of section 644. So far as it relates to this contention indictment No. 930 shows that petitioner was charged with and pleaded guilty to larceny of goods of the value of $89. But this larceny was legally a crime entirely unrelated to case No. 929. It appears from the California record that petitioner denied the 1913 Pennsylvania conviction and that the fact of such conviction was proved to the California trial court

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[1] "Courts take judicial notice of the following facts: * * * the laws of the several states of the United States and the interpretation thereof by the highest courts of appellate jurisdiction of such states." (Code Civ.Proc., § 1875, par. 3.)

by a certified copy of the Pennsylvania conviction in case No. 929; it was not proved to or determined by the trial court that petitioner had suffered a conviction in case No. 930. Therefore, the latter conviction, having never been before the trial court of this state, is not available to support this adjudication of habitual criminality.

[6] From the 1913 Pennsylvania indictment and commitment it further appears (and it was proved to the California trial court) that in case No. 929 petitioner, in Philadelphia County, was also charged with and pleaded guilty to entering a building on September 24, 1913, with intent to steal personal property, and that he was sentenced to "undergo imprisonment in separate or solitary confinement at labor, in the Philadelphia County Prison, for the term of Two (2) years." The adjudicated elements of the offense of which petitioner on his plea of guilty was convicted, are identical with those of the then California felony of second degree burglary as defined by the pertinent statutes. (Pen.Code, § 459, as am.Stats.1913, p. 228, in effect August 10, 1913; §§ 460 and 461, as am.Code Amdts. 1875–1876, p. 112.) Therefore, so far as the substance of the offense is concerned this 1913 conviction was competent to support the determination of habitual criminality.

[7, 8] Petitioner contends that for the 1913 Pennsylvania conviction he did not serve a term in a state prison or federal penitentiary as required by section 644 of the Penal Code. The California information charged and the trial court found that petitioner served the term "in a penal institution." This is insufficient to bring the prior conviction within section 644, for the phrase "penal institution," as used by the Legislature in other sections of the Penal Code which deal with repeated offenders, refers to a county jail as well as a state prison or federal penitentiary. Thus section 666 provides for punishment of offenders who have suffered a previous conviction of petty theft and "served a term therefor in any penal institution." The "penal institution" there referred to must include a county jail, for in California one who is convicted of petty theft and who has suffered no previous conviction can be imprisoned only in a county jail. (Pen.Code, § 490.)

[9, 10] However, the determination of service of a term of imprisonment, a necessary part of the determination of habitual criminality, "does not involve the validity or finality of a judgment of conviction, as such," and both petitioner and respondent, as already stated, may refer to matters outside the California judgment roll in order to show the actual status of petitioner. (In Re McVickers (1946), supra, pages 271, 272, 279 of 29 Cal.2d, 176 P.2d 40, 45; In re Seeley (1946), supra, pages 298, 299 of 29 Cal.2d, 176 P.2d 24.) Here, as the California record of proceedings at the time of sentence shows, it was proved to the trial court that petitioner served the term in the Philadelphia County Prison and the trial court concluded that such imprisonment satisfied the requirement of section 644. A review of the pertinent Pennsylvania law as to punishment and penal institutions (hereinafter set out) supports that conclusion.

One found guilty of entering with intent to steal in Pennsylvania in 1913 was punished by fine and "imprisonment by separate or solitary confinement at labor not exceeding ten years." (1863, April 22, P.L. 531, § 2; 18 Purdon's Pa.Stats., § 4901, Historical Note.) There were in Pennsylvania "state penitentiaries" wherein were imprisoned offenders sentenced to "imprisonment at labor, by separate or solitary confinement, for any period not less than one year" (19 Purdon's Pa.Stats., § 1021) and there were "county jails," a "reformatory," a "house of correction" and "workhouses" wherein were confined offenders suffering lesser sentences. (61 Purdon's Pa.Stats.) There was also the "Philadelphia County Prison," wherein were confined various types of offenders sentenced in Philadelphia County; its inmates comprised persons sentenced to separate or solitary confinement at labor for a "period of time under two years" (Id. § 636), as well as those similarly sentenced "for any period not less than one year" (19 Purdon's Pa. Stats., § 1021), and convicts awaiting the death penalty (61 Purdon's Pa.Stats., § 644).

The operation of the penal system as it applied to one in petitioner's position has been explained by a Pennsylvania court (in Com. v. Arbach (1934), 113 Pa.Super. 137, 172 A. 311) as follows:

"The sentencing of convicts both as respects the term of imprisonment and where they shall be confined is fixed by statute. An examination of the penal clauses affixed to offenses by the Penal Code of 1860 (March 31, 1860, P.L. 382) will show that certain crimes or misdemeanors are punishable by 'imprisonment,' without more, or by 'simple imprisonment.' These mean confinement in a county jail or workhouse. Com. ex rel. Stanton v. Francies, 250 Pa. 350, 352, 95 A. 798; Com. v. Fetterman, 26 Pa.Super.Ct. 569. Certain other crimes are punishable by imprisonment at labor, by separate or solitary confinement, or by separate or solitary confinement at labor. These mean confinement in a penitentiary, except as hereinafter stated. Id. The Criminal Procedure Act of 1860 (March 31, 1860, P.L. 427 [19 P.S. § 1 et seq.]) divides sentences for penitentiary offenses into two classes: (1) Those for a period of a year or longer; (2) those for less than a year. As to the former, it provides in section 74 (as amended by Act of February 28, 1905, P.L. 25 [19 P.S. § 1021]) that: 'Whenever any person shall be sentenced to imprisonment at labor, by separate or solitary confinement, for any period not less than one year, the imprisonment and labor shall be had and performed in the state penitentiary for the proper district: Provided, That nothing in this section contained shall prevent such person from being sentenced to imprisonment and labor, by separate or solitary confinement, in the county prisons now or hereafter authorized by law to receive convicts of a like description.' This proviso * * * does not give a court the power to elect to sentence a person, who has been convicted of a crime punishable by imprisonment at labor by separate or solitary confinement, to either the penitentiary or the county jail or prison, except in two instances: (1) Where the act defining the offense and fixing the penalty expressly gives such option (see Criminal Code, inter alia, sections 4, 5, 20, 23, 41, 78, 98, 127, 128 [18 P.S. §§ 260, 253, 552, 2934, 2281, 2225, 2112, 211, 2451]);[2] or (2) where the county prison to which the convict is sentenced comes within the language of the proviso, and was in 1860, at the passage of the Criminal Procedure Act, or afterwards, 'authorized by law to receive convicts of a like description,' that is, convicts sentenced to imprisonment at labor, by separate or solitary confinement. Thus by Act of February 8, 1842, P.L. 14, § 11 (19 P.S. § 1022), it was provided that: 'Every person who shall hereafter be convicted in any court of criminal jurisdiction, in the city or county of Philadelphia, of any crime, the punishment of which would now be imprisonment in the state penitentiary, may be sentenced by the proper court to suffer imprisonment, by separate or solitary confinement, at labor, either in the state penitentiary, or in the Philadelphia county prison, at the discretion of the courts, excepting in cases of murder in the second degree, and manslaughter.' The Philadelphia County Prison comes within the proviso of section 74 of the act of 1860, supra, as being *'now* (that is, in 1860) * * * authorized by law to receive convicts of a like description.' * * *

"Section 75 of the Criminal Procedure Act of 1860 * * *, 19 P.S. § 891, governs sentences to imprisonment at labor by separate or solitary confinement, for a period of less time than one year, and provides that: 'No person shall be sentenced to imprisonment at labor by separate or solitary confinement for a period of time less than one year, except in the counties where, in the opinion of the court pronouncing the sentence, suitable prisons have been erected for such confinement and labor: * * * Provided, That in the counties where suitable prisons for separate or solitary confinement at labor do not exist, and the sentence shall be less than one year, simple imprisonment shall be substituted in all cases for the separate and solitary confinement at labor required by the act * * *.' It also provides that all persons sentenced to simple imprisonment for any period of time shall be confined in the county jail where the conviction shall take place.

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[2] The statute defining petitioner's offense gave no such option.

"This section gives the court in any county, where in its opinion a suitable prison has been erected for furnishing convicts with separate or solitary confinement and labor, in imposing sentences for less than a year upon persons convicted of crimes which require, as a penalty, imprisonment in a penitentiary, power to sentence them to separate or solitary confinement at labor in such suitable county prison; and if there is no such suitable county prison, to sentence them to simple imprisonment in the county jail. It has no application at all to sentences for a year or longer, which, whether there be a suitable county prison or not, in all crimes requiring a penalty of imprisonment at labor, by separate or solitary confinement, must be to the penitentiary of the proper district, unless the county prison is by law authorized to receive such convicts. Section 75, of itself, does not furnish such authority, except as to sentences for less than a year."

It thus appears that petitioner, necessarily sentenced to separate imprisonment at labor, and in fact sentenced to two years of such imprisonment, must have served his term in a Pennsylvania state penitentiary had he been so convicted and sentenced in some county other than Philadelphia. So far as petitioner and other offenders similarly sentenced were concerned, occupance of the Philadelphia County Prison, because of "the character of the institution and its inmates together with the nature of the proceedings leading to confinement therein," was equivalent to service of time in a state prison or federal penitentiary. (In re Gilliam (1945), 26 Cal. 2d 860, 863–864, 161 P.2d 793, and cases there cited; see State v. Clementi (1937), 224 Wis. 145, 272 N.W. 29, 33; State v. Blankenship (1943), 242 Wis. 195, 7 N.W. 2d 424; State v. Jardine (1943), 242 Wis. 200, 7 N.W.2d 426.)

[11] The 1930 conviction, in Delaware County, Pennsylvania, was upon petitioner's plea of guilty to the charge of larceny of described clothing of the value of $38.50 and on the same day feloniously receiving the same goods knowing them to have been stolen. In Pennsylvania, "In every indictment for feloniously stealing property it shall be lawful to add a count for feloniously receiving the said property, knowing it to have been stolen; * * * and it shall be lawful for the jury trying the same to find a verdict of guilty either of stealing the property, or of receiving the same, knowing it to have been stolen * * *." (1860, March 31, P.L. 427, § 24; 19 Purdon's Pa.Stats., § 411.) Under this statute a defendant cannot properly be convicted of both receiving stolen property and larceny of the same property in the same transaction; the offenses are distinct and inconsistent. (Com. v. O'Neill (1901), 10 Pa.Dist.R. 227, 18 Lanc.Rev. 85; Com. v. Joulwan (1920), 29 Pa.Dist.R. 1181, 16 Schuyl.Leg.Reg. 232; Com. v. Maxberry (1930), 13 Pa.Dist. & Co.R. 371, cited 136 A.L.R. 1089; Com. v. Simpson (1946), 60 York Leg.R. 5.) But it appears that where the point has not been raised convictions of both larceny and feloniously receiving stolen goods, based on substantially the same transaction have been affirmed. (Com. v. Witmer (1919), 33 York 101; Com. v. Lindie (1942), 147 Pa.Super. 335, 24 A.2d 39; Com. v. Wiand (1943), 151 Pa.Super. 444, 30 A.2d 635, 638.) It would seem that judgments based on such dual convictions are erroneous but not void. Also, where there were multiple and inconsistent charges based on the same transaction (1. entry by breaking into a certain garage with intent to steal certain goods; 2. entry without breaking into the garage with the intent to steal the same goods; 3. receiving the same goods knowing them to have been stolen) a general plea of guilty, and a single judgment which did not specify the count or precise offense upon which it was based, such judgment was held valid as against attack through habeas corpus. (Com. ex rel. Vincent v. Smith (1938), 132 Pa.Super. 469, 1 A.2d 838.) Thus it appears that the 1930 dual ground conviction and judgment in Pennsylvania is a valid judgment there.

[12, 13] Petitioner now seeks to go behind, not merely the California determination of the 1930 prior conviction of receiv-

ing stolen goods, made on petitioner's admission of such conviction, but behind the Pennsylvania judgment rendered on his plea of guilty. He seeks to show that in fact the Pennsylvania charges of larceny and of receiving stolen goods were based one criminal act of petitioner, and that such act amounted to larceny exclusively. This he cannot do. "Sections 644 and 668 of the Penal Code contemplate that a defendant shall have been *convicted* in a judicial proceeding of a crime enumerated in section 644. All the essential facts of his guilt must be res judicata. In applying section 644 the courts of this state may take cognizance only of what has been lawfully adjudicated. Any other rule would lead to absurd consequences. If our trial courts could take evidence to prove, and upon that evidence adjudicate for themselves, that a defendant had been convicted in another state of [a crime enumerated in section 644] * * * despite the fact that he had been there charged, tried, and convicted under a statute defining another offense * * *, then our courts could also take evidence and decide that the defendant had been convicted in the other state of * * * any * * * offense enumerated in section 644, even though he had never been charged with, placed upon trial for, or adjudged guilty of, any of those offenses in such other state." (In re McVickers (1946), supra, page 276 of 29 Cal.2d, 176 P.2d 481.) Equally absurd consequences would result if the courts of this state could take evidence to prove, and upon that evidence adjudicate for themselves, that a defendant was not guilty of a crime with which he had been charged, for which he had been tried or to which he had pleaded guilty, and of which he had been convicted in another state. It is not legally impossible that petitioner on the same day stole goods and, in a separate transaction, received the same goods knowing them to have been stolen. It has been finally adjudicated that he did so. Even if the Pennsylvania judgment were erroneous, a matter into which we cannot inquire, it has been duly certified to us as the solemn judgment of a sister state, the jurisdiction of the court which rendered it is not questioned, and it is therefore entitled to full faith and credit. (See 24 C.J.S., Criminal Law, § 1961, p. 1156.)

[14] It has been suggested, as to the 1930 Pennsylvania conviction, that we must assume that petitioner pleaded guilty to and was adjudged guilty of the least offense charged in the Pennsylvania indictment. But it does not appear that the crimes charged were mere alternate statements of the same acts or that either was in fact included in the other. On the face of the pleading they were distinct offenses and petitioner, as stated, could have been guilty of both. Furthermore, it cannot be determined by reference to punishment that one of the offenses charged in Pennsylvania in 1930 was "less than" the other. As already stated, larceny was punishable by separate or solitary confinement at labor for not more than ten years; receiving stolen goods was punishable by "like pains and penalties which are by law imposed upon the person who shall have actually stolen * * * the same" (1909, April 23, P.L. 159, § 1; 18 Purdon's Pa.Stats., § 4817, Historical Note); and petitioner was sentenced to undergo imprisonment by separate and solitary confinement in the Eastern Penitentiary for two to four years.

[15, 16] Petitioner contends that in any event a conviction of receiving stolen goods in Pennsylvania in 1930 is not available to support a California determination of habitual criminality. Section 668 of the Penal Code, previously quoted, provides that one convicted in another state of a crime "which, if committed within this state, would [and petitioner emphasizes the fact that the section says *would* not *could*] be punishable by the laws of this state by imprisonment in the state prison" is punishable as if such conviction had been suffered in California. In 1930, the punishment prescribed by a judgment of conviction of receiving stolen goods fixed the character of the California offense as felony or misdemeanor. (Pen.Code, §§ 17, 496.) "A [California] crime which may be punished by imprisonment in the state prison although the statute confers a discretion on the court to impose a mere county jail sentence, is deemed to be a

felony, unless the court actually exercises that discretion by imposing only a fine or a jail sentence. [Citations.]" (In re Rogers (1937), 20 Cal.App.2d 397, 400, 66 P.2d 1237, 1238; see 95 A.L.R. 1121.) The 1930 Pennsylvania crime of receiving stolen goods, on the other hand, was by statute denominated a felony regardless of the imposed punishment (which could be fine, imprisonment by separate or solitary confinement at labor for any term not exceeding three years, or both). (1860, March 31, P.L. 382, § 103; 1909, April 23, P.L. 159 § 1; 18 Purdon's Pa.Stats., §§ 4807, 4817, Historical Notes.)

Problems similar to that presented by petitioner's last stated contention have arisen in Indiana and it has been held that "where the previous offense relied upon was committed in another jurisdiction, proof that the punishment, prescribed by the law of that jurisdiction consisted of death or imprisonment in the state prison of that jurisdiction will sustain the allegation that the offense relied upon was a felony. Kelley v. State (Ind.Sup. 1933) [204 Ind. 612], 185 N.E. 453, 458. Proof that the punishment actually imposed for the offense committed in another jurisdiction did in fact consist of imprisonment in the state prison of that jurisdiction will also sustain the allegation that the offense relied upon was a felony." (Dougherty v. State (1934), 106 Ind. 678, 191 N.E. 84, 88.) We agree with the conclusion of the Indiana court. The offense which petitioner was adjudged to have committed in Pennsylvania in 1930 and the punishment which he there underwent are shown to be substantially equivalent to the California crime of receiving stolen goods punished by imprisonment in a California state prison, i. e., to the crime of "feloniously receiving stolen goods" enumerated in section 644 of our Penal Code (Stats.1941, ch. 106, § 10).

[17] For the reasons above eludicated we hold that petitioner is a person properly determined to be an habitual criminal who has suffered two previous convictions within the purview of section 644 as it read when he committed the primary offense (Stats.1941, ch. 106, § 10). But his primary offense—grand theft—is not one of the substantive offenses now enumerated in section 644 (Stats.1945, ch. 934, § 1). Therefore, according to section 3048.5 of the Penal Code (Stats.1945, ch. 934, § 4), he is a person previously determined to be an habitual criminal, who could not be determined to be an habitual criminal under section 644 as it now reads; as such he "shall be deemed to be imprisoned for life and shall be eligible for release on parole after he shall have served a minimum term of seven calendar years." (In re Harincar, (1946), supra, page 408 of 29 Cal.2d, 176 P.2d 58.)

Since petitioner has not shown that he is presently entitled to release the writ is discharged and he is remanded to custody.

GIBSON, C. J., and SHENK, and CARTER, JJ., concurred.

SPENCE, Justice (concurring).

I concur with the conclusion reached in the majority opinion that the writ should be discharged and that the petitioner should be remanded to custody. I still adhere, however, to the views expressed in my dissenting opinions in In re McVickers, 29 Cal.2d 264, 281, 176 P.2d 40, and In re Seeley, 29 Cal.2d 294, 303, 176 P.2d 24, and base my concurrence here upon those views rather than upon the views stated in the majority opinion. As stated in the dissenting opinion in In re Seeley, supra, 29 Cal.2d at page 317, 176 P.2d at page 30—I believe that the scope of review in this proceeding on habeas corpus, where it is sought to attack the validity of the judgment adjudicating petitioner to be an habitual criminal, "extends only to the question of the jurisdiction of the trial court to make such habitual criminal adjudication; that the inquiry does not extend beyond the face of the record in the criminal proceeding in which such adjudication was made; and that if it does not affirmatively appear from the face of such record that the trial court was without jurisdiction to make such adjudication, then the habitual criminal adjudication should not be nullified."

Here the judgment adjudicating petitioner to be an habitual criminal has long since become final. No lack of jurisdiction to make such adjudication appears upon the face of the record in the criminal proceeding in which such adjudication was made. If the review in this proceeding is confined to its proper scope, it is at once apparent that petitioner is not entitled to his release.

EDMONDS and TRAYNOR, JJ., concurred.

* * *

30 Cal.2d 8

LOVETT et al. v. BELL et al.

L. A. 19991.

Supreme Court of California, in Bank.

April 29, 1947.

Rehearing Denied May 26, 1947.

1. Landlord and tenant 🔑200(1½), 278½
War 🔑4

Rent regulation issued under Emergency Price Control Act prohibiting agreement by tenant to waive benefit of any provision of regulation recognizes the restricted supply of housing accommodations available during designated period of national emergency and protects tenant from the enforcement of exactions obtained by landlord at variance with rent control program. Emergency Price Control Act of 1942, § 2(g), 50 U.S.C.A.Appendix, § 902(g).

2. Landlord and tenant 🔑278½
War 🔑4

Even though tenants' agreement to relinquish their interest in leased premises at termination of lease constituted part of consideration for alteration of lease, the agreement constituted a waiver of benefits of rent regulation issued under Emergency Price Control Act and was void under provision of rent regulation declaring that tenant's agreement to waive benefits of regulation was void. Emergency Price Control Act of 1942, § 2(g), 50 U.S.C.A.Appendix, § 902(g).

3. Landlord and tenant 🔑200(1½), 278½
War 🔑4

Under rent regulations issued under Emergency Price Control Act, if occupant originally took lawful possession of premises as tenant, he remains such for purposes of rent regulation no matter what change in ownership occurs and regardless of whether under local law, he is technically a tenant. Emergency Price Control Act of 1942, § 2(g), 50 U.S.C.A.Appendix, § 902(g).

4. Landlord and tenant 🔑278½
War 🔑4

Where rent regulation for housing issued under Emergency Price Control Act applied to entire structures or premises wherein 25 or less rooms were rented, the fact that tenant used but two of twelve units of motor hotel for their own housing accommodations and rented balance of premises for business purposes did not deprive tenants of benefit of rent regulation restricting removal of tenants so long as tenants continue to pay rent to which landlord was entitled. Emergency Price Control Act of 1942, § 2(g), 50 U.S.C.A.Appendix, § 902(g).

5. Landlord and tenant 🔑278½
War 🔑4

Where lease was modified by landlords' agreement to relinquish their right to sell premises free of lease prior to expiration thereof and tenants relinquished any interest in leased premises after termination date of lease, tenants could not be deprived of benefit of rent regulation under which they were entitled to remain in possession after termination of lease, on ground that an avoidance of tenants' promise of relinquishment would permit tenants to profit by their own fraud and breach of contract. Civ.Code, §§ 1589, 3521; Emergency Price Control Act of 1942, § 2(g), 50 U.S.C.A.Appendix, § 902(g).

6. States 🔑4

The Emergency Price Control Act within its scope is the supreme law of the land and supersedes state statutes which are inconsistent with its purpose. Emergency Price Control Act of 1942, § 1 et seq., as amended, 50 U.S.C.A.Appendix, § 901 et seq.; U.S.C.A.Const. art. 6, cl. 2.

7. Landlord and tenant ⚷278½
War ⚷4

Even though tenants agreed to relinquish their interest in leased premises after termination date of lease, they remained "tenants" within rent regulation restricting removal of tenants so long as tenants continue to pay rent to which landlord is entitled and tenants were entitled to rely on the regulation, and therefore landlord's eviction claim in challenge of jurisdiction of Area Rent Director of Office of Price Administration could not prevail. Emergency Price Control Act of 1942, § 2(g), 50 U.S.C.A.Appendix, § 902(g).

See Words and Phrases, Permanent Edition, for all other definitions of "Tenants".

SCHAUER, SHENK and CARTER, JJ., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action in unlawful detainer by Clyde A. Lovett and others against R. H. Bell and others. From a judgment of eviction and damages defendants appeal.

Reversed.

Prior opinion of District Court of Appeals, see 173 P.2d 560.

Louis Ballenger, of Glendale, for appellants.

Austin Clapp, William B. Wetherall and Cecil F. Poole, all of San Francisco, amicus curiæ, for appellants.

Henry E. Bianchi, of Los Angeles, for respondents.

SPENCE, Justice.

This is an appeal by defendants from a judgment of eviction and damages for withholding entered in an unlawful detainer action brought after the expiration of the lease between the parties litigant. The Price Administrator has filed a brief as amicus curiæ in support of defendants' claim that the judgment must be reversed because it contravenes the Emergency Price Control Act of 1942, as amended, 56 Stats. 23, 50 U.S.C.A.Appendix, § 901 et seq., and the Rent Regulations for Housing (8 F.R. 7322) promulgated thereunder. The record sustains that position.

There is no dispute as to the facts. Defendants had gone into possession of a motor hotel in Glendale, an entire structure containing twelve units and owned by plaintiffs, under a written lease covering a five-year period ending September 30, 1945. Defendants occupied two units as living accommodations. On May 3, 1944, a written modification of the lease was executed between the parties, by the terms of which plaintiffs relinquished "their right to sell said premises free and clear of said lease prior to the expiration" thereof and defendants relinquished an option they had to renew the lease and "any interest in said leased premises above described after the 30th day of September, 1945." On September 25, 1945, defendants forwarded to plaintiffs a check for $200, the monthly rent required by the terms of the lease, "for the calendar month October, 1945," and in the accompanying letter defendants stated that "every effort" was being made "to get into another place as soon as possible," surely "before the first of January, 1946." Plaintiffs promptly returned the check with the declaration that defendants' continued occupancy of the premises after September 30, 1945, would result in eviction proceedings. Thereafter, and on October 11, 1945, without complying with the provisions of the Rent Regulation for Housing prescribed by the Office of Price Administration under authority of the Emergency Price Control Act, plaintiffs filed their complaint for unlawful detainer. Following a trial, findings of fact and conclusions of law were made in favor of plaintiffs upon the theory that by virtue of the parties' agreement of May 3, 1944, defendants relinquished all right to remain upon the premises after the expiration of their lease; that therefore, while the premises were situate within a defense rental area, no relationship of landlord and tenant existed after the termination date of September 30, 1945; and consequently, the rent director of the OPA had no jurisdiction over the matter in litigation. Judgment was entered accordingly on November 20, 1945.

Section 6(a) of the Rent Regulation for Housing restricts the removal of tenants as follows: *"So long as the tenant continues to pay the rent to which the landlord is entitled,* no tenant shall be removed from any housing accommodations, by action to evict or to recover possession, by exclusion from possession, or otherwise, nor shall any person attempt such removal or exclusion from possession, notwithstanding that *such tenant has no lease or that his lease or other rental agreement has expired or otherwise terminated, and regardless of any contract, lease, agreement or obligation heretofore or hereafter entered into* which provides for entry of judgment upon the tenant's confession for breach of the covenants thereof or which otherwise provides contrary hereto, unless * * *" (Emphasis added.)

(Then follows six paragraphs giving the class of cases where dispossession may take place, which conditions have no pertinency to this controversy.)

[1] Plaintiffs argue that the modification agreement of May 3, 1944, whereby defendants relinquished their "interest in said leased premises * * * after the 30th day of September, 1945," constituted a "waiver" of defendants' right to continued occupancy of the property after the expiration of the lease and defendants therefore cannot invoke the protection of section 6(a) as the basis for refusing to surrender possession. But such argument cannot prevail to defendants' prejudice in the assertion of their tenancy claim as contemplated by the act and Rent Regulation thereunder. Among other purposes, the act as a war measure was designed to "eliminate and prevent * * * disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; * * *". (50 U.S.C.A.Appendix, § 901.) Section 2(g) of the act provides that "regulations, orders and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof." (50 U.S.C.A.Appendix, § 902(g).) In line with this expression of policy, section 1(d) of the Rent Regulation declares that "an agreement by the tenant to waive the benefit of any provision of this regulation is void." Such prohibition recognizes the restricted supply of housing accommodations available during the designated period of national emergency and protects the tenant from the enforcement of exactions obtained by the landlord at variance with the rent control program. Siegel v. Bowers, 185 Misc. 684, 685, 686, 58 N.Y.S.2d 187, 189; see, also, Zwang v. A. & P. Food Stores, 181 Misc. 375, 46 N.Y.S.2d 747; Schaubach v. Anderson, 184 Va. 795, 36 S.E.2d 539; Schaffer v. Leimberg, 318 Mass. 396, 62 N.E.2d 193; Porter v. Crawford & Doherty Foundry Co., 9 Cir., 154 F.2d 431, certiorari denied 67 S.Ct. 53.

[2] At the time the modification agreement was executed, defendants indisputably were tenants of plaintiffs. That agreement gave defendants "security" in their occupancy of the premises for the full term of the lease, consistent with plaintiffs' relinquishment of their right to sell the property and oust defendants from possession thereof prior to the designated termination date. As a part of that agreement defendants paid plaintiffs the sum of $1,250. In a dispute between the parties as to whether such sum represented "a raise in the rent" in violation of the operative Rent Regulation, the additional payment was sustained as "consideration for a change in the terms of the lease" so as to give defendants the unmolested tenancy they sought. Bell v. Lovett, 75 Cal.App.2d 883, 171 P.2d 758. Now here plaintiffs claim that defendants' relinquishment of their "interest in [the] leased premises * * * after the 30th day of September, 1945," also entered as "a part of the consideration" for the alteration of the lease and should be construed as an "absolute surrender" of all right to possession upon the stated date. But accepting plaintiffs' views as to the purport of the parties' understanding in effecting the modification of the lease, a "waiver" of the benefits of the Rent Regulation "is void." (§ 1(d).) Manifestly, within such classification and therefore unenforceable is an agreement by a tenant to relinquish the right to resist eviction under the provisions of section 6(a) of the Rent Regulation.

Plaintiffs cite as "in point" here the case of Bowles v. Strano, D.C., 62 F.Supp. 9, but that decision turned on an entirely different factual situation. The parties there were *vendors* and *vendees,* and it was agreed between them that the vendors might remain in possession of the property for one month following the consummation of the sale. Upon the vendors' failure to vacate the premises at the stipulated time, the vendees instituted an action in ejectment in the state court under local law. Price Administrator Bowles then sought in the federal court an injunction to restrain the ejectment proceedings. The injunction was refused on two grounds: (1) the *vendor-vendee relationship* of the parties brought the agreement without the jurisdiction and control of the OPA or of the Area Rent Director; and (2) the *equitable powers* of the court would not be used to aid in violation of the agreement where it appeared that no interest of the United States was adversely affected. But here the parties stand in the controlling *landlord-tenant relationship,* so that their agreement for modification of the lease comes precisely within the scope of the Rent Regulation; and the ulawful detainer proceeding instituted by plaintiffs for the enforcement of their eviction claim is an *action at law,* requiring strict compliance with all conditions precedent to its maintenance in recognition of the interest of the United States in effectuating the entire national rent control program. As so distinguished the reasoning of the Bowles v. Strano case has no application here. See Porter v. Dicken, 328 U.S. 252, 66 S.Ct. 1094, 90 L.Ed. 1203; Porter v. Lee, 328 U. S. 246, 66 S.Ct. 1096, 90 L.Ed. 1199.

[3, 4] Upon the undisputed facts, the rights and obligations of the parties stemming from their *landlord-tenant relationship* continued after the expiration of the lease. The Rent Regulation defines "housing accommodations" to mean "any building, structure, or part thereof * * * rented or offered for rent for living or dwelling purposes." (§ 13(a) (6).) It also defines "landlord" to include "an owner * * * or other person receiving or entitled to receive rent for the use or occupancy of any housing accommodations"; and it defines "tenant" to include any person "entitled to the possession or to the use or occupancy of any housing accommodations." (§ 13(a) (8) and (9).) The chief consideration under these definitions seems to be the character of the initial occupancy of the property as housing accommodation. If the occupant originally took lawful possession of the premises as a tenant, he remains such for the purposes of the Rent Regulation no matter what change in ownership occurs and regardless of whether under local law he is technically a "tenant." Pfalzgraf v. Voso, 184 Misc. 575, 577, 578, 55 N.Y.S.2d 171, 173. For example, a purchaser of rental property at a lien foreclosure sale may not oust a tenant in possession except in pursuance of the Rent Regulation specifying the grounds for eviction. Long Branch Banking Co. v. Howland, 133 N.J.Eq. 315, 32 A.2d 860; Home Savings Bank of City of Albany v. Hunter, 180 Misc. 1, 42 N.Y.S.2d 557; Edison Savings & Loan Association v. Stamberger, 184 Misc. 52, 53, 53 N.Y.S.2d 578, 579. Nor is it of any significance in the cited cases that the dispossession attempt was made with respect to a single family dwelling while here defendants use but two of the twelve units for their own housing accommodation and the balance of the motel is rented for business purposes. The Rent Regulation for Housing applies to "entire structures or premises wherein 25 or less rooms are rented or offered for rent by any lessee, sublessee or other tenant of such entire structure or premises, whether or not used by the lessee, sublessee or other tenant as a hotel or rooming house." § 1(b) (4); United States Trust Co. of New York v. Schaeffer, 185 Misc. 148, 149, 55 N.Y.S.2d 886, 887. Here defendants were lawfully in possession of the property at the expiration of the lease; and section 6(a) specifically applies in restricting their removal after such termination date "so long as" they continue "to pay the rent to which the landlord is entitled" and "regardless of any contract, lease, agreement or obligation * * * entered into which * * * otherwise provides."

[5] Plaintiffs finally argue that an avoidance of defendants' promise to relinquish their "interest" in the leased premises after the termination date of the lease would permit defendants to profit "by their own fraud and breach of contract"; that defendants should therefore be estopped from now taking a position contrary to the import of their so-called "waiver" in the modification agreement on which plaintiffs confidently relied and acted. Civ.Code, §§ 1589, 3521; Estate of Bruce, 27 Cal.App.2d 44, 80 P.2d 82; Harlan v. Harlan, 70 Cal. App.2d 657, 161 P.2d 490. But such argument cannot affect the determination of the jurisdictional question as to the application of the Rent Regulation in furtherance of sound public policy as declared by the act.

[6] Within its scope the act is the supreme law of the land (U.S.Const., Art. VI, Clause 2; Case v. Bowles, 327 U.S. 92, 66 S.Ct. 438, 90 L.Ed. 552) and supersedes state statutes which are inconsistent with its purpose. Emergency Price Control Act of 1942, §§ 204(d), 305, 50 U.S.C.A.Appendix, §§ 924(d), 945; Miller v. Municipal Court, 22 Cal.2d 818, 142 P.2d 297. It was said on this point in Zwang v. A. & P. Food Stores, supra, 181 Misc. 375, 46 N.Y.S.2d 747, at page 749: "Congress alone is the judge of the economic soundness, the fairness, and the necessity of this important emergency measure. With those considerations the courts have no concern. Having the power to enact the legislation, the Congress likewise had the power to determine how it should be most effectively enforced." As part of the over-all national program to preserve the economic security of the country during the emergency period, the act envisages, among other things, the regulation of rentals and the control of the eviction of tenants in congested defense areas where housing accommodations would be at a premium. In furtherance of such avowed purpose the Rent Regulation to be administered by the OPA establishes the procedure to be followed as a means of adjusting the conflicting interests of landlords and tenants, and, as part of such effective administration, declares that a tenant's "waiver" of the benefits of such Rent Regulation shall be "void." Such provision recognizes the unequal bargaining power of the parties in contracting with respect to the limited supply of housing accommodations and protects a tenant from unreasonable and inflationary demands which might be inserted in leases contrary to the express purpose of the act and in circumvention thereof. There is nothing unique about the obviation of the effect of contracts which contravene the avowed purpose of Congress to protect certain groups of society; as, for instance, illustrated by cases involving the Fair Labor Standards Act of 1938, 29 U.S.C.A. § 201 et seq. Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 65 S.Ct. 895, 89 L.Ed. 1296; D. A. Schulte, Inc. v. Gangi, 328 U.S. 108, 66 S.Ct. 925, 90 L.Ed. 1114. Accordingly, defendants' so-called "waiver" of the right to resist eviction of the premises as authorized by the Rent Regulation cannot be enforced because it is an extension contrary to the interests of the United States as declared by the act. To hold otherwise would enable a landlord to effectuate an eviction claim by a method which he could not otherwise urge because of the "restrictions on the removal of tenants," as promulgated by the Rent Regulation. Matkowsky v. Katz, 184 Misc. 60, 53 N.Y.S.2d 430.

[7] Since defendants remained tenants within the intendment of section 6(a) of the Rent Regulation and are entitled to rely thereon, unaffected in such status either by the expiration of the lease or the inoperative "waiver," plaintiffs' eviction claim in challenge of the jurisdiction of the Area Rent Director of the OPA cannot prevail. Bauer v. Neuzil, 66 Cal.App.2d Supp. 1020, 1025, 152 P.2d 47.

The judgment is reversed.

GIBSON, C. J., and EDMONDS and TRAYNOR, JJ., concurred.

SCHAUER, Justice.

I dissent. The controlling issues in this case are res judicata. (Bell v. Lovett, 1946, 75 Cal.App.2d 883, 171 P.2d 758.) The decision in the earlier litigation at least impliedly (and, on the facts, conclusively) determines that the premises involved are not "housing accommodations" within the meaning of the Emergency Price Control Act of 1942, as amended (56 Stats. 23, 50 U.S.C.A.Appendix, § 901 et seq.) and the Rent Regulation for Housing (8 F.R. 7322) promulgated thereunder, and adjudges valid the agreement of May 3, 1944, whereby the defendants herein relinquished all right to occupy and operate the premises subsequent to September 30, 1945. The majority opinion errs in disregarding the previously and finally adjudicated facts. It cannot reach its results without disregarding those facts and the law of res judicata.

The Rent Regulation (§ 13(9) (6)) defines "housing accommodations" to mean "any building, structure, or part thereof * * * rented or offered for rent for living or dwelling purposes." It is obvious here that as between plaintiffs and defendants the premises in question were *not* "rent or offered for rent *for living or dwelling purposes.*" The premises were an entire "motor hotel" of twelve units owned by plaintiffs. The lease to defendants (or their predecessors) was not for "housing accommodations" for them but as a business enterprise to be operated for profit. In the prior litigation the court expressly found that "all of the * * * rooms involved in said lease with the exception of one (1) were sublet to the general public by plaintiff [R. H. Bell, defendant here]. That plaintiff [R. H. Bell, defendant here] was not the ultimate consumer of said premises other than one (1) room." (Bell v. Lovett (1946), supra, 75 Cal.App.2d 883, 885, 171 P.2d 758, 759). The controversy, therefore, does not concern the right of a tenant or occupant of a family dwelling to remain in possession of his living quarters after the expiration of the rental term but involves a willful holding over in the operation of a business for profit after the relinquishment, for a valuable consideration, of all right therein.

In 1940, the property to be operated as a business enterprise, was leased by plaintiffs to defendants' predecessors for a term expiring September 30, 1945, and with an option to the lessees to renew the term for an additional five years. The lease, however, reserved to plaintiffs "the right * * * to sell the said premises at any time during the term of this lease" and upon such sale to terminate the lessees' rights and occupancy. In 1944, for valuable considerations, the lease was modified. The lessors (plaintiffs) did "relinquish their right to sell said premises free and clear of said lease prior to the expiration of said lease" and the defendant R. H. Bell (who had acquired the lessees' rights) agreed that he did "relinquish his right to the exercising of an option beyond the 30th day of September, 1945, and * * * give up all rights to said option and *will not have any interest in said leased premises* * * * after the 30th day of September, 1945." (Italics added.) The plaintiffs fully performed their part of the contract but the defendants, notwithstanding their own covenant, and notwithstanding that they had received such full performance from plaintiffs, refused on and after September 30, 1945, to surrender possession of the premises or any part thereof. The complexion of the whole matter might have appeared different to the trial judge if the defendants had surrendered to plaintiffs possession of the entire business property reserving only a claim of right to continue in personal occupancy of a single unit as a "housing accommodation." Their refusal to surrender possession, it appears however, was not related to a single unit or to any housing shortage or "housing accommodation" but was found by the court to be "deliberate, intentional, wilful and with knowledge that all of defendants' rights therein and their right to possession had terminated, and with knowledge that they were holding over against the will of the plaintiffs." The court further found "that from and after the 30th day of September, 1945, no relationship of landlord and tenant has existed between the plaintiffs and defendants, and that the Rent Director of the Office of Price Administration has no jurisdiction over the subject matter herein."

The last mentioned finding undoubtedly has reference to the fact that the property involved is not a mere residential or "housing accommodation" holding of the defendants but is a business holding. That is to say, the property, as hereinabove indicated, is a "motor hotel" which is occupied by the defendants not primarily for residence purposes but mainly for purposes of business operation in the subletting of hotel units to the general public. As expressly found by the court, "Said premises were at all times * * * improved by a motor hotel, the units of which were rented to the public on a daily and weekly basis by the defendants herein." It was also found "That the defendant * * * as alleged in plaintiffs' complaint did relinquish and surrender and abandon to the plaintiffs any and all right * * * to enjoy and remain in possession of the said premises * * * from and after the 30th day of September, 1945" and that "the defendants * * * do not have any interest therein nor the right to the possession thereof nor the right to possession of any part thereof." As aptly declared by Mr. Presiding Justice Moore in the opinion of the District Court of Appeal in this case, "If a total renunciation of interest in the property be not the fact established by the language of the agreement then the art and custom of reducing to writing the understandings of men might as well be cast into the discard." (Lovett v. Bell (1946), Cal.App., 173 P.2d 560, 562, 563.)

The court did not expressly find that the defendants entered into the 1944 modification agreement with the specific intent not to perform their obligations thereunder but the evidence and the findings which were made amply support such a deduction. It is to be noted that defendants, having induced plaintiffs to relinquish their right to sell the premises free and clear of the lease (and which sale, even under the Emergency Price Control Act of 1942 and the Rent Regulations for Housing could have resulted in the dispossession of defendants) at once showed their bad faith in the matter by suing the plaintiffs for triple damages, asserting that the cash paid by defendants to plaintiffs as a part of the consideration for the latter's relinquishment of their right to sell free and clear, was additional rent. Their contention was disposed of adversely to the defendants herein. (Bell v. Lovett, 1946, supra, 75 Cal.App.2d 883, 171 P.2d 758). Apparently, it is in furtherance of the same general plan that the defendants have, as found by the court, continued to operate the motor hotel business and to withhold possession of the premises, such withholding being "deliberate, intentional, wilful and with knowledge that all of the defendants' rights therein and their right to possession had terminated."

As previously indicated the legality of the consideration and of the object of the controlling contract was established in the earlier litigation (Bell v. Lovett (1946), supra, 75 Cal.App.2d 883, 171 P.2d 758) and is now res judicata. Whatever might be our views on the several contentions of the parties if the matter were before us initially, certainly we cannot now say that that part of the modification agreement by which the lessees relinquished their interest in the leased premises effective September 30, 1945, is void despite the fact that it has been finally adjudicated between the parties that the agreement is valid. The contract was executed as an entirety and it is obvious that the lessors would not have entered into it without the agreement by the lessees that their interest in the property and right to occupancy terminated on September 30, 1945. As stated in Krier v. Krier, (1946), 28 Cal.2d 841, 843, 172 P.2d 681, 682, "a judgment in a prior action between the same parties on the identical cause of action is res judicata, and a bar to a second suit thereon, not only as to issues actually determined therein but also as to issues necessarily involved. [Citations.] And even though the causes of action be different, the prior determination of an issue is conclusive in a subsequent suit between the same parties as to that issue and every matter which might have been urged to sustain or defeat its determination. [Citations.]"

Courts should abhor and refuse to unnecessarily perpetrate injustice. Here the defendants have received from the plaintiffs full measure of performance. The plaintiffs surrendered their right to sell their property and thereupon and thereby cause defendants to be dispossessed. The defendants having had the full benefit of plaintiffs' forbearance now assert that the contract by which they procured such forbearance was void. And even though such contract has been finally adjudicated valid this court now disregards the law of res judicata and supports defendants in their "wilful and deliberate" refusal to perform. Such applications of the Emergency Price Control Act tend to bring odium to its administration.

Under the circumstances shown in this record the rights of the defendants to possession of and to operate and enjoy the profits of their business venture ceased on September 30, 1945. Their possession and operation of the business premises since that date have been unlawful. The judgment of the trial court is amply supported and should be affirmed.

SHENK and CARTER, JJ., concurred.

Rehearing denied; SHENK, CARTER, and SCHAUER, JJ., dissenting.

30 Cal.2d 118

TOMLIN et al. v. CALIFORNIA EMPLOYMENT COMMISSION (two cases).

S. F. 17283, 17284.

Supreme Court of California, in Bank.

May 16, 1947.

1. Taxation 🔑59

The relationship contemplated by the Unemployment Insurance Act for contribution purposes is that of employer and employee, and does not include an independent contractor. Gen.Laws, Act 8780d.

2. Master and servant 🔑5

The most important factor in determining whether a person is an employee or independent contractor is the right to control the manner and means of accomplishing the result desired.

3. Master and servant 🔑5

Strong evidence in support of a finding of control as a factor in determining whether a person is an employee or independent contractor is the right to discharge at will, without cause, but other factors are also to be considered in determining the type of relationship that exists.

4. Taxation 🔑59

"Lessees" engaged in placing and servicing amusement vending machines owned by partners who had the right to control manner and means of accomplishing result desired and who might, under written agreement, terminate relationship at any time without cause, and by threatening to recall machines, could control activities of "lessees" were not "independent contractors" but were "employees" with respect to whom partners were obligated to pay unemployment insurance contributions. Gen.Laws, Act 8780d.

See Words and Phrases, Permanent Edition, for all other definitions of "Employees" and "Independent Contractors".

Appeal from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

Actions, consolidated for trial, by C. H. Tomlin and others, doing business under the fictitious firm name and style of Rex Novelty Company, against the California Employment Commission, sometimes called the Unemployment Reserves Commission, to recover separate sums collected as contributions under the Unemployment Insurance Act. From adverse judgments, plaintiffs appeal.

Affirmed.

Prior opinion, 173 P.2d 565.

B. E. Kragen, of San Francisco, and Lionel B. Benas, of Oakland (Hillard Goldstein, of San Francisco, of counsel), for appellants.

Robert W. Kenny, Atty. Gen., Clarence A. Linn and Doris H. Maier, Dep. Attys. Gen., for respondents.

EDMONDS, Justice.

C. H. Tomlin and several partners, doing business as Rex Novelty Company, sued to recover contributions paid under the Unemployment Insurance Act (Stats.1935, p.

1226, as amended, 3 Deering's Gen.Laws, Act 8780d). They contend that certain persons, who placed and serviced amusement vending machines owned by the partnership, were independent contractors rather than employees. A consolidated appeal from separate judgments in favor of the commission presents for determination the question as to the relationship of the partners and these persons.

Pursuant to the demands of the commission, the partnership paid the sums of $809.40 and $7,027.80 under a verified protest in writing. These amounts represented contributions, interest, and penalties alleged by the commission to be due under the Unemployment Insurance Act with respect to compensation paid to the persons whose status is now in controversy during the years 1938 through 1942, inclusive.

Notice of assessment of delinquent contributions was served on the partners by the commission, and thereafter they filed a petition for reassessment with a request for a hearing as provided in section 45.5 of the Unemployment Insurance Act. A referee found in favor of the commission. The appeals board created by the statute approved the assessment and denied the petition for reassessment. The present actions were then instituted to recover the amounts paid. Upon a trial, the court held that the partners were employers and rendered judgments in favor of the commission.

During the taxable period for which contributions were levied, the partnership owned approximately 450 "crane", "claw", or "digger-type" amusement vending machines. These machines were placed in desirable locations for the use of the public by the men who the commission asserts were the employees of the partnership. The partnership stands upon the terms of a "lease agreement" giving each of such persons, termed a "lessee", the right to place and service a specified number of the machines.

Under the terms of this contract, which was a standard form used by the partnership in its operations, each "lessee" agreed to obtain locations for the machines delivered to him. At intervals, the "lessee", or person employed by him, termed an "operator", collected the money deposited by the public, stocked the machine with merchandise to be delivered to the users, and generally serviced the mechanism. The amounts taken in by the machines, after deducting the cost of the merchandise, were divided upon an agreed percentage basis among the location owners, the partnership and the "lessees".

By the terms of the contract, the "lessee" agreed that, at the expiration of the specified term, he would deliver to the partnership, in good condition, the machines entrusted to him. The partnership might take delivery at the place where a machine was located. The partners were to pay all licenses and taxes imposed upon the operation of the machines.

A further provision of the agreement was that the "lessee" was not to purchase, rent, or operate any other coin operated merchandise vending machine. The "lessee" bound himself to devote his time exclusively to the operation of the partnership's machines, unless the parties otherwise agreed in writing. By express terms, it was stipulated that the contract was one of rental only, and should not be construed as creating the legal relationship of partnership, agency or employer-employee. The partnership was not to be liable for any of the "lessee's" losses, the parties also declared. The "lessee" agreed to procure insurance, at his own expense, against property damage and public liability, and to save the partners harmless from any damage in this respect arising out of the operation of the machines by him. No term was specified for the relationship to continue, and the contract could be terminated by either party upon notice in writing.

Notwithstanding the provisions of the contract, some of the "lessees" engaged in other businesses with the partners' knowledge and consent, and operated machines belonging to themselves or to other companies. As a matter of practice, the contracts were terminable upon 30 days' notice. Also, some of the "lessees" did not divide the net income from the machines in accordance with the percentage fixed by the agreement, but paid the location owners on a different basis and divided the balance equally between themselves and the novelty company.

Prior to making such a contract, the partners determined if the proposed "lessee" was a responsible person, knew the business, and could operate machines with profit to the owners. The "lessee's" activities were confined to a particular area, and he was required to submit weekly reports to the partnership showing the names of each of the operators working for him, the location of the machines, the amount of money collected from the particular location, the amounts paid to the various operators, and the expenses deducted for the maintenance of the route. The operator was required to secure a signed receipt from the location owner when he made his collection. This receipt was given to the "lessee", who remitted it to the partnership with his weekly report.

From time to time, a representative of the partners visited the territories in which the machines were located for the purpose of checking the location of the machines and determining that they were in establishments which afforded protection for the investment of the owners. The representative "would talk to different lessees and exchange ideas with them". Occasionally, the partners held meetings at which the "lessees" and the operators were present. Discussions were held by representatives of the partnership concerning methods of improving collections, and ideas were exchanged in regard to the operation of the business. A "lessee" could sell his route, but the partners had the right to pass upon the qualifications of the proposed "lessee". Norman Pope, a partner in the Rex Novelty Company, testified that if it was determined from the weekly report that there was not sufficient income from a particular location, or that there was any danger of losing the equipment, the "lessee" was advised to change the location or to send the machine back to the company.

The record includes testimony that the "lessees" selected their own employees, called operators, and regulated their hours of work. Although one of the "lessees" testified that he consulted with the partnership when he employed an operator, he was not required to do so. The "lessees" were not required "to put in any particular amount of time". And there is evidence that the partners did not fix the wages of the operators, regulate the nature of their work, or have anything to do with the employment of them.

The "lessees" performed minor repairs on the machines, according to Pope, but if a major repair was necessary, a new machine was substituted by the company and the one in need of repair was returned. Although the partners bore all the risk of loss of a machine because of a fine or confiscation, the "lessee" was held responsible for the cost of the merchandise placed in the machine. This merchandise was charged to the "lessee" upon an inventory taken when the machine left the Rex shop.

On occasions when the "lessees" opened new territory they were given financial assistance by the company in the form of a drawing account. The amount was usually, but not invariably, repaid from the "lessee's" percentage of the profits. The telephone, in most instances, was listed under the name of "Rex Novelty Company", and in some cases, the company shared the telephone expenses. Garage rents, legal fees, the expense of licenses for new machines, and the cost of association stickers were also shared. However, the "lessee" assumed other business charges. The automobile or other transportation used by the "lessees" or their operators was furnished by the "lessees", who paid the expenses of operation.

Upon this evidence, in each action the trial court found that the "lessees" "rendered services to plaintiffs under a contract of hire and for wages and were subject to plaintiffs' authoritative control." As conclusions of law, the court held "that the individuals performing services for the plaintiffs in the plaintiffs' business of operating crane or digger-type machines were in plaintiffs' employ", and that the partnership was not entitled to a refund of the amounts paid for contributions required by the Unemployment Insurance Act. Judgments were entered accordingly, and separate motions for a new trial were denied.

[1-3] Under recent decisions, the relationship contemplated by the Unemployment Insurance Act has been held to be that of employer and employee, an independent contractor not being within the scope of its provisions. As stated in those cases, the most important factor in determining whether a person is an employee or independent contractor, is the *right* to control the manner and means of accomplishing the result desired. Strong evidence in support of a finding of control is the right to discharge at will, without cause. Other factors, enumerated in the Restatement of Agency (sec. 220), are also to be taken into consideration in determining the type of relationship that exists. California Emp. Stab. Com. v. Norins Realty Co., 29 Cal.2d 419, 175 P.2d 217; California Emp. Stab. Com. v. Morris, 28 Cal.2d 812, 172 P.2d 497; Twentieth Century Lites v. California Dept. of Emp., 28 Cal.2d 56, 168 P.2d 699; Briggs v. California Emp. Com., 28 Cal.2d 50, 168 P.2d 696; Empire Star Mines Co. v. California Emp. Com., 28 Cal.2d 33, 168 P.2d 686.

[4] In the present case, there is evidence to support the finding of the trial court that the partners had the right to control the manner and means of accomplishing the result desired. The partners might, under the written agreement, terminate the relationship at any time, without cause, and by threatening to recall the machines, could control the "lessees'" activities. The work of the "lessees" and their operators was checked at frequent intervals through the weekly reports, the visits of a company representative, and by means of company meetings. Some of the other factors which create the relationship of employer-employee were also present. The "lessees" were not engaged in a distinct occupation or business and their services constituted an integral part of the business operations of the novelty company. The principal instrumentality, the vending machine, was supplied by the partnership. The existence of these factors fully justifies a determination of an employer-employee relationship.

The judgments are affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

30 Cal.2d 1

WOLFE v. WOLFE.

L. A. 19676.

Supreme Court of California, in Bank.
April 29, 1947.

1. Divorce 🔑311

Order entered on ex parte application directing defendant to pay specified amount of support money for child due under divorce decree was not unauthorized as another judgment in same divorce proceeding redetermining the award for child's support but was in effect an order directing that execution issue and could be entered without notice to defendant as to installments due and unpaid within five years of the time of the application, notwithstanding application was made more than five years after divorce decree. Code Civ. Proc. §§ 681, 685.

2. Divorce 🔑311

A party to a divorce action is entitled to execution as to unpaid installments of a support award on an ex parte application although the application be made more than five years after entry of the decree provided the execution be restricted to unpaid amounts falling due within five years immediately preceding the application. Code Civ.Proc. §§ 681, 685.

3. Divorce 🔑311

Notice to judgment debtor is not required as to issuance of execution as to installments for child's support due under divorce decree which were due and unpaid within five years of the time of application for execution under statute which before amendment authorized carrying judgment into execution after lapse of five years from its entry by leave of court on ex parte order, or as amended, to require obtaining leave on motion and due notice to debtor, accompanied by affidavit setting forth reasons for not proceeding within five years from entry of judgment. Code Civ.Proc. §§ 681, 685.

4. Divorce 🔑311

On motion to vacate an order determining the amount due for child's support resulting from failure to pay support installments required by divorce decree, evidence did not establish that the parties had agreed to a modification of the support award so as to establish an abuse of discretion in denying motion.

5. **Divorce** ⟹312

An abuse of discretion, in denying motion to vacate order determining the amount of unpaid installments for child's support due on award made in divorce suit must be affirmatively established to authorize reversal.

SPENCE, EDMONDS and SCHAUER, JJ., dissenting.

———◆———

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Proceeding by Ann L. Wolfe against Martin C. Wolfe for an order fixing the amount of unpaid support due under a prior final judgment for divorce. From denial of defendant's motion to vacate the order, defendant appeals.

Affirmed.

Prior opinion, 171 P.2d 509.

John B. Molenaar, of Chula Vista, for appellant.

Harry C. Clark, of San Diego, for respondent.

SHENK, Justice.

This is an appeal by the defendant from an order denying a motion to vacate an order determining the amount due for child support under a final decree of divorce.

The parties married in August, 1925. They had two children, a son and a daughter. The plaintiff wife obtained in the superior court, San Diego County, an interlocutory decree of divorce from the defendant in November, 1931, and a final decree in October, 1933. She was awarded the custody of the children, who were six and five years respectively at the time of the final decree. The interlocutory and final decrees ordered payment by the defendant of the sum of $50 per month for the support of the children.

In September, 1945, the plaintiff made an ex parte application in the same court for an order directing the defendant to pay $2,925 support money. Her affidavit showed that $8,175 had become due, that $3,868 had been paid by the defendant, leaving the sum of $4,307 unpaid. However, she sought only $2,925, which represented $50 per month for the five years immediately preceding the date of her application, less $25 per month for the last three months during which the son, who had attained the age of eighteen years, was in the United States Army. On September 8, 1945, the court entered an order that the plaintiff have judgment against the defendant for the sum of $2,925.

In December, 1945, the defendant noticed a motion to vacate the order of September 8th on the ground that there had been a modification of the support order by the plaintiff's oral agreement to accept $24 per month, and that the sums paid by him had been in full compliance with that agreement; also on the ground that the court had no jurisdiction to make the order without notice to him. Both parties appeared and offered evidence at the hearing on the motion. The court denied the motion and the appeal followed.

The defendant contends that the court had no jurisdiction without notice to determine the amount due and unpaid under the divorce decree which had been entered more than five years prior to the plaintiff's application.

[1] Being merely a subsequent step in the same divorce proceeding, the order did not amount to a new judgment (Doehla v. Phillips, 151 Cal. 488, 496, 91 P. 330); although it did not expressly direct that execution issue, it was in effect such an order. It was not another judgment in the same (divorce) proceeding redetermining the award for child support, in which event it would be an unauthorized judgment. In re Estate of Hultin, 29 Cal.2d 825, 178 P.2d 756.

It was an order determining the amount unpaid under an existing judgment for child support, and was treated by the parties and by the court on the motion to vacate as having the same effect as an order directing that execution issue. It was therefore controlled by the code provisions and decisions dealing with the question of when execution may issue.

Section 681 of the Code of Civil Procedure provides that a writ of execution may issue for the enforcement of a judgment at any time within five years after its entry.

It was in 1945, that the plaintiff sought enforcement of the final decree which was rendered in the divorce action in 1933. Her application was therefore filed more than eleven years after entry of the decree.

Section 685 of the Code of Civil Procedure applies generally in the case of the enforcement of a judgment more than five years after its entry. Prior to 1933, under that section the judgment might be carried into execution after the lapse of five years from its entry by leave of court on ex parte order. Parker v. Parker, 203 Cal. 787, 793, 266 P. 283, and cases cited. By amendment in that year (Stats. 1933, p. 2499), the requirement was added that the leave must be obtained upon motion "and after due notice to the judgment debtor accompanied by an affidavit or affidavits setting forth the reasons for failure to proceed in compliance with the provisions of section 681 of this code. The failure to set forth such reasons as shall, in the discretion of the court, be sufficient, shall be ground for the denial of the motion."

[2, 3] A decree awarding support, such as in this case, provides for amounts to become due at regular intervals in the future. It has been held that a party to a divorce action is entitled to execution as to unpaid installments of a support award on an ex parte application although the application be made more than five years after entry of the decree, provided the execution be restricted to unpaid amounts falling due within the five years immediately preceding the application. Lohman v. Lohman, 29 Cal.2d 144, 173 P.2d 657; Castle v. Castle, 71 Cal.App.2d 323, 324, 102 P.2d 656. In Da Arauje v. Rodriques, 50 Cal.App.2d 425, 123 P.2d 154, it was pointed out that section 685 of the Code of Civil Procedure made provision for the enforcement, by motion and on notice, of a judgment which had been barred by the statute of limitations. The limitation statute has uniformly been deemed not to have run against unpaid installments under a judgment until five years after they have become due. DeUprey v. DeUprey, 23 Cal. 352; Gaston v. Gaston, 114 Cal. 542, 46 P. 609, 55 Am.St. Rep. 86; Shields v. Superior Court, 138 Cal.App. 151, 154, 31 P.2d 1045; Atkinson v. Atkinson, 35 Cal.App.2d 705, 707, 96 P.2d 824; Cochrane v. Cochrane, 57 Cal.App.2d 937, 938, 135 P.2d 714; Castle v. Castle, supra, 71 Cal.App.2d at page 324, 102 P.2d 656; see, also, Yager v. Yager, 7 Cal.2d 213, 218, 60 P.2d 422, 106 A.L.R. 664. The fact that execution cannot issue against installments until they have become due establishes a basis for the conclusion that, either before or after the 1933 amendment of section 685, notice is not required as to installments which were due and unpaid within five years of the time of the application for execution.

The plaintiff sought no relief as to amounts which became due and remained unpaid during the period more than five years prior to her application. She designated those amounts only which were due and unpaid during five years immediately preceding her application, and the order was similarly restricted. It follows, therefore, that the contention of the defendant that the court was without jurisdiction to enter the order except on notice cannot be sustained.

[4] There remains the question whether the court abused its discretion in denying the motion to vacate the order. By the denial of the motion it was impliedly found and concluded that there had been no modification of the support award by agreement or otherwise; that there was due from the defendant $2,925 as the amount unpaid for support during the five years immediately preceding the plaintiff's application; and that there was no legal or equitable consideration which would bar execution thereon. The defendant urges that the record does not support the findings and conclusions. He asserts many facts which have no bearing on the present inquiry, although they might have been pertinent on a motion for a modification of the support award had such a motion been timely made. There is otherwise no question that the amount specified in the order was due and unpaid if the award was not modified by agreement of

the plaintiff. The only evidence introduced by the defendant of such a modification was his testimony that the plaintiff, in a telephone conversation with him shortly after the entry of the interlocutory decree, agreed to take $24 per month instead of the $50 ordered by the court. The plaintiff's testimony that no such agreement existed was supported by evidence from sources which may be said to have been independent and disinterested. There is no contention or showing that the defendant's payments for support were made in such installments and at such times as would evidence the existence of the alleged agreement. The record indicates that the court was justified in concluding that the defendant's assertion of the agreement had no basis in fact.

[5] An abuse of discretion must be affirmatively established. Wilder v. Wilder, 214 Cal. 783, 785, 7 P.2d 1032. The record fails to show such an abuse. Futhermore, the defendant had full opportunity to assert his position on the motion to vacate. Doehla v. Phillips, supra, 151 Cal. at page 495, 91 P. 330.

The order is affirmed.

GIBSON, C. J., and CARTER and TRAYNOR, JJ., concurred.

SPENCE, Justice.

I dissent.

The fallacy underlying the majority opinion is found in the assumption therein that the trial court was dealing with a motion to vacate an order directing the issuance of execution. No order directing the issuance of execution has ever been entered by the trial court and no attempt has been made at any time to obtain such an order for the purpose of enforcing the decree which was entered in 1931.

The essential facts presented in this controversy may be briefly stated. In 1945, plaintiff presented an affidavit which contained the following prayer: "Wherefore, affiant as plaintiff requests that this Court issue its judgment directed against the defendant Martin C. Wolfe, for the sum of $2,925.00 with interest thereon from date of Judgment at the rate of 7% per annum." Plaintiff served no notice of any kind and the trial court entered ex parte its judgment which shows on its face that it was based solely upon the affidavit of plaintiff and which reads: "It is Therefore Ordered, Adjudged and Decreed that said plaintiff have Judgment against defendant, Martin C. Wolfe for the sum of $2,925.00 with interest thereon from the date of Judgment at the rate of 7% per annum." This judgment was recorded on September 11, 1945, in "Judgment Book 128 of said Court, at Page 840." It is undisputed that defendant had no notice of the application for this second judgment and had no notice of its entry until shortly before he served his notice of motion to vacate said judgment on December 7, 1945. Defendant's motion was based upon numerous grounds including the ground that he had been given no notice of the application for said second judgment and that the court was without jurisdiction to enter the same.

It is therefore apparent that the trial court entered a second judgment in the same action for which no justification can be found in the statutory or case law. It is further apparent from the face of the record that such second judgment was entered ex parte. Such second judgment was therefore void on its face. In our recent decision in Re Estate of Hultin, 29 Cal.2d 825, we said at page 830, 178 P.2d 756, at page 759, that the order under consideration in that case "was granted ex parte and was therefore void on its face" and that "The trial court * * * had authority to vacate that order on the ground that it was void on its face. Olivera v. Grace, 19 Cal. 2d 570, 574, 122 P.2d 564, 140 A.L.R. 1328." When a judgment is void on its face, the trial court not only has the authority but it is its duty to vacate such judgment, as such void judgment constitutes what has been termed a "dead limb upon the judicial tree." People v. Greene, 74 Cal. 400, 405, 16 P. 197, 199, 5 Am.St.Rep. 448; see, also, People v. Davis, 143 Cal. 673, 676, 77 P. 651; In re Estate of Smead, 12 Cal.2d 20, 25, 82 P.2d 182.

The majority opinion states that this judgment "did not amount to a new judgment" and that "although it did not expressly direct that execution issue, it was in effect such an order." It concludes that "It was therefore controlled by the code provisions and decisions dealing with the question of when execution may issue." The entire discussion in the majority opinion is based upon this erroneous assumption. The only authority cited in support of this assumption is Doehla v. Phillips, 151 Cal. 488, 496, 91 P. 330, 331. There the appeals were "from an order *directing the enforcement of a judgment* as against appellant, and from an order denying a motion to recall the execution and vacate the former order." (Emphasis added.) The order there clearly directed "That the said judgment be revived and enforced * * * in the sum of $518.35, with interest from December 30th, 1891." While there was a further portion of the order fixing the "total amount now due," the order in question appeared upon its face to be essentially an order for enforcement and not a new or second judgment. In fact, the court said on page 496 of 151 Cal., at page 333 of 91 P.: "As contended by appellant, the lower court had no power without notice to enter a new judgment against him, but we do not read the order made on March 10, 1905, as doing this." In the present case, however, there was no order directing enforcement but there was a second "judgment," which was a judgment in both form and substance, was so designated by name, and was so entered and recorded. The cited case not only does not justify the entry of such second judgment but clearly implies that a second judgment entered without notice would be wholly void. In my opinion, the entire procedure which resulted in the second judgment in the present case was abortive. The trial court should have granted the motion to vacate said second judgment which was entered without notice, and the parties could then have proceeded with some semblance of regularity by presenting their controversy upon an appropriate aplication seeking an order for the issuance of execution.

For the reasons stated, I am of the opinion that the order denying the motion to vacate the second judgment should be reversed with directions to the trial court to grant said motion. In view of this conclusion, it appears unnecessary to discuss the case of Lohman v. Lohman, 29 Cal.2d 144, 173 P.2d 657, 658. Suffice it to state that the Lohman case is not in point, as it involved not an appeal from a second judgment entered without notice but an appeal from an order denying "a motion to enforce the decree," which order had been made after notice and hearing.

EDMONDS and SCHAUER, JJ., concurred.

29 Cal.2d 843

WARGIN v. WARGIN (McCLEARY, Third-Party Claimant-Appellant).

L. A. 19636.

Supreme Court of California, in Bank.

March 28, 1947.

1. Automobiles ⚷20

In proceeding on third party claim by second wife's mother to husband's automobile on which first wife had levied execution to enforce divorce decree, evidence supported conclusion that there was no transfer of ownership from husband upon which estoppel to deny the transfer could be based. Vehicle Code, § 186; Civ. Code, § 3440.

2. Automobiles ⚷20

Estoppel to deny validity of transfer of automobile not complying with statutory requirements cannot be applied in absence of bona fide change of ownership and possession. Vehicle Code, § 186; Civ.Code, § 3440.

3. Automobiles ⚷20

Where husband did not comply with statutory requirement for transfer of automobile to second wife's mother, and transfer was not a bona fide change of ownership and possession but, at most, for security, transferee could not resist execution against the automobile to enforce first wife's divorce decree. Vehicle Code, § 186; Civ.Code, § 3440.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Divorce action by Esther Wargin against Emil M. Wargin, wherein plaintiff was awarded decree and writ of execution thereon, levied on an automobile. From a judgment denying her third party claim to be owner of the automobile, Ida McCleary appeals.

Affirmed.

Prior opinion, 172 P.2d 518.

Joseph L. Fainer, Jerrell Babb and Louise A. Steele, all of Los Angeles, for appellant.

Ernest Eugene Walker, of Los Angeles, for respondent.

SHENK, Justice.

This is an appeal from a judgment against a third party claimant in a proceeding to try title to personal property levied on under a writ of execution.

The defendant, Emil M. (Milan) Wargin, was in arrears in payments to his former wife, the plaintiff Esther Wargin, to the extent of $1,200 of the periodical sums awarded by a decree of divorce for the support of their minor child. On the plaintiff's application a writ of execution issued and, on May 15, 1945, was levied on a Plymouth sedan automobile. Ida McCleary, mother of Ona Wargin, the defendant's present wife, filed a verified third party claim, averring that she was the sole owner of the automobile. A proceeding to try title followed. It was the judgment of the court that Ida McCleary was not the owner of the automobile. From that judgment she prosecutes this appeal.

It is unquestioned that about February 21, 1945, there was an attempt to transfer title to the automobile from Milan Wargin, in whose name title stood, to Ida McCleary. It is also without dispute that prior to the levy of the writ of execution a transfer of the title was not effected in accordance with the requirements of section 186 of the Vehicle Code. That section provides that any attempted transfer shall not be effective unless and until the parties have fulfilled the prescribed requirements.

The appellant urges that the judgment creditor stands in the shoes of the judgment debtor in respect to ownership of the property. She contends that the doctrine of estoppel applies to the defendant in the attempted transfer, and that therefore the plaintiff as the judgment creditor is also precluded from denying the title of the transferee.

The appellant relies on the rule of estoppel expressly announced in section 186 of the Vehicle Code in 1935 (Stats. 1935, pp. 93, 118) but deleted in 1943 (Stats.1943, p. 3072). In the period between those years the section provided that an attempted transfer of ownership of a motor vehicle should not be effective for any purpose until the transfer of registration was made and the required certificates issued, "except as a transferor may be estopped by law to deny a transfer." It may be assumed that the omission of the quoted provision in the section as it now reads did not change the law regarding the application of the principles of estoppel in proper cases. The correctness of the invoked doctrine as a principle of law has been recognized. See Kenny v. Christianson, 200 Cal. 419, 423, 253 P. 715, 50 A.L.R. 1297; Parke v. Franciscus, 194 Cal. 284, 297, 228 P. 435; Boles v. Stiles, 188 Cal. 304, 306, 204 P. 848; LeGrand v. Russell, 52 Cal.App.2d 279, 126 P.2d 136; Carpenter v. Devitt, 49 Cal.App.2d 473, 122 P.2d 79; Bank of America N. T. & S. A. v. National Funding Corp., 45 Cal.App.2d 320, 330, 331, 114 P.2d 49; Dennis v. Bank of America, 34 Cal.App.2d 618, 623, 624, 94 P.2d 51; Pacific Acceptance Corp. v. Jones, 95 Cal. App. 365, 370, 272 P. 1084. It is necessary, however, for the appellant to present a factual basis for its application.

The court in the proceeding to try title heard all of the evidence offered on the issue of estoppel. There remains only the question whether the evidence supports the judgment on that issue.

At the time of the foregoing events Ida McCleary was 70 years of age. Prior to the latter part of January, 1945, she lived with her husband in Texas. Early in that month upon request she telegraphed the sum of $1,900 to the defendant, whom she had twice theretofore met. The defendant's letter of request was not produced. It was said to have been destroyed. There was testimony to the effect that the transaction was a loan.

The McClearys came to California in January, 1945, and took up separate living quarters in the apartment house where the Wargins resided. On February 21, 1945, the defendant executed to Ida McCleary a bill of sale of the automobile for which he accepted a receipt crediting $895 on the $1,900 "loan." The defendant did not purchase another car.

The financial circumstances of the McClearys were not shown. It was admitted that in the past they received small gifts of money from the defendant. Neither of the McClearys could drive the car. A set of keys was retained by Ona, the defendant's wife, who used the car and conveyed the McClearys in it. No change was made in the storage of the automobile, except that receipts for garage rent were issued in the name of Ida McCleary. By his own admissions the defendant was insolvent at the time of the execution of the bill of sale to Ida McCleary.

[1] The evidence supports the conclusion that there was no transfer of ownership upon which an estoppel could properly be based. The credibility of the witnesses was for the trial court. The record, including the inferences that could reasonably be drawn from the evidence, justifies the implied findings and conclusions that there was in fact not a loan from Ida McCleary to the defendant; or, if there was, that the attempted transfer of ownership of the automobile was for purposes of security only; that there was no change of possession of the automobile; and that by the bill of sale there was no intention in fact that the defendant should relinquish any right of ownership or possession.

[2] There can be no room for the application of the doctrine relied on by the appellant where there is no bona fide change of ownership and possession. Section 3440 of the Civil Code provides that every transfer of personal property (with exceptions not pertinent here) "is conclusively presumed if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession * * *."

[3] The court could justifiably conclude that there was no factual basis upon which the defendant could be estopped to deny the claim of ownership of Ida McCleary, and that the issue of ownership was then controlled by the provisions of section 186 of the Vehicle Code. Since the provisions of that section were not complied with, the defendant was still the owner of the car. There was therefore no error in the judgment that Ida McCleary, as third party claimant, was not the owner of the automobile.

The judgment is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

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30 Cal.2d 104

WILK v. VENCILL et al.

L. A. 19745.

Supreme Court of California, in Bank.
May 13, 1947.

1. Frauds, statute of 🔑144

Although failure to make a writing as agreed is not such fraud as will remove a case from operation of statute of frauds, under doctrine of "equitable estoppel", a representation of a future intention, absolute in form, deliberately made for purpose of influencing conduct of other party, if acted upon by other party, is generally the source of a right, and may amount to a contract enforceable as such by court of equity. Code Civ.Proc. § 1973; Civ.Code, § 1624.

See Words and Phrases, Permanent Edition, for all other definitions of "Equitable Estoppel".

2. Frauds, statute of 🔑144

The doctrine of estoppel is not destructive of statute of frauds, but rather, without the qualifying doctrine of estoppel in a proper case, the statute would encourage rather than prevent perpetration of fraud. Code Civ.Proc. § 1973; Civ.Code, § 1624.

3. Specific performance 🔑121(2)

Plaintiff seeking specific performance of contract to sell realty which belonged to husband and wife in joint tenancy, and which contract was signed by husband only, must establish the contract, his reliance on wife's oral representation that she would execute the agreement after she and her husband had completed their property settlement agreement, and change of his position as result of such reliance by a preponderance of the evidence in order to recover. Code Civ.Proc. § 1973; Civ.Code, § 1624.

4. Joint tenancy 🔑13

One joint tenant may dispose of his interest without consent of the other.

5. Specific performance 🔑10(1)

A party may agree to convey more than he possesses, and, although he cannot fully perform, specific performance may be available insofar as it is possible.

6. Specific performance 🔑116¾

Even if wife was successful in her defense of statute of frauds in action seeking specific performance of contract to sell realty which belonged to husband and wife in joint tenancy, and which contract was signed by husband only, husband would not as result thereof also be entitled to have his demurrer to the complaint sustained. Code Civ.Proc. § 1973; Civ.Code, § 1624.

7. Specific performance 🔑116¾

A complaint seeking specific performance of contract to sell realty which belonged to husband and wife in joint tenancy, and which contract was signed by husband only, which alleged that wife orally represented that she would execute the agreement after she and her husband had completed their property settlement agreement, and that plaintiff relied upon her representation and changed his position, in that he refrained from purchasing another house in neighborhood which was at that time available but which was subsequently sold, was sufficient to state a cause of action against both husband and wife as against general demurrer. Code Civ.Proc. § 1973; Civ.Code, § 1624.

8. Pleading 🔑225(2)

Where complaint was sufficient against a general demurrer, sustaining special demurrers without leave to amend was improper.

◆

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by Nat Wilk against Charles A. Vencill and Mabel Vencill for specific performance of a contract to sell realty or to recover damages. From a judgment of dismissal without leave to amend, the plaintiff appeals.

Reversed.

Prior opinion, 173 P.2d 669.

Albert G. Bergman, of Los Angeles, for appellant.

Samuel H. Robinson and Harold M. Heimbaugh, both of Los Angeles, for respondents.

TRAYNOR, Justice.

This appeal is from a judgment of the superior court dismissing an action for specific performance or damages after defendants' demurrers to plaintiff's fourth amended complaint had been sustained without leave to amend.

The following facts are alleged in the fourth amended complaint: Defendants, husband and wife, are the owners in joint tenancy of a house and lot. On July 24, 1945, plaintiff and defendant husband executed the following agreement:

"Received of Nat Wilk, the sum of Ten Dollars as part payment for my real property located at 425 North Martel Ave., Los Angeles, California.

"The entire price to be paid for the above described property is the sum of Eighty-Nine Hundred Dollars and to be paid as follows:

"Five Thousand Dollars Cash in escrow to be commenced within thirty days after a property settlement agreement is executed between the undersigned seller herein and his wife.

"Also this property to be sold to said Nat Wilk subject to two encumbrances wherein their total unpaid balances is the sum of approximately Thirty-Nine Hundred Dollars.

"Further this within option to purchase the above described property is made with the specific understanding that the undersign's wife will surrender possession thereof when and if she is able to procure other living accommodations.

"Dated July 24, 1945.
"Chas. A. Vencill

"I accept the within option.
"July 24, 1945.
"Nat Wilk"

Plaintiff gave defendant wife a copy of this agreement and requested that she join in its execution. She stated that she approved of and consented to the sale and agreed to sign the agreement as well as any other documents necessary to the transfer of title. Mrs. Vencill informed plaintiff of marital difficulties between her and her husband and said that they were living apart and were negotiating a property settlement. She stated that she wished to defer execution of the agreement until she and her husband completed their property settlement agreement. She estimated that this would be accomplished in about a week from July 24, 1945, and that immediately thereafter she would sign the agreement to sell the property.

Plaintiff was negotiating to purchase another home for himself and his family in the neighborhood where defendants live. The price was approximately the same as that fixed by defendants for their house, and the two houses were much alike. Plaintiff decided to purchase defendants' house and the other house was subsequently sold to another. When defendants later refused to sell there was no other house available in that neighborhood. Within a day or two after Mr. Vencill signed the agreement to which Mrs. Vencill orally assented, plaintiff made arrangements, in her presence, with painters and contractors to make repairs and improvements to the property. Mrs. Vencill told plaintiff that she was happy that he and his family were going to live in the house and that she preferred them to any other prospective purchasers. She stated that she was sure that they would be happy in the home after it was redecorated and repaired. The next day she agreed to sell the bedroom rugs to plaintiff, at a price to be fixed when she moved out. Plaintiff spent about two weeks after July 24, 1945, cutting, cleaning and watering the grounds and premises, devoting his time thereto to the exclusion of his law practice. He also expended $10 employing another person to assist him.

Defendants executed their property settlement agreement on or about July 31, 1945, and at that time, or immediately thereafter, plaintiff asked Mrs. Vencill to carry out her agreement. Mrs. Vencill refused, stating that she was arranging to sell the property to others, having been advised that plaintiff could not enforce the performance of her promise. Plaintiff contends that when Mrs. Vencill made her promise she did so with the secret reservation not to perform and with the intention of misleading and deceiving him. Plaintiff tendered the $5,000 within the prescribed time and the tender was refused. He states that the price of $8,900 is fair and was fair at the time of the execution of the agreement. The defendants agreed to sell the property to another on or about August 15, 1945, for about $9,000, but this sale has not yet been consummated. Plaintiff requests specific performance or, if that is not possible, damages. Both defendants separately demurred generally and specially and their demurrers were sustained without leave to amend.

[1] Plaintiff contends that although Mrs. Vencill did not sign the contract as required by the statute of frauds (Code Civ.Proc. § 1973; Civ.Code § 1624), her conduct was sufficient to bar her from invoking the statute. Defendants contend that plaintiff can show only that he relied upon her promise to sign the sales contract and that the failure to comply with a promise cannot serve as a basis for estoppel. The same contention was advanced in Seymour v. Oelrichs, 156 Cal. 782, 792, 797, 106 P. 88, 95, 134 Am.St.Rep. 154, upon which defendants rely. It was there stated

that although the failure to make a writing as agreed is not such fraud as will remove a case from the operation of the statute of frauds, under the doctrine of equitable estoppel "a representation of a future intention absolute in form, deliberately made for the purpose of influencing the conduct of the other party * * * if acted upon by the other party, is generally the source of a right, and may amount to a contract enforceable as such by a court of equity." At pages 797, 798, of 156 Cal., at page 95 of 106 P. Plaintiff alleged that Mrs. Vencill told him that she consented to the sale and that she would sign the agreement in the near future; that in reliance upon her representations and acts he relinquished his opportunity to buy another home in that neighborhood within his price range; and that her words and acts led him to rely upon the security of his agreement. He thereby lost more than the subject of the agreement; he lost the opportunity to purchase another home. Plaintiff does not allege that Mrs. Vencill knew of his opportunity to buy another home, but he states that he can prove that she did and that he requested the trial court to allow him to amend his complaint in order to add this allegation. The failure to make the allegation, however, is not fatal to his statement of a cause of action. The object of Mrs. Vencill's representations was to lead plaintiff to consider himself entitled to buy her house and to regard his search for a family home as ended. She encouraged his preparations to move into her house with his family. Since his change of position was a natural and probable consequence of his reliance upon her representations, it is immaterial whether or not she actually knew of his opportunity to purchase another home in that neighborhood.

[2,3] The doctrine of estoppel is not destructive of the statute of frauds. Halsey v. Robinson, 19 Cal.2d 476, 482, 122 P.2d 11. Without the qualifying doctrine of estoppel in a proper case the statute would encourage rather than prevent the perpetration of frauds. Wilson v. Bailey, 8 Cal.2d 416, 422, 65 P.2d 770. Plaintiff must still establish the truth of his allegations, and if he does not prove the contract, the reliance, and the change of position by a preponderance of the evidence, he cannot recover. See Notten v. Mensing, 3 Cal.2d 469, 477, 45 P.2d 198; Notten v. Mensing, 20 Cal.App.2d 694, 697, 67 P.2d 734.

[4-6] Mr. Vencill contends that if his wife is successful in her defense on the statute of frauds, he cannot be held to the contract on the ground that where one of two joint tenants contracts to sell real estate and the other joint tenant does not execute the contract, the party executing the agreement cannot be compelled to convey his own undivided interest since he contracted to sell the entire property and not simply his undivided interest therein. Assuming that plaintiff cannot sustain his burden of proof as against Mrs. Vencill, it does not follow that plaintiff's complaint against her husband must be dismissed. One joint tenant may dispose of his interest without the consent of the other. Delanoy v. Delanoy, 216 Cal. 23, 26, 13 P.2d 719, 86 A.L.R. 1321. Further, a party may agree to convey more than he possesses and, although he cannot fully perform, specific performance may be available insofar as it is possible. Armstrong v. Sacramento V. R. Co., 52 Cal.App. 110, 116, 198 P. 217; see 5 Williston on Contracts § 1436; Rest., Contracts, § 365. The contract does not show on its face that both joint tenants were to sign. Mr. Vencill, in view of his impending separation, may have intended to convey his interest whatever the decision of his wife. The nature and extent of plaintiff's recovery, if any, against Mr. Vencill will be decided after the facts have been presented to the trial court. It was therefore error to sustain Mr. Vencill's demurrer regardless of the ruling with respect to his wife.

[7,8] There are other objections raised by defendants, establishing at most only plaintiff's inability to obtain specific performance. The contract is sufficiently clear in its statement of terms to support a decree of specific performance (O'Donnell v. Lutter, 68 Cal.App.2d 376, 383, 156 P.2d 958), and the trial court may require additional clarifications of the pleadings if necessary, or deny specific performance if that remedy is not proper. The complaint is sufficient against a general demurrer.

however, and in such a case it is improper to sustain special demurrers without leave to amend. Columbia Pictures Corp. v. De Toth, 26 Cal.2d 753, 762, 161 P.2d 217, 162 A.L.R. 747; Wilkerson v. Seib, 20 Cal.2d 556, 564, 127 P.2d 904.

The judgment is reversed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concur.

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79 Cal.App.2d 404

MORTIMER v. ACQUISITION AND IMPROVEMENT DIST. NO. 36 OF SAN DIEGO COUNTY et al.

Civ. 15451.

District Court of Appeal, Second District, Division 1, California.
April 30, 1947.

Rehearing Denied May 29, 1947.

Appeal and error 🔑1152

Where acquisition and improvement district which respondent admitted had no legal capacity to be sued was sued by its true name and appeared and judgment was taken against it and county in which district operated was sued by a fictitious name and appeared by its true name and admitted that the district held a certain fund awaiting judicial determination of the proper payee, but county was not named in judgment nor was complaint amended to show the true defendant, District Court of Appeal was without power to order the judgment amended by substituting the county as judgment debtor, and the cause would be remanded for a new trial. Gen.Laws, Act 3276a, § 39; Code Civ.Proc. § 474.

◆

Appeal from Superior Court, Los Angeles County; Benjamin C. Jones, Judge.

Action by Frank C. Mortimer, as Building and Loan Commissioner of the State of California in the liquidation of the California Mutual Building & Loan Association, against Acquisition and Improvement District No. 36 of San Diego County and others for the recovery of certain coupons detached from specific bonds issued by the named defendant and for declaratory relief as to the respective rights and ownership and possession thereof. From a judgment for defendant Howard Claman, sued as Howard Clayman, assignee, the named defendant appeals.

Judgment reversed and cause remanded for a new trial in conformity with opinion.

Thomas Whelan, Dist. Atty., Carroll H. Smith, Chief Trial Deputy Dist. Atty., and Frank T. Dunn, Asst. Dist. Atty., all of San Diego, for appellant.

Musgrove & Cannan, of Los Angeles, for respondent.

YORK, Presiding Justice.

The instant action by the State Building and Loan Commissioner in liquidation of the California Mutual Building and Loan Association against the Acquisition and Improvement District No. 36 of San Diego and others, including Howard Claman, sued as Howard Clayman, and the County of San Diego, which was sued as Doe Corporation One, is for the recovery of certain coupons detached from specific bonds and for declaratory relief as to the respective rights of ownership and possession thereof by the parties hereto.

It appears from the complaint that defendant district long prior to the institution of the instant suit had issued bonds under the Acquisition and Improvement Act of 1925, and that a number of these bonds by mesne transfers from the original holders came into the possession and ownership of the California Mutual Building and Loan Association with all coupons attached; that while in the possession of said association, the coupons here involved were detached from the bonds and found their way into the hands of defendant Claman; that subsequently these bonds with all coupons, attached and detached, were sold by the said association back to the Improvement District for 15¢ on the dollar; tha because the association was unable to deliver the detached or missing coupons, the district withheld from the entire purchase price of the bonds, the agreed purchase price of said missing coupons, to-wit: $1,204.24, and retained that sum awaiting due presentment and surrender of the coupons and demand for payment by their holder; that said association was taken over in liquidation by the plaintiff State Building and Loan Commissioner on behalf of the State of California, and subsequently a controversy developed between plaintiff and defendant Claman as to who was the rightful owner and possessor of the coupons, whereupon the instant action was brought praying that the court determine the rightful owner of the coupons and that judgment be made declaring and defining the respective rights and interests of the parties in and to the said coupons and the fund of $1,204.24 held by defendant district. The action was defended by the County of San Diego, which answered the complaint admitting that defendant district "now has and holds the sum of $1,204.24 awaiting judicial determination of the proper payee."

Prior to trial, the court denied the motion of the County of San Diego to amend its answer to include as an additional affirmative defense the bar of the statute of limitations. In opposition to said motion, defendant Claman filed an affidavit in which he averred that the county was estopped from asserting such defense for the reason that relying upon the answer of the county theretofore filed in the action and the allegations contained therein, he had entered into an agreement with the plaintiff whereby he paid the latter $200 for an assignment dated October 17, 1944, of all of plaintiff's right, title and interest in and to the said coupons.

When the instant cause came on for trial, said motion to amend the answer was renewed and denied, whereupon a stipulation by counsel for plaintiff, for defendants Claman and Guaranty Liquidating Corporation, for judgment in favor of defendant Claman was admitted in evidence.

From the judgment decreeing that defendant Claman "is the sole owner" of the coupons in controversy; "is the proper payee" of the sum of $1,204.24, and "is entitled to the payment thereof from the defendant San Diego Acquisition and Improvement District No. 36", this appeal is prosecuted by the "defendant Acquisition and Improvement District No. 36 of San Diego County."

It is first contended that the judgment is void because taken against a party which has no legal capacity to sue or be sued and therefore is not such a legal entity as will permit a judgment to operate against it.

Respondent admits that the district has no legal capacity to be sued, but urges that the County of San Diego (sued as Doe Corporation One) is the real party in interest operating under another name, to-wit: Acquisition and Improvement District No. 36 of San Diego County, and therefore this court may order the complaint and the judgment "amended as of a date prior to the entry of the judgment to express the true circumstances."

Respondent's theory of amendment is apparently based upon the concept that the error to be corrected is one of misnomer, i. e., that the County and the District are one and the same legal entity and that jurisdiction over both having been acquired by the trial court an amendment would effect no change in the parties, being only a substitution or change of names for one and the same party defendant.

An examination of the record discloses that appellant district was sued by its true name, it appeared and judgment was taken against it in its true name. Defendant County of San Diego was sued by a fictitious name; it appeared by its true name and admitted that "defendant * * * district now has and holds the sum of $1204.24 awaiting judicial determination of the proper payee"; however said County is not named in the judgment, nor was the complaint amended, pursuant to section 474 of the Code of Civil Procedure, to show such defendant's true name.

Appellant is an improvement district organized under the Acquisition and Improvement Act of 1925. Stats.1925, p. 849, Deering's Gen.Laws, Act 3276a. Section 39 of said Act sets up in haec verba the form of bond to be issued thereunder, which recites in part as follows:

"Acquisition and Improvement District Bond. Acquisition and improvement district No. ——— of the county (or city) of ———, State of California. $——— Bond No. ——— Series ———.

"Under and by virtue of an act of the legislature of the state of California, known as the 'Acquisition and improvement act of 1925', the county (or city) of ——— state of California, will pay to the bearer, out of the fund hereinafter designated, at the office of the treasurer of said county (or city), on the —— day of ———, 19——, the sum of ——— dollars in gold coin of the United States of America, with interest thereon in like gold coin at the rate of ——— per cent per annum, payable semi-annually on the second day of January and the second day of July in each year from the date hereof * * * upon the presentation and surrender, as they respectively become due, of the proper interest coupons hereto attached * * *.

"This bond is payable out of the 'Acquisition and improvement district No. ——— of the county (or city) of ——— interest and sinking fund', exclusively, as the said fund appears upon the books of the treasurer of said county (or city) and neither said county (or city) nor any officer thereof shall be holden for its payment otherwise; but in accordance with the provisions of said act a special assessment tax will be levied and collected upon the lands in said district in an amount clearly sufficient to pay the principal and interest of said bonds as the same shall become payable.

"In witness whereof the ——— (here designate the legislative body) of said county (or city) has caused this bond to be signed by the treasurer of said county (or city) and the seal of ——— (here use the words 'the board of supervisors of said county or the words * * *', as the case may be) to be affixed this ——— day of ———, 19——. * * *

"All bonds issued under this act shall be signed by the treasurer of the county or municipality whose legislative body conducts the proceeding and shall have the seal of the board of supervisor of the county or the seal of the city, as the case may be, thereto affixed, and when so signed shall be binding according to the terms thereof as prescribed in the above form therefor. The interest coupons attached to said bonds shall be in such form as the said treasurer shall determine, subject to the provisions of this act and the determination made by the legislative body, and the signature on said interest coupons by said treasurer, by either written or engraved or printed facsimile signature shall be sufficient."

This appears to be a direct promise of the county to pay to the bearer the amount of the bond and interest coupons upon presentment.

In the state of the record here presented, this court is without power to order the judgment amended in the manner suggested by respondent, to-wit: by the substitution therein of the County of San Diego as judgment debtor in place of the Acquisition and Improvement District No. 36 of the County of San Diego.

The judgment is reversed and the cause remanded for a new trial on the question as to whether the County of San Diego and the Acquisition and Improvement District No. 36 of the County of San Diego compose one legal entity so as to entitle respondent to a judgment against the County of San Diego for the sum of $1,204.24, which the County Treasurer holds in the Acquisition and Improvement District No. 36 of the County of San Diego Interest and Sinking Fund, at which time the trial court may permit such amendments to the pleadings, findings and judgment as it sees fit.

DORAN and WHITE, JJ., concur.

79 Cal.App.2d 627

HASTINGS et al. v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

Civ. 15706.

District Court of Appeal, Second District, Division 2, California.

May 12, 1947.

Rehearing Denied May 29, 1947.

Hearing Denied July 10, 1947.

1. Escrows ⚿6, 8(2), 12

Where $500 deposited in escrow was not to be paid to vendors until after delivery of deed and a policy of title insurance had issued, the payment of deposit and delivery of deed were mutually dependent, and title to money remained in purchasers until time fixed for closing transaction and they were entitled to withdraw it even though they were liable in damages for failure to complete the transaction as provided by escrow agreement.

2. Escrows ⚿12

The title to money deposited in escrow to be paid to the vendor does not pass until all conditions of the escrow have been fulfilled.

3. Escrows ⚿9

Where escrow agreement provided for $500 deposit by purchasers and balance of purchase price whenever escrowee should have filed for recordation a sufficient conveyance, etc., that if this could not be done on or before July 22, 1944, escrowee should comply as soon thereafter as possible unless a written demand for return of money or instruments should be made subsequent to such date and 30-day extension was thereafter granted the escrow agreement implied that purchasers should be notified of vendors' desire to close escrow and purchasers could not be divested of their rights to complete the transaction without such notice specifying a day as the expiration of the term of indulgence.

4. Equity ⚿66

It is a cardinal principle of extensive application that he who seeks equity must do equity.

5. Damages ⚿78(6)

Vendors were not entitled to down payment as liquidated damages in absence of agreement therefor in event of purchasers' failure to pay balance of purchase price.

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Paul Hastings and Lucia Hastings against Bank of America National Trust & Savings Association, Thomas O. Reynolds and Eseling Reynolds to quiet title to $500 held in escrow by other defendant wherein the individual defendants filed a cross-complaint. From a judgment for plaintiffs, the individual defendants appeal.

Judgment reversed with instructions to enter judgment for appellants.

L. B. Reynolds, of Redondo Beach, for appellants.

Ratzer & Bridge, of Redondo Beach, for respondents.

MOORE, Presiding Justice.

On June 22, 1944, respondents were owners of lots 12 and 13 of the Hallowell tract in Los Angeles county. On that day appellants agreed to deposit in an escrow with defendant bank the sum of $3,500 to be paid to respondents whenever the bank should have filed for recordation a sufficient conveyance such as would entitle the bank to procure an owner's policy of title insurance issued by the Title Insurance and Trust Company or National Title Insurance Company showing title of the two lots vested in appellants subject to certain specified exceptions. At the same time appellants deposited $500 of the purchase price and directed the bank if it should be "unable to comply with these instructions on or prior to July 22, 1944, you will comply as soon thereafter as possible unless a written demand for return of money or instruments by a party to this escrow is received by you subsequent to such date". On or about the same day respondents approved by writing of appellants' instructions and agreed to deposit such instruments in the escrow as would enable the bank to comply with the instructions. Also, they authorized the bank to use such instruments when it should hold for the account of respondents the sum of $3,500.

The legal effect of the instructions was an obligation upon appellants to pay into the escrow the balance of the purchase price on or prior to July 22, 1944, but that if they should be unable to comply by that date they should "comply as soon thereafter as possible unless a written demand for return of money or instruments by party to this escrow is received by you subsequent to such date and prior to the recording of any instrument provided for herein." No demand was thereafter made upon appellants to comply with the escrow by depositing the balance of the money, but without notice to appellants and without their knowledge on August 21, 1944, respondents conveyed the property to a stranger to the escrow and eleven days later demanded payment of the deposit to themselves. Respondents filed this action to quiet their title to the $500, less the $20 service charge alleging that appellants' claims thereto are without right.

In their cross-complaint appellants alleged in addition to the facts above recited that "said deed was never recorded and said owner's policy of title insurance was never obtained; that said * * * bank * * * could not obtain said owner's policy of title insurance because of the fact that said plaintiffs * * * did * * * convey said real property to a third party which deed was recorded on August 31, 1944, in the office of the county recorder." In response to such pleading respondents alleged that the bank was instructed by appellants to record the deed and obtain the policy of title insurance "on or before July 22, 1944," but that on the latter date appellants declared their inability to consummate the purchase and refused to deposit the balance of the purchase price. The bank having deposited the $480 with the clerk of the court was dismissed from further liability.

Although respondents extended the term of the escrow for another 30 days, no written demand was ever made by them for the return of the deed or for a termination of the escrow. But while appellants were still endeavoring to raise the $3,000 respondents opened an escrow at another bank, completed their sale and the deed to the new purchaser was recorded.

The court found (1) that "appellants have been continuously since July 22, 1944, and still are in default upon their agreement to purchase the * * * property from plaintiffs and that plaintiffs were at all times * * * able, willing, and ready to transfer and convey said real property to defendants Reynolds free and clear of all incumbrances except as provided in said agreement"; (2) that the $480 is the property of respondents and (3) that appellants have no right, title or interest in that sum. Judgment was entered accordingly.

[1-4] The $500 was not to be paid to respondents until after delivery of the deed and a policy of title insurance had issued. The payment of that deposit and the delivery of the deed were mutually dependent upon each other. The title to the money remained in appellants, and after July 22, 1944, they were entitled to withdraw it even though they were liable in damages for failure to complete the transaction as provided by the terms of the escrow. Widess v. Title Insurance & Trust Company, 112 Cal.App. 343, 296 P. 899. The title to money deposited in escrow to be paid to the vendor of property does not pass until all conditions of the escrow have been fulfilled. Hildebrand v. Beck, 196 Cal. 141, 146, 236 P. 301, 39 A.L.R. 1076; 39 A.L.R. note 1080; 19 Am.Jur. 426, sec. 11. The language of the instructions clearly implies that appellants should be notified of respondents' desire to close the escrow. After July 22 the purchasers could not be divested of their rights to complete the transaction without notice specifying a day as the expiration date of the term of indulgence. It is a cardinal principle of extensive application that he who seeks equity must do equity. 30 C.J.S., Equity, § 90, p. 458.

[5] The rule with reference to the treatment of money placed in an escrow does not differ from the rule governing the delivery of written instruments deposited in the same escrow. If the deed held by the escrow agent for appellants did not pass to them merely because it was where it was, neither did title to the money pass to respondents merely because it was in the escrow. Holding the deed as agent for respondents, the bank was not obliged to deliver it to appellants until all

specified conditions had been performed. Likewise it held the money until title of the lots was vested in appellants. There was not only no agreement that the bank should pay the money to respondents except in event such title should pass to appellants, but there was no provision in the escrow instructions that respondents should be entitled to the $500 either as a forfeiture or as liquidated damages. Of course a forfeiture could not have been declared either by the bank or by the court, since forfeitures are abhorred. Neither are respondents entitled to the money as liquidated damages in the absence of an allegation of damages and of an agreement that such sum should be the amount of respondents' damages in the event appellants should fail to deposit the balance of the purchase price prior to respondents' abandonment of the escrow.

Respondents have proceeded upon the hypothesis that they had an agreement for themselves to receive the $500, sale or no sale, as though they had a contract of purchase and sale with a covenant that appellants' initial deposit should be "retained not as a penalty but as liquidated damages because it is extremely difficult to determine the amount of such damage." Language similar to the last-quoted clause was a part of the agreement involved in Glock v. Howard, 123 Cal. 1, 55 P. 713, 43 L.R.A. 199, 69 Am.St.Rep. 17, cited by respondents, and time was there made "of the essence of the contract." No action was taken by respondents herein to place appellants in default, and there was no offer by respondents to make conveyance after August 21, 1944, to which date they had extended the term of the escrow, if appellants would pay the balance by a specified date. Having allowed the buyers until the latter date to comply with respondents' instructions which directed the bank to "comply as soon thereafter as possible unless a written demand for return of money or instruments by a party to this escrow is received by you subsequent to such date and prior to the recording of any instrument provided for herein," respondents could not even under a formal contract lay claim to the $500 without first having put appellants in default. See Glock v. Howard, supra.

The fact that the term of the escrow was extended to August 21 as an accommodation to appellants does not alter the applicability of the foregoing principles. Within that period appellants were attempting to raise the $3,000 as they had attempted to do during the term designated in the instructions. Since the money was never deposited the escrow was never completed and title to the money did not pass from appellants.

The contention that respondents are entitled to recover the $500 deposited since it was to apply on the purchase price of land and respondents had escrowed all necessary instruments to effect a complete transfer of their title is not legally sound. Wilson v. Coffey, 92 Cal.App. 343, 349, 268 P. 408, and Tuso v. Green, 194 Cal. 574, 581, 229 P. 327, do not support their thesis. In the Wilson case all acts had been done by both buyer and seller as provided by their escrow instructions. The defendant there attempted to avoid the consummation of the transaction by reason of the existence of an incumbrance which had been by him waived. The court there followed Tuso v. Green, 194 Cal. 574, 229 P. 327, wherein it was held that both parties having performed all of their covenants and a clear title except for the reservations specified in the escrow instructions having been prepared for conveyance to the buyer, the seller was entitled to keep the amount deposited by the purchaser in the escrow. In the case at bar a wholly different situation obtained. Without advising appellants of their intention not to stand upon the terms of the escrow respondents repudiated the agreement and sold their lots to another party.

The judgment is reversed with instructions to enter judgment for appellants.

McCOMB and WILSON, JJ., concur.

Hearing denied; EDMONDS and SCHAUER, JJ., dissenting.

79 Cal.App.2d 363

BEDFORD INV. CO. v. FOLB et al.

Civ. 15786.

District Court of Appeal, Second District,
Division 2, California.

April 28, 1947.

As Amended on Denial of Rehearing
May 6, 1947.

1. Witnesses 🔑268(16)

In unlawful detainer action by lessor based on breach of lease which prohibited assignment of lease or sublease without lessor's written consent, but which provided that lessor should not arbitrarily withhold approval, question addressed to business manager of lessor on cross-examination, inquiring whether he objected to type of business sublessees were running, was proper for purpose of showing whether refusal to consent to sublease was because of the character of sublessee's business or was arbitrary rejection.

2. Landlord and tenant 🔑291(12)

In unlawful detainer action by lessor based on breach of lease prohibiting assignment of lease or sublease without lessor's written consent but providing that lessor should not arbitrarily withhold approval, testimony by sublessee that he had once attempted to rent the entire premises directly from lessor, and that business manager of lessor knew the kind of business he intended to conduct and did not object thereto, was admissible.

3. Appeal and error 🔑995

The testimony of lessee, sued in unlawful detainer, that rent was paid up to date, would be taken as true, in absence of denial in record or evidence that rent was not accepted by lessor.

4. Landlord and tenant 🔑112(2)

Lessor's acceptance of rent after his unlawful detainer action had been filed against lessees barred right to forfeiture of lease for breach of covenant therein.

5. Landlord and tenant 🔑103(1)

The enforcement of forfeiture covenants in a lease are avoided whenever possible.

6. Landlord and tenant 🔑112(2)

The right of lessor to a forfeiture of lease because of sublease without lessor's consent in violation of covenant was waived by lessor's acceptance of specified rents after acquiring knowledge of sublease.

7. Landlord and tenant 🔑290(3)

In unlawful detainer action by lessor based upon breach of condition against sublease without lessor's written consent, where it was undisputed that rent had been paid to date of trial and had been accepted by lessor with knowledge of the sublease, lessor was not entitled to recover rent, possession, or damages in amount of rental value.

8. Landlord and tenant 🔑291(13)

In unlawful detainer action by lessor based on breach of lease which prohibited subleasing without lessor's consent but which required that lessor should not arbitrarily withhold approval, evidence as to knowledge by business manager of lessor concerning intended sublease and nature of sublessees' business established that approval by lessor was arbitrarily withheld.

◆

Appeal from Superior Court, Los Angeles County; Ranse R. Sischo, Judge.

Unlawful detainer action by the Bedford Investment Company against Alex Folb and others. Judgment for plaintiff, and Alex Folb and Daphne Folb appeal.

Reversed with directions.

C. V. Caldwell, of Los Angeles, for appellants.

J. Robert Arkush, of Los Angeles, for respondent.

WILSON, Justice.

Respondent leased business property in Los Angeles to appellants by a written instrument dated October 17, 1945, the original draft of which contained a provision that the lessees should not assign the lease nor sublet any part of the premises without the lessor's written consent. Appellants objected to that provision as being too restrictive and to satisfy their objection the following words were added: "Lessor shall not arbitrarily withhold approval." As so amended the lease was signed by lessor and lessees.

In April, 1946, appellants sublet a part of the premises to defendants Farrell and Rios after having requested but without having received respondent's consent. Appellants contend that the withholding of the lessor's consent was arbitrary and in violation of the lease.

Respondent brought this action for unlawful detainer, after having served a notice of termination of the lease and notice to quit, on the ground that the sublease had been made without its consent. Judgment was in favor of respondent for possession of the premises and damages in the sum of $8.33 per day for each day after May 31, 1946, from which appellants have appealed.

Appellant Alex Folb testified that on the day before he signed the sublease he had a conversation over the telephone with Pelton, business manager of respondent, in which he requested the lessor's consent to the sublease and that Pelton refused to give his consent unless he received half of the profits that appellants were receiving from it. Pelton did not deny making that statement but testified merely that he did not recall such a conversation. A sublease of a portion of the premises to another party had been previously consented to by Pelton on behalf of respondent. Referring to another occasion when appellants desired to sublet a part of the building to be used as a liquor store, Pelton testified that he did not recall having made any objection thereto but that he had referred the matter to his attorney. Folb said that Pelton offered no objection. The tenants under the sublease in question are engaged in the upholstering and furniture repair business which would not appear to be any more objectionable than the liquor business.

[1] Pelton was asked by appellants' counsel on cross-examination "Did you object or have objection to the type of business they were running?" referring to the sublessees. The court sustained an objection to the question and the ruling is assigned as error. The evidence shows that before the sublessees moved into the premises appellants advised respondent as to who they were and the kind of business they intended to conduct. Pelton knew Farrell's business through a conversation previously had between them. The question was proper for the purpose of showing whether the refusal to consent to the sublease was because of the character of their business or was an arbitrary rejection of appellants' request. The court erred in sustaining the objection.

[2] That Pelton had no objection to the subtenants' business is shown by the evidence of defendant Farrell, one of the sublessees. He testified that about a month after this action was commenced he had a conversation with Pelton in which he said that he, Farrell, did not want to be compelled to move and lose what he had expended on the store, to which Pelton responded "you don't have to worry. We can come to terms, whatever who wins or loose the case." [Sic.]

Farrell also testified that he had attempted to rent from respondent the entire premises covered by appellants' lease shortly before they were leased to appellants, and that he told Pelton the kind of business he intended to conduct—upholstering and repairing furniture; that the lease was not made because Farrell and his partner felt that the rent was too high; that Pelton did not object to the business in which they were engaged. The court struck out Farrell's testimony concerning his conversation with Pelton. This ruling was erroneous for the reason that the answer as given showed that Pelton knew the character of the business which the sublessees intended to carry on, yet he did not offer this to appellants as an objection to the sublease.

[3-6] An arbitrary act or decision is one that is arrived at through the exercise of will or by caprice, one supported by mere option or discretion and not by a fair or substantial reason. This is the only rational characterization that is suggested by the record of respondent's refusal to give its approval to the sublease.

The case was tried on August 2, 1946. Alex Folb testified that the rent was "paid right up to date." There was no objection to the question, no motion to strike the answer, and no cross-examination. The evidence of payment must be taken as true since the record does not contain any denial of the testimony or any evidence that the rent was not accepted by respondent. Pelton testified in rebuttal on other matters but was not asked to deny Folb's testimony that the rent was paid to the date of trial. Respondent's acceptance of payment of the rental after the action was filed bars the right to forfeit the lease. The enforcement of covenants for forfeiture are avoided whenever possible. The right of the lessor to declare a forfeiture of a lease by reason of the making of a sublease without the lessor's consent in violation of the lease is waived when the lessor, after knowledge of the sublease, accepts the rents specified in the lease. Kern Sunset Oil Co. v. Good Roads Oil Co., 214 Cal. 435, 440, 6 P.2d 71, 80 A.L.R. 453; Miller v. Reidy, 85 Cal.App. 757, 762, 260 P. 358. The statement by respondent's counsel in his brief that notice had been given to appellants that no rent was being accepted subsequently to the alleged breach of the lease is not supported by any evidence and the brief so admits. Even if evidence of such notice had been offered it would not have rebutted the uncontradicted evidence of payment.

[7] Since it is undisputed that the rent was paid up to the date of trial, the finding that respondent was entitled to damages in the amount of the rental value of $8.33 per day from May 31, 1946, and the judgment for that amount were contrary to the evidence and therefore erroneous. The payment of rent obviously bars any judgment against appellants for the rent and it likewise bars a judgment either for damages or for possession.

The complaint alleged and the court found that the sublease was made without plaintiff's knowledge. The evidence does not sustain the finding but that to which we have referred abundantly demonstrates the contrary.

[8] The answer alleged that plaintiff had no just or reasonable cause for refusing its consent to the sublease and that its refusal was arbitrary and in violation of the lease. The court found that this allegation was not true. The evidence heretofore mentioned conclusively shows that Pelton, respondent's business manager with whom all the business was transacted, was notified by appellant Alex Folb of the intended sublease and information was given concerning the proposed sublessees. By Pelton's previous conversation with Farrell he knew the character of their business. The only reason for the refusal of consent that can be gleaned from the evidence is that appellants did not offer Pelton a share of such profits, if any, as they would have derived from the transaction.

Ther are other errors in the record but they need not be mentioned since those enumerated necessitate the reversal of the judgment.

Judgment reversed. The court is ordered to enter a judgment in favor of defendants restoring to them all rights to which they were and are entitled under the lease.

MOORE, P. J., and McCOMB, J., concur.

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79 Cal.App.2d 602

FARNSWORTH & RUGGLES, Inc., et al. v. CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION.

Civ. 13373.

District Court of Appeal, First District, Division 1, California.

May 12, 1947.

Hearing Denied July 10, 1947.

1. Pleading 🔑87, 193(4)

Where laches appears from allegations of the complaint, it is equally available by demurrer or answer.

2. Mandamus 🔑7

A writ of mandate issues only in court's discretion.

3. Mandamus 🔑143(2)

Petitions for writs of mandate to compel California Employment Stabilization Commission under section 41.1 to furnish petitioners with itemized statements showing the charges and credits to their reserve accounts, the balance thereof, and their contribution rate for period of January 1, 1941, to June 30, 1941, inclusive, were denied on ground of laches, where petitioners with notice thereof failed to take any action until filing of their present petitions more than three years after effective date of the statute. Gen.Laws, Act 8780d, §§ 41.1, 90.

Appeal from Superior Court, City and County of San Francisco; Melvyn I. Cronin, Judge.

Consolidated petitions by Farnsworth & Ruggles, Inc., and Morris Benetar and Tessie Benetar for writs of mandate to compel the California Employment Stabilization Commission under California Employment Insurance Act, Gen.Laws, Act 8780d, § 41.1, to furnish them with itemized statement showing the charges on credit to their reserve accounts, the balance thereof and their contribution rate for the period of January 1, 1941, to June 30, 1941, inclusive. From a judgment denying the writs, the petitioners appeal.

Affirmed.

Fabian D. Brown, of San Francisco, for appellants.

Fred N. Howser, Atty. Gen., Clarence A. Linn, Doris H. Maier, and Charles W. Johnson, Deputy Attys. Gen., for respondent.

WARD, Justice.

November 22, 1944, Farnsworth & Ruggles, Inc., and Morris Benetar and Tessie Benetar filed similar petitions to the superior court for writs of mandate to compel the California Employment Stabilization Commission under California Unemployment Insurance Act, Gen.Laws, Act 8780d, section 41.1 to furnish them with itemized statements showing the charges and credits to their reserve accounts, the balance thereof, and their contribution rate for the period of January 1, 1941, to June 30, 1941, inclusive. Demurrers thereto which raised the issue of laches were overruled. Laches and compliance with section 41.1 were pleaded in the answer. The cases were consolidated for trial.

The evidence shows that pursuant to the commission's rule 41.1, which it promulgated under Unemployment Insurance Act section 90, the commission furnished statements of itemized charges to the reserve account of the Benetars June 11, 1940; September 27, 1940; January 6, 1941; March 14, 1941; and May 14, 1941; and statements of itemized charges to the reserve account of Farnsworth & Ruggles, Inc., June 11, 1940; September 27, 1940; January 6, 1941; March 14, 1941; and September 11, 1941. September 26, 1941, petitioners were each given a notice of their employer's contribution rate, accompanied by a summary record of the charges and credits to their reserve accounts.

On October 20, 1941, both petitioners were advised of rights which were available to them "under the terms of amendments to the California Unemployment Insurance Act which became effective September 13, 1941." The statement described the provisions of section 41.1, informing petitioners that they had sixty days from the date the commission's statements were mailed to protest same. It concluded that petitioners had the right to protest within sixty days the statements which had been mailed to them on September 26, 1941, but not in pursuance of section 41.1.

Petitioners argued during the trial and on appeal that nothing done prior to the effective date of section 41.1, namely, September 13, 1941, constituted compliance with said section. Counsel for the commission not only answered that section 41.1 had been complied with but contended "that the Petitioner, by failing to take any action subsequent to the effective date of the Act, September 13, 1941, down to the filing of these two cases, which was approximately in November, 1944, was guilty of laches; that he had received these notices, these early notices back in 1940, and prior to the effective date of the Act; and that if he desired to call the Commission's attention to the fact that they had not sufficiently complied with the provisions of the Act, he should have taken action prior to that time, prior to waiting practically three years, or more than three years after the enactment of Section 41.1. It is well known, in cases involving a petition for a writ of mandate, that the Court will not allow parties to sleep on their rights, but requires them in cases where they are seeking relief, to act promptly. In the instant matter, if we allowed petitioners to wait three years and then bring these actions, there is no limit on the time within which the Department must maintain the records and claims filed there. It makes an administrative impossibility to handle all of these numerous files and retain them for a period of innumerable years. And therefore we submit that petitioner has not stated any facts in his Complaint to justify any reason for the delay in his action * * *."

[1] The court observed that the fact that the question of laches had "been passed on on demurrer only goes to the question of pleading. I still think we have reserved to us the right to pass on it, if, as a matter of fact, from the evidence, laches appears, if it is a proper defense." The court committed no error in this respect since laches in the present case appears from the allegations of the complaint. It is therefore equally available by demurrer or answer. Chilberg v. City of Los Angeles, 54 Cal.App.2d 99, 101, 128 P.2d 693.

The court found that until the filing of the petitions, petitioners without excuse failed to seek the issuance of the statements under section 41.1 and that "such delay was for an undue and unreasonable time" to the commission's prejudice. The court concluded that not only had the commission complied with the provisions of the California Unemployment Insurance Act, but that petitioners had been guilty of laches.

[2] A clear case of laches having been presented, it is unnecessary to consider whether the court was correct in its conclusion that the commission had complied with the provisions of section 41.1. A writ of mandate issues only in the court's discretion; hence petitioner's laches is often an important element in determining the disposition of the cause. Vela v. Huberty, 1 Cal.2d 466, 35 P.2d 531; Hermanson v. Board of Pension Comm'rs, 219 Cal. 622, 28 P.2d 21; Jenkins v. Superior Court, 98 Cal.App. 729, 277 P. 757.

[3] The judgment of the trial court is affirmed upon the ground that the facts warrant the applicability of the doctrine of laches.

PETERS, P. J., and BRAY, J., concur.

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79 Cal.App.2d 587

MOLFINO v. LEVINSON PRODUCE CO. et al.

Civ. 3574.

District Court of Appeal, Fourth District, California.

May 8, 1947.

1. Sales 🔑110(2)

Where complaint, seeking rescission of contract for sale of a crop of muscat grapes for $67.50 per ton on ground of fraudulent representation that another person had sold his grapes at price of $60 per ton, did not contain allegation from which inference could be drawn that contract was unfair or resulted in any damage to plaintiff or that $67.50 per ton was not reasonable price of grapes at time of sale, complaint failed to state cause of action for rescission. Agricultural Code, §§ 1261, 1273.

2. Contracts 🔑259

Where parties deal at arm's length and fiduciary relationship does not exist, in order to enable plaintiff to secure cancellation of contract for fraud or deceit some damage or injury must have resulted or be bound to result from the fraud.

◆

Appeal from Superior Court, Tulare County; Glenn L. Moran, Judge.

Action by S. F. Molfino against Levinson Produce Company, a copartnership, Sam Levinson and another to rescind a contract for sale a crop of muscat grapes on ground of fraud. Judgment for defendants, and plaintiff appeals.

Affirmed.

Jamison & Jamison, of Porterville, for appellant.

John T. Fuller, of Porterville, for respondents.

MARKS, Justice.

This is an action to rescind a contract for the sale of a crop of muscat grapes on the ground of fraud. A general and special demurrer to an amended complaint was sustained without leave to amend. Judgment was entered for defendants and this appeal followed.

Plaintiff was the grower and defendants were the purchasers of the crop.

On August 13, 1946, the parties entered into the following contract: "Sam Levinson & E. J. Glueck bought Aug. 13 from S. F. Molfino all muscats on his ranch 6 miles West of Strathmore for $67.50 per ton roadside—Buyers to pick & furnish swampers to load—seller to furnish tractor and trailer without any expense to buyer—$1000 deposit to remain until all grapes test—and to buyers to pay balance by certified scale weights—grower to water & sulphur as necessary. Approximately 14 acres."

The only misrepresentation alleged is as follows: "That in order to induce said plaintiff S. F. Molfino, to make said sale, the defendant, Sam Levinson, falsely and fraudulently represented to the said plaintiff, S. F. Molfino, that one Tasker, a person well versed and well informed in the market of Mus*k*at Grapes and who was formerly a grape buyer by trade all of which was known to said Sam Levinson and S. F. Molfino, had sold to said Sam Levinson his Mus*k*at Grapes at the price of $60.00 per ton."

[1] There is no allegation in the pleading from which the inference could be drawn that the contract was unfair, or resulted in any damage or injury to plaintiff or that $67.50 per ton was not the reasonable market value of the grapes at the time of the sale.

[2] The parties here were dealing at arm's length and there was no fiduciary relationship existing between them. Under such circumstances it is well established in California that in order to enable the plaintiff to secure the cancellation of a contract for fraud or deceit some damage or injury must have resulted or be bound to result from the fraud. 4 Cal.Juris. 776. In Neet v. Holmes, 25 Cal.2d 447, 154 P.2d 854, 859, it is said: "In order to enforce their attempted rescission of the lease (assuming they were proper parties to make the rescission and bring the action), they must allege facts showing that the lease was unfair and resulted in damage to them. They do not, however, allege wherein the lease executed by the Rayfitz Company with their consent was unfair. * * * There is therefore an absence of allegations sufficient to establish that the lease was fraudulent, or unfair, or resulted in damage to the plaintiffs." See, also, Bailey v. Fox, 78 Cal. 389, 20 P. 868.

In Darrow v. Houlihan, 205 Cal. 771, 272 P. 1049, 1050, it is said that "it is equally well settled, however, that fraud, unproductive of injury, 'will not justify a rescission, nor support an action either for rescission or damages. * * *' Spreckels v. Gorrill, 152 Cal. 383, 388, 92 P. 1011, 1014."

In a letter written after this case was submitted counsel for plaintiff cite sections 1261 and 1273 of the Agricultural Code, and People v. Mulholland, 16 Cal.2d 62, 104 P.2d 1045, in support of their argument that the statement alleged to have been made to plaintiff to the effect that one Tasker had sold his muscat grapes for $60 per ton was a representation of a fact "used to determine market value". The cited authorities do not support that argument. Had they done so that allegation would not have cured the fatal defect in the pleading.

As the amended complaint failed to even indicate that the contract was unfair or that plaintiff had suffered any injury or damage from it, it failed to state a cause of action for rescission. This conclusion makes it unnecessary to consider the other questions argued by counsel.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

BURTON et ux. v. LOS ANGELES RY. CORPORATION et al.

Civ. 15541.

District Court of Appeal, Second District,
Division 2, California.
May 12, 1947.

Rehearing Denied May 29, 1947.
Hearing Denied July 10, 1947.

1. Appeal and error ⚷1010(1)

A reviewing court cannot interfere with judgment based upon findings of fact supported by substantial evidence.

2. Automobiles ⚷168(1)

A motorist has duty to anticipate that he might meet pedestrians or vehicles at any point in street and to keep his automobile under such control as will enable him to avoid a collision with persons using ordinary care. Vehicle Code, § 510.

3. Automobiles ⚷162(8)

A greater degree of care is required of motorist when he knows that small children are at play in immediate vicinity of his vehicle, and it is his duty to see persons on road in front of him when his view is unobstructed. Vehicle Code, § 510.

4. Appeal and error ⚷1008(1)

Question as to capacity of particular child at time of accident to exercise care to avoid danger is one of fact for trial court.

5. Automobiles ⚷160(1), 216

The question of exercise of due care on part of motorist or pedestrian is one of fact to be determined from surrounding circumstances.

6. Automobiles ⚷159

If a person without fault is suddenly put into situation where automobile collision is imminent, without sufficient time to consider all the circumstances, he is excusable for omitting some precautions or for making an unwise choice although he should have done otherwise had his mind been free from disturbing influence.

7. Automobiles ⚷160(3), 168(8)

A motorist need not move at a creep or stop every rod to search for pedestrians to comply with the rules of ordinary care, but amount of care in driving a bus upon residential street at night is greater than that required on open highway or country road.

8. Appeal and error ⚷1122(2)

Before the appellate court may make new findings as a basis of reversal and of new judgment record must show that upon no reasonable theory could respondent make further substantial showing on a new trial in support of his defense.

9. Appeal and error ⚷1122(2)

The appellate court may supply findings only where such action will result in affirmance of the judgment.

10. Negligence ⚷142

If court in action for injuries should find negligence on part of defendant, findings of contributory negligence on part of plaintiff would not be inconsistent therewith since however negligent a defendant may be, if plaintiff is also negligent and if his negligence contributed to accident pleaded recovery is thereby defeated.

11. Appeal and error ⚷1008(1)
Trial ⚷404(1)

The findings must be interpreted as a whole and if possible so as to uphold the judgment, and unless there is an irreconcilable conflict between findings of party's negligence and findings as to particulars upon which appellant relies, judgment must be affirmed.

12. Automobiles ⚷244(7, 58)

In action for death of plaintiffs' 5½ year old daughter who was struck by bus on street at night, evidence sustained findings that bus driver was not negligent and that plaintiffs' negligence in permitting daughter to play about the streets without proper supervision contributed to the death.

13. Appeal and error ⚷110

An order denying new trial is not appealable.

Appeal from Superior Court, of Los Angeles County; Caryl M. Sheldon, Judge.

Action by Cecil A. Burton and his wife against Los Angeles Railway Corporation and Lankford D. Ulmer to recover for the death of plaintiffs' minor daughter who was struck by a bus owned by first named defendant and driven by last named defendant. From a judgment for defendants, and from an order denying a motion for new trial, plaintiffs appeal.

Appeal from order denying new trial dismissed, and judgment affirmed and motion to make new findings denied.

Morris Lavine, of Los Angeles, for plaintiffs.

Gibson, Dunn & Crutcher, of Los Angeles (Sherman Welpton, Jr., of Los Angeles, of counsel), for respondents.

MOORE, Presiding Justice.

Dissatisfied with both the judgment and the findings plaintiffs bring this appeal from the judgment and the order denying their motion for a new trial. They ask that new findings supplant those of the court below.

Appellants sought damages for the death of their daughter, Dorothy, age five and a half, alleging negligence of respondent Ulmer, a bus driver of respondent corporation. Findings that respondents were free from negligence, that appellants' own negligence directly contributed to their damage, that Dorothy negligently ran in front of the bus and thereby proximately contributed to her death, and that the driver could not avoid the collision by the exercise of ordinary care, are attacked as not supported by the evidence. A resume of the facts proved at the trial leaves no doubt of the sufficiency of the facts adopted by the trial court.

It was Halloween and spirits walked. Little children were eager, excited, and gay, and their oldsters joined in the merriment. Little Dorothy and her sister Betty, age seven, were enjoying the childish sport of "trick or treat" among the neighbors of the Burtons in the city of Los Angeles. They resided on the north side of 105th Street which is 36 feet in width. While so engaged they visited a home about 250 feet east of the Burton residence and on the south side of the street. Intending to recross the street at about 7:30 p. m. they stood momentarily at the curb beneath the street light and behind a parked automobile headed eastward. They estimated that the bus "had just turned the corner" a block to the east of them. The street was clear; the head lights of the bus glared. Hand in hand, Betty leading, they proceeded to the center of the street, suddenly to discover the bus was bearing down upon them. They started to run. No other traffic was seen by Betty who barely escaped as Dorothy was stricken down and dragged 18 feet. The driver did not see the girls. He was traveling at a speed of from 15 to 20 miles an hour. About five feet before the impact he "got a kind of flash of something in front of the bus," heard a scream and applied his brakes. R. E. Goodwyn sat in his own car across the street from the children facing southward awaiting the arrival of an eastbound automobile. As it passed he drove from his property onto the south side of the street and followed the moving automobile to the street light, when Betty and Dorothy suddenly ran in front of the approaching bus as it was not more than five feet from them. Betty testified that she was nervous and did not see the car that preceded Mr. Goodwyn. She "just got out of the way in time" and lost her shoe in the effort. Mrs. Evelyn Griggs was standing on her porch which was near the children as they stood behind the parked automobile. She saw them run toward the bus, Betty pulling Dorothy who was a step behind.

[1] It would belabor this report of the instant action merely to list the decisions of California appellate courts holding that it is beyond the province of a reviewing court to interfere with a judgment based upon findings of fact supported by substantial evidence. With such declaration the curtain might be lowered upon this heart rending scene. But such termination would not answer this appeal. Appellants ask more than whether the facts support the findings. They maintain that a fair interpretation of the entire evidence requires contrary findings and judgment. In so contending they present certain evidence, which the trial court rejected, as though it formed the basis of a finding of respondent's negligence. For example, they emphasize that Betty testified (1) that before stepping into the street they looked in both directions for traffic and observed the bus

to be a block away; (2) that when she discovered the vehicle to be nearer "than we thought it was" she noticed that "the driver was looking back talking to a lady." While her first statement is partially corroborated by Mr. Goodwyn the court was not required to find it to be true. The children were engrossed in the pursuit of gleeful play and may not have been normally cautious even for children of their ages. As to her observation of Mr. Ulmer's conversing with a lady as he came near, the events happened wtih such suddenness that it is highly improbable that even more experienced eyes could have detected the acts of the driver unless the observer had been on the lookout for his behavior. Moreover, the testimony of the only passenger on the bus, who sat a third of the way back from the front, relaxed in her seat, tired from having stood all day and whose view of the driver was obscured by a sort of canvass awning drawn between the driver and the seats of passengers, was that she was not conversing with the operator. Ulmer testified that he was not conscious of the presence of his passenger, that he was not in a hurry, not counting money or listing transfers. It was not unreasonable for the trial court to decide in conformance with the testimony of the two adult witnesses rather than to adopt that of the excited child.

Despite the finding of no negligence on the part of respondents, appellants now cite the statute which forbids a motorist to drive at a speed greater than is reasonable with due regard "for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property." Vehicle Code, § 510. Nothing indicates that the trial court disregarded such statute or the decisions cited in appellants' brief. Such cases announce a variety of guiding rules which control the trials resulting from collisions of vehicles and pedestrians on the highways as follows:

[2] (1) It is the duty of a motorist to anticipate that he might meet pedestrians or vehicles at any point in the street and to keep his automobile under such control as will enable him to avoid a collision with persons using ordinary care and precaution. Dullanty v. Smith, 203 Cal. 621, 265 P. 814; McPherson v. Walling, 58 Cal. App. 563, 209 P. 209; Hine v. Leppard, 5 Cal.App.2d 154, 42 P.2d 389, 43 P.2d 595; Potter v. Driver, 97 Cal.App. 311, 315, 275 P. 526.

[3] (2) A greater degree of care is required of a driver when he knows that small children are at play in the immediate vicinity of his vehicle, and it is his duty to see persons on the road in front of him when his view is unobstructed. Parra v. Cleaver, 110 Cal.App. 168, 171, 294 P. 6; Waterbury v. Elysian Springs Water Company, 139 Cal.App. 355, 361, 33 P.2d 1048; Nichols v. Nelson, 80 Cal.App. 590, 595, 252 P. 739; Warner v. Bertholf, 40 Cal.App. 776, 778, 181 P. 808.

[4] (3) Question as to the capacity of a particular child at the time of an accident to exercise care to avoid a danger is one of fact for the trial court. Hunt v. Los Angeles Railway, 110 Cal.App. 456, 460, 294 P. 745.

[5] (4) The question of the exercise of due care on the part of a motorist or pedestrian is one of fact to be determined from all the conditions or circumstances of the case. McManus v. Arnold Taxi Corporation, 82 Cal.App. 215, 220, 255 P. 755.

[6] (5) If a person without fault is suddenly put into a situation where a collision is imminent, without sufficient time to consider all the circumstances, he is excusable for omitting some precautions or for making an unwise choice although he should have done otherwise had his mind been free from the disturbing influence. Scandalis v. Jenny, 132 Cal.App. 307, 313, 22 P.2d 545.

[7] A motorist is not obliged to move at a creep nor to stop every rod to search for pedestrians to comply with the rules of ordinary care. Of course the amount of care in driving a bus upon a residential street at night is greater than that required on the open highway or a country road. From the record in the instant case the trial court could reasonably find that the control of the bus was such that a prudent driver could stop before striking a motionless, visible object. But if a child sudden-

ly runs from the cover of an automobile standing at the curb of a narrow street toward the front of an approaching bus traveling at a speed of 15 miles an hour, in either the artificial light of a street or in the brilliance of a noonday sun, it would require more than reasonable care to avoid a collision.

New Findings Cannot Be Made

[8, 9] Appellants request this court to eliminate the findings of the trial court and to make new findings in the form submitted by them. Such request is based upon three facts: (1) that the court below tried the cause upon the transcript of an earlier trial before a jury presided over by another judge; (2) that section 956a, Code of Civil Procedure, provides that where a jury has been waived the appellate court may make findings contrary to those made by the trial court; and (3) that this court is in as good a position as the trial judge to determine the facts and to draw inferences. In support of such request appellants cite an article in 58 Harvard Law Review by Robert L. Stern entitled, "Review of Findings of Administrators, Judges and Juries: A comparative Analysis." The article confessedly deals only with the federal judicial and administrative systems and is not designed as authority for the guidance of a state appellate court in the matter of its rewriting the findings of a trial court. However, if the article should be consulted with reference to the propriety of this court's rewriting the findings in this case we could not set aside the findings unless they were clearly erroneous; and due regard should be given to the fact that the trial court had an opportunity at least equal to that of this court to judge the credibility of witnesses. It is commonplace to say that under the prevailing procedure of this state appellate courts are bound by the findings of the trial court when based upon substantial evidence. They may not set aside findings of the trial court and make other findings even though they opine that the evidence preponderates in favor of appellant. Tupman v. Haberkern, 208 Cal. 256, 280 P. 970; Isenberg v. Sherman, 212 Cal. 454, 461, 298 P. 1004, 299 P. 528; 1 Cal.Jur., Ten Year Supp., Appeal and Error, Sec. 588c. Before the appellate court may make new findings as a basis of reversal and of a new judgment the record must show that upon no reasonable theory could the respondent make a further substantial showing on a new trial in support of his defense. Davis v. Chipman, 210 Cal. 609, 623, 293 P. 40. Moreover, the appellate court may supply findings only in a case in which such action will result in an affirmance of the judgment. Sec. 588c, supra.

Findings Not Inconsistent

[10-12] The findings are attacked for their inconsistency. Finding II is that neither defendant was negligent; finding III, that plaintiffs' negligence in permitting Dorothy to play about the streets without proper supervision "contributed" to their damages; finding IV, that Dorothy so negligently ran in front of the bus that the operator could not avoid a collision by the exercise of ordinary care, and her injuries were "directly, proximately and concurrently caused and contributed to by her own * * * negligence." The point of appellants' attack is that finding II, that Ulmer was not negligent, conflicts with finding III, that the negligence of appellants and of Dorothy "contributed" to the death of the child. There is nothing inconsistent in these expressions of the court's determination of the facts. The use of the word "contributed" might more correctly be used in a "conclusion" in defining the effect of the negligence of appellants and of Dorothy in defeating their right of recovery. If it is used to state the ultimate fact that the negligence of the parents and of Dorothy was partially responsible for the collision, it is the form commonly used to express the court's affirmative determination of a defendant's plea of contributory negligence, customarily alleged by declaring the ultimate fact. While in the case at bar respondents pleaded both the probative facts, encumbered with some legal conclusions, and the ultimate fact of contributory negligence, the findings make appropriate response thereto substantially in the language of the answer. Even though in an action for personal injuries the court should find negligence on the part of the defendant, findings of contributory

negligence on the part of plaintiff would not be inconsistent therewith for the reason that however negligent a defendant may be, if the plaintiff is also negligent and if his negligence contributed to the accident pleaded recovery is thereby defeated. Findings are to be interpreted as a whole, and if possible so as to uphold the judgment; and unless there is an irreconcilable conflict between the finding of a party's negligence and the findings as to the particulars upon which appellant relies, the judgment must be affirmed." Todd v. Orcutt, 42 Cal.App. 687, 691, 183 P. 963, 965; Agdeppa v. Glougie, 71 Cal.App.2d 463, 467, 162 P.2d 944. The findings herein clearly express the court's deductions from the evidence, namely that defendant Ulmer was not negligent.

[13] The order denying a new trial being nonappealable, the attempted appeal therefrom is dismissed. The judgment and the order denying motion to vacate the judgment are affirmed. Motion to make new findings denied

McCOMB and WILSON, JJ., concur.

Hearing denied; CARTER, J., dissenting.

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79 Cal.App.2d 635

PEOPLE v. HADDEN et al.

Cr. 4093.

District Court of Appeal, Second District, Division 3, California.

May 12, 1947.

1. Criminal law 🔑42

The word "acquittal" in statute providing that an order discharging a defendant so that he may be a witness for the people against his codefendants is an "acquittal" of such defendant, does not mean an acquittal on the merits, and therefore fact that codefendant who had possession of pistol at time of alleged burglary, was discharged so that he could testify against defendant, did not prevent codefendant's possession of the pistol from being imputed to the defendant in order to charge him with burglary committed with a deadly weapon. Pen.Code, §§ 460, 1099, 1101.

See Words and Phrases, Permanent Edition, for all other definitions of "Acquittal".

2. Burglary 🔑41(1)

Evidence sustained conviction under statute making every burglary committed by a person armed with a deadly weapon burglary in the first degree. Pen.Code, § 460.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Thomas Hadden and Charles Herdegen were convicted of burglary in the first degree, and Charles Herdegen appeals.

Judgment and order denying motion for new trial affirmed.

A. Maxson Smith, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and L. G. Campbell, Deputy Atty. Gen., for respondent.

WOOD, Justice.

Defendants Hadden and Herdegen were charged with the crime of burglary in two counts. Count I charged that they committed burglary on January 18, 1946, and Count II that they committed burglary on April 2, 1946. Both defendants waived trial by jury. At the trial Hadden pleaded guilty to Count I, and Count II was dismissed as to him in order that he might be called as a witness for the People. The trial proceeded as to Herdegen and, after the evidence on behalf of the People had been presented, the court dismissed Count I. After evidence was presented on behalf of Herdegen, the court adjudged that he was guilty as charged in Count II, and that the offense was burglary of the first degree. Herdegen appeals from that judgment and the order denying his motion for a new trial.

Appellant contends that the evidence is insufficient to support a conviction of burglary of the first degree.

Appellant and Hadden were arrested about 3 a. m. on April 2, 1946, in an alley behind a music store which was on Melrose Avenue in Los Angeles. Before the arrest, while appellant was fleeing from the scene of the crime, he was shot by a police officer. At the time of the arrest Hadden was armed with a .32 automatic pistol which, according to testimony, he pointed at two of the arresting officers. Appellant's automobile, which was in the alley, contained radios and other articles which had been removed from the music store, and at the time the policemen first drove into the alley appellant and Hadden were carrying a radio toward appellant's automobile. Appellant testified that he had been drinking heavily for several hours prior to his arrest; that he vaguely remembered entering the alley but he did not remember entering the music store; that he did not remember being shot, and did not know he had been shot until he was in the hospital. Hadden testified that he was driving appellant's automobile; that appellant had been drinking heavily and he took him for a ride to "straighten him out"; that he drove into the alley, and the back window to the music store was open; that he entered the store through the window; that he then opened the back door of the store from the inside and admitted appellant; that the two of them removed the articles from the store which were found in appellant's automobile, and they also removed the radio, which they were carrying when the policemen arrived, from the store; that the burglary had not been planned; that while he was entering the store through the window, appellant handed him the pistol and he put it in his pocket; that he did not remember removing it from his pocket but he remembered having it in his hand before his arrest while he was running.

Section 460 of the Penal Code provides, in part, that every burglary "committed by a person armed with a deadly weapon" is burglary of the first degree. Appellant, who was convicted of Count II, asserts that he was not armed and that the possession of a deadly weapon by Hadden, as to whom Count II was dismissed, could not be imputed to appellant. His argument is, in substance, that the discharge of Hadden, under Section 1099 of the Penal Code, was an acquittal of Hadden according to the provisions of Section 1101 of the Penal Code and was equivalent to a verdict of not guilty; that, therefore, the possession of a deadly weapon by Hadden, who was innocent as to Count II, could not be imputed to appellant.

At the trial, before any evidence was presented, the deputy district attorney stated that he would call Hadden as a witness for the People, and "for that reason" he then asked the court to dismiss Count II. The court thereupon dismissed Count II as to Hadden. The minutes for that day include the statement, "On motion of the People, Count 2 of the indictment is dismissed as to the Defendant Thomas Hadden only." It appears, as asserted by the parties in their briefs, that said dismissal was under the provisions of Section 1099 of the Penal Code.

Section 1099 of the Penal Code provides: "When two or more persons are included in the same charge, the court may, at any time before the defendants have gone into their defense, on the application of the district attorney, direct any defendant to be discharged, that he may be a witness for the people."

Section 1101 of the Penal Code, above referred to, provides: "The order mentioned in the last two sections [including sec. 1099] is an acquittal of the defendant discharged, and is a bar to another prosecution for the same offense."

The court considered those two sections in the case of People v. Gilbert, 26 Cal. App.2d 1, 78 P.2d 770, wherein the appellants, husband and wife, contended that the discharge of their codefendants under Section 1099 of the Penal Code amounted to an acquittal under the provisions of Section 1101 of the Penal Code, and that consequently such codefendants could no longer be considered as co-conspirators, and appellants, being husband and wife, could not alone be guilty of a conspiracy. It was held therein that when the discharge is pursuant to Section 1099 such a result should not follow, and the court stated, 26 Cal. App.2d at page 25, 78 P.2d at page 783. "The purpose of the order of discharge, as indicated by the statute, is that the defendant who receives the benefit of the order of discharge 'may be a witness for the people.' The issue remains the same, notwithstanding the discharge, and we would be thwarting the legislative purpose should we engraft an exception upon the statute in favor of a coconspirator." It was stated further, 26 Cal.App.2d at page 26, 78 P.2d at page 783: "Where, as in the instant case, the discharge of an alleged coconspirator is not inconsistent with his guilt, but simply bars a subsequent prosecution of him, it does not invalidate the conviction of his coconspirators. Statutes such as sections 1099 and 1101 of the Penal Code, granting an immunity to persons testifying, do not in our opinion acquit the witness of the offense, but the fact of his testifying bars a prosecution for such offense. While Mr. and Mrs. Baylis (the co-defendants] could not be further prosecuted, their discharge under the provisions of section 1099 did not amount to a declaration of their innocence of the charges against them in the conspiracy counts of the amended indictment."

[1] Appellant states that the court, in People v. Gilbert, supra, ignored the plain meaning of the word "acquittal" as used in section 1101. The word "acquittal" as used in that section is not to be construed as an acquittal on the merits. The dismissal of Count II as to Hadden was not an adjudication that he was not guilty of the crime charged therein, but it was a bar to prosecution of Hadden on that charge. In the case of People v. Simpson, 66 Cal.App.2d 319, 152 P.2d 339, wherein appellant contended that dismissal of a charge of kidnaping against her codefendants operated as an acquittal of appellant since her offense consisted of aiding and abetting those codefendants in the commission of that crime, the court stated, 66 Cal.App.2d at page 329, 152 P.2d at page 344: "The judgment of dismissal was not an adjudication that the crime of kidnaping had not been committed, although it has operated to free the codefendants from further prosecution and from punishment for that crime. They stand as if they had never been prosecuted for the crime of kidnaping. The judgment of dismissal has no greater effect."

[2] The evidence was sufficient to support the conviction of burglary of the first degree.

The judgment and the order denying the motion for a new trial are affirmed.

SHINN, Acting P. J., and KINCAID, J., pro tem., concur.

79 Cal.App.2d 632

PEOPLE v. DURFEE.

Cr. 4107.

District Court of Appeal, Second District,
Division 2, California.

May 12, 1947.

1. Infants 🔑20

Testimony of sisters, ages 8 and 10 years respectively, regarding details of stepfather's lascivious acts upon or with them was sufficient to establish the corpus delicti, in support of conviction. Pen. Code, § 288.

2. Criminal law 🔑563

Proof of the corpus delicti may consist in the testimony of eyewitnesses or of circumstantial evidence.

3. Criminal law 🔑562

Where no alibi was pleaded, clear proof that offenses alleged were committed at times and places specified warranted verdicts of conviction.

4. Criminal law 🔑1159(2)

A verdict cannot be reversed unless upon no hypothesis whatever is there sufficient substantial evidence of the guilt of accused.

5. Criminal law 🔑538(3)

Where stepfather was charged with lascivious acts upon or with children under the age of 14 years, jury and trial court were justified in determining that stepfather's charges against his wife to the effect that she caused his prosecution in order to get rid of him and that she had been guilty of criminal acts were false, in view of stepfather's confession. Pen. Code, § 288.

6. Criminal law 🔑1159(4)

The reviewing court cannot retry the case or determine the credibility of witnesses.

7. Criminal law 🔑1160

The trial court's denial of new trial was significant in connection with argument of accused that his wife had caused his prosecution in order to get rid of him and that she had been guilty of criminal acts, since had the judge believed his story of the wrongs committed against him, presumptively a new trial would have been granted.

8. Criminal law 🔑517(4)

In prosecution for lascivious acts committed upon or with children under the age of 14 years, admitting evidence of confession prior to proof of corpus delicti was not error. Pen. Code, § 288.

9. Criminal law 🔑680(1), 1153(3)

The order of proof in a criminal trial is within trial court's discretion, and its rulings will not be disturbed unless it be clearly shown that discretion was abused.

◆

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Harold R. Durfee was convicted of lewd or lascivious acts upon children under the age of 14 years and he appeals.

Affirmed in part and reversed in part.

William E. Turner and Stanley L. Avery, both of Los Angeles, for appellant.

Fred. Howser, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Having been accused by information of 10 offenses defined by section 288 of the Penal Code[1] and convicted by a jury, defendant's motion for a new trial was denied. He appealed on the ground that the evidence does not support the verdict in that the corpus delicti was not established.

The first five counts of the pleading charge crimes against Sue; the second five counts allege crimes against Jane. They are sisters, ages 8 and 10 years respectively. Their mother had married appellant February 23, 1945. He was 41 years of age, an instructor of chemistry and physics in a high school and some time notary public and insurance and realty broker. For obvious good reasons the sordid details related by the two children are omitted from this discussion. Suffice it to say that in support of counts I, II, III, IV and V Sue testified before the court to the details of appellant's lascivious acts. As to counts VI, VII, IX and X Jane likewise testified fully as to appellant's misconduct and treatment of her. However, it cannot be said that her testimony with reference to count VIII establishes an act different from those pleaded in counts IV and V.

[1] Such testimony from two girls of tender ages and without experience is abundant proof to support the implied finding of the jury. They are not expected to give a detailed description of each transaction and of all the circumstances. People v. Kearney, 20 Cal.2d 435, 437, 126 P.2d 612. They did not keep diaries or report each incident to an elder, or make a mark of the dates of the crimes. They were fearful of appellant who threatened to beat them if they reported his behavior.

But their voices did not bring the only proof of the offenses. When appellant was called upon to make a statement in answer to the charges about to be filed, he confessed his sin to Deputy District Attorney Ernest Roll. At first he denied all. On hearing Sue repeat her story he had "no comment". On hearing Jane tell hers, he had "no comment". But after a 10 minute recess he made a free and voluntary confession that all the two girls had said was true. He then categorically confirmed each of their statements of the crimes. What he said was freely and voluntarily stated, without immunity or hope of reward, nor was it induced by force or threats of force. Pursuant to his request Mrs. Durfee entered the room. He told her that he had confessed the truth of all that the girls had reported; that he had been ashamed of it. Later he told Deputy District Attorney Tobey that he had been so afflicted the greater part of his lifetime and that it had been the bane of his existence.

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[1] Any person who shall wilfully and lewdly commit any lewd or lascivious act including any of the acts constituting other crimes provided for in part one of this code upon or with the body, or any part or member thereof, of a child under the age of fourteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child, shall be guilty of a felony and shall be imprisoned in the State prison for a term of from one year to life.

[2-4] There is nothing lacking to establish the corpus delicti. It may consist in the testimony of eyewitnesses or of circumstantial evidence. People v. Watters, 202 Cal. 154, 157, 259 P. 442. Inasmuch as appellant pleaded no alibi, the clear proof that the offenses alleged were committed at the times and places specified warranted all the verdicts of conviction except as to count VIII. A verdict cannot be reversed unless upon no hypothesis whatever is there sufficient substantial evidence of the guilt of the accused. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778. The testimony of young children concerning a series of events cannot be as perfect as a phonographic record thereof. It would practically close the door against the prosecution of many of such wrongs if girls of tender years were required to give detailed and unvarying description of each transaction and its circumstances. People v. Kearney, 20 Cal.2d 435, 437, 126 P.2d 612.

[5-7] The argument of appellant that his wife caused his prosecution in order to get rid of him was discredited by the jury, as was his testimony that she had been guilty of criminal acts. In view of his confession, which was found to be true, the jury and the trial court were justified in determining that his charges against his wife were false. The reviewing court cannot retry the case or determine the credibility of witnesses. People v. Barnett, 77 Cal.App.2d 299, 175 P.2d 237. Moreover, the court's denial of a new trial is significant. Had the judge believed appellant's story of the wrongs committed against him by his wife as described by his testimony, presumptively a new trial would have been granted. People v. Ohman, 67 Cal.App.2d 467, 476, 154 P.2d 463.

[8, 9] The court was without error in admitting evidence of the confession prior to proof of the corpus delicti. The order of proof in a criminal trial is a matter within the discretion of the trial court, and its rulings will not be disturbed unless it be clearly shown that its discretion was abused. People v. Watters, supra; People v. Seymour, 54 Cal.App.2d 266, 275, 128 P.2d 726.

The judgment and the order denying a new trial are affirmed except as to count VIII as to which they are reversed.

McCOMB, J., and WILSON, J., concur.

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79 Cal.App.2d 727

KNACKSTEDT v. SUPERIOR COURT IN AND FOR CONTRA COSTA COUNTY et al.

Civ. 13395.

District Court of Appeal, First District, Division 1, California.

May 19, 1947.

1. Mandamus 🔑13

Where wife has been granted an interlocutory divorce decree requiring husband to pay support money, entry of final decree may be compelled by mandate notwithstanding failure to make required support payments if husband's allegations in petition relative to his inability to pay are not controverted and husband was not in contempt for failure to pay.

2. Divorce 🔑156

Where wife had been granted interlocutory divorce decree requiring husband to pay support money and husband requested entry of final decree but was in default in support payments, evidence sustained finding that, at time the payments fell due and at time of hearing on husband's petition, husband had the ability to make the payments and justified refusal to enter final decree of divorce.

3. Appeal and error ⚿539

In absence of reporter's transcript, District Court of Appeal was required to accept certified minutes of trial court admitted into evidence by stipulation as reflecting the true facts.

4. Mandamus ⚿168(2)

On petition for writ of mandate to compel trial court to enter a final decree of divorce in a pending action, District Court of Appeal was required to assume that evidence, taken at hearing at which final decree was denied, supported trial court's implied finding that petitioner had ability to pay default support money required by interlocutory decree where no reporter's transcript was filed showing the evidence but record showed that evidence had been taken.

◆

Petition by Edward H. Knackstedt against the Superior Court of the State of California, in and for the County of Contra Costa, and Honorable A. F. Bray, of Department One, for a writ of mandate to compel the Superior Court of Contra Costa County to enter a final decree of divorce in an action pending in that court.

Alternative writ discharged and petition for peremptory writ denied.

Laurence Sledge, of Oakland, for petitioner.

James F. Hoey, of Martinez, for respondent.

PETERS, Presiding Justice.

Petitioner applied to this court for a writ of mandate to compel the Superior Court of Contra Costa County to enter a final decree of divorce in an action pending in that court. Based on the allegations of the petition this court issued its alternative writ. The respondent subsequently filed an answer, and on the return day of the writ it was stipulated that certain records of the respondent court could be introduced and considered by the court. From the complete facts now before us it is quite apparent that the peremptory writ should not issue.

The petition alleges that on August 22, 1945, in the case of Knackstedt v. Knackstedt, then pending in the Contra Costa County Court, an interlocutory decree of divorce was signed, filed and entered; that it was thereby adjudged that Delia Knackstedt, the plaintiff in that action, was entitled to an interlocutory decree of divorce from the defendant, the petitioner herein; that among other things the decree provided that petitioner should pay his wife, the plaintiff in that action, $100 per month for the maintenance and support of the plaintiff and the minor children of the parties; that on October 28, 1946, the petitioner presented to the Contra Costa Court his affidavit in support of his request that the final decree of divorce be entered; that by this affidavit he admitted that he had not paid all of the alimony due under the interlocutory and sought to excuse such nonpayment by the averment that from August 22, 1945, to February 3, 1946, he was unemployed; that during that time he was under medical care for an injury and is still handicapped by that injury; that this affidavit further averred that petitioner had not been adjudged in contempt for failure to pay the alimony in full and avers that petitioner was and is financially unable to comply with the provisions of the interlocutory. The petition then avers that "on the 28th day of October, 1946, when your petitioner presented his affidavit and request for a Final Decree in said action there was no evidence taken or produced before said Court * * * to show that your petitioner herein, had means or ability to comply with said alimony payments; and at no time prior thereto had there ever been introduced or produced before said court or said honorable judge any testimony or other evidence showing or having a tendency to show that the petitioner herein had the means or ability to comply with the provisions of the said interlocutory decree of divorce other than as the

Defendant therein and petitioner herein has already complied therewith, or to show that petitioner herein at any time ever willfully failed to comply with the provisions of the said interlocutory decree he having the ability so to do." The petition then avers that the trial judge refused to sign the final decree until the petitioner paid to his wife all of the past due alimony. It was in reliance on these allegations, and in particular in reliance on the quoted allegation, that this court issued its alternative writ. If such allegations were true it would follow that the writ should issue. In Isakson v. Superior Court, 130 Cal.App. 180, 19 P.2d 840, the respondent court refused to grant a final decree because of the petitioner's failure to fully comply with the provisions of the interlocutory as to payment of alimony. The appellate court properly held that where, in the trial court, the petitioner's allegations relating to his inability to pay are not controverted, and where, as a result, it appears that the petitioner was not in contempt for failure to pay, the trial court must enter the final decree of divorce, and where it fails to do so it will be compelled to do so by mandate. But it is equally well settled that where a final decree is requested, and it appears that the party requesting the entry of the final is in default, and where it appears from the evidence then presented that the petitioner had or has the ability to comply with the order, even though there has been no prior adjudication of contempt and none is sought, the trial court is justified in denying the request to enter the final decree of divorce. Weeks v. Superior Court, 187 Cal. 620, 203 P. 93; Pearson v. Superior Court, 32 Cal.App.2d 87, 89 P.2d 162; Sullivan v. Superior Court, 72 Cal.App. 531, 237 P. 782. The rule of these cases is based on the theory that a party is not entitled to ask the aid of a court while he stands in a position of actual contempt to its legal orders and processes.

[1] The answer of the respondent court in the instant case alleges facts that brings this case directly within the rule of the last cited cases. It is first alleged that the only reason that petitioner had not been cited for contempt during the year after the issuance of the interlocutory for failure to make the alimony payments was that his whereabouts prior to the time he requested the entry of the final decree were unknown to Delia Knackstedt and her counsel. There then appears in the verified answer this most important allegation: "that there was a regular hearing before Honorable A. F. Bray, Judge of said Superior Court [referring to the hearing upon petitioner's affidavit and request for a final decree of divorce], at which there was present petitioner and his counsel, Lawrence Sledge, Esq., Delia Knackstedt, plaintiff in said divorce action, and her counsel, Jas. F. Hoey, Esq., and evidence was introduced at length upon all of the issues involved, including the issue as to whether or not petitioner was able to comply with the requirements of said interlocutory decree of divorce and whether he wilfully failed to comply with the provisions of said interlocutory decree of divorce, and upon hearing all of the evidence and observing the witnesses, respondent Honorable A. F. Bray determined that petitioner was able to comply with the provisions of said interlocutory decree of divorce and wilfully failed to do so, and that he was in fact in contempt of court and was not entitled to a final decree of divorce until he had complied with the terms of the interlocutory decree of divorce."

This allegation is verified by Judge Bray who was then judge of the Superior Court of Contra Costa County, and who was the judge who had refused to enter the final decree.

The certified minutes of the trial court, admitted into evidence by stipulation, demonstrate that the quoted allegation of the answer is true. The minutes show that a hearing was held on October 28, 1946, and after argument was continued to November 18, 1946; that on November 18, 1946, a hearing of motions by defendant for an order modifying the alimony award, and for the entry of the final decree was held; that the plaintiff and defendant were sworn to testify; that argument was then had; that the court thereupon ordered the interlocutory modified by reducing the alimony payments from $100 to $75 per month effective November 1, 1946; that the motion for entry of a final decree was denied.

[2-4] At the oral argument on the return day of the writ counsel for the petitioner informed the court that he thought a reporter had been present on the day of the above mentioned hearing and requested permission to secure and file a reporter's transcript of the proceedings on that day. The permission was granted but counsel failed to file such a transcript within the time limited or at all. In the absence of such a transcript this court must accept the minutes of the court as reflecting the true facts. That record shows that evidence was taken. In support of the record we must assume that such evidence supports the trial court's implied finding that during the year and at the time of the hearing petitioner had the ability to pay. This being so, under the rule of the cases cited, the trial court was justified in refusing to enter the final decree.

The alternative writ is discharged and the petition for a preemptory writ is denied.

WARD, J., concurs.

BRAY, J., being disqualified, did not participate in this proceeding.

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79 Cal.App.2d 368

HILL v. HILL.

Civ. 15925.

District Court of Appeal, Second District, Division 2, California.

April 28, 1947.

1. Courts ⚷206(1)

Where interlocutory divorce decree awarded wife additional attorney's fees and husband forwarded to wife a check for sum awarded, appellate court would not render an advisory opinion on question whether payment tendered could be accepted without prejudice to right of wife to prosecute her appeal from other parts of the decree.

2. Courts ⚷206(1)

An appellate court will not inform litigants what opinion of court is on question that has not been raised in action, or what its decision would be if question should be presented.

◆

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Divorce action by Alfred J. Hill against Bryan Houston Hill. An interlocutory decree of divorce was entered in favor of plaintiff in which defendant was awarded attorney's fees in addition to amount previously awarded to her and paid by plaintiff, and defendant appeals. On defendant's motion for an advisory or recommendatory opinion.

Motion denied.

Baldwin Robertson, of Los Angeles, for appellant.

Hill, Morgan & Farrer, Elliott H. Pentz and William S. Scully, all of Los Angeles, for respondent.

WILSON, Justice.

By appellant's motion we are asked to render an advisory or recommendatory opinion whereby we would be committed in advance on an important question that may be presented by respondent in his resistance of the appeal from a judgment in his favor.

An interlocutory decree of divorce was entered on August 23, 1946, in favor of respondent in which appellant was awarded the sum of $5,690 as attorney's fees in addition to the amount previously awarded to her and paid by respondent. On August 29, 1946, respondent forwarded to appellant a check drawn in her favor for said sum of $5,690.

[1] Appellant has moved this court "for an order directing that she may receive payment of, and enforce payment of" said sum "without prejudice to the right of appellant to prosecute her appeal from all other parts and portions of said interlocutory judgment of divorce." The motion is made on the ground that "appellant and her attorney of record are entitled to demand and receive said sum without prejudice to the right of appellant to prosecute her appeal from all other portions of said interlocutory judgment of divorce. * * *"

In the affidavit of appellant's attorney he states that appellant "suspecting entrapment, has not accepted, used or cashed said check for fear that her use thereof might jeopardize this pending appeal and might be used as the basis of a motion by respondent to dismiss her said appeal."

In respondent's affidavit in opposition to the motion he informs us that he has paid to appellant $4,500 as attorney's fees, $2,144 for the reporter's transcript on appeal, together with other items of costs, and that he has been ordered by the trial court to pay the cost of printing appellant's opening and closing briefs on appeal. The court found that appellant owns separate property consisting of stocks, bonds and cash aggregating $20,524.15. Appellant's application for alimony pending appeal was denied.

In the case of Storke v. Storke, 132 Cal. 349, 64 P. 578, a decree of divorce was granted to the plaintiff and the defendant was awarded sums for her support and for attorney's fees. The defendant served a notice of intention to move for a new trial. Four years later, the motion not having been heard because of a controversy concerning the preparation of the record, the plaintiff served a notice of motion to dismiss the motion for a new trial which was denied. On appeal the Supreme Court held that it should have been granted upon two grounds, one being that the defendant had accepted money for support and attorney's fees which was the part of the judgment that was beneficial to her, and having taken the benefit she had waived all right of appeal from the judgment. That case was followed in McCaleb v. McCaleb, 32 Cal.App. 648, 163 P. 1045, where a decree of divorce was denied to both parties but an award for support was made to the wife, payable in monthly sums. After having accepted payment for four months she served notice of intention to move for a new trial. The court held that by acceptance of payments awarded to her she was estopped from making a motion for a new trial for the purpose of having the judgment reviewed on appeal. The case of Browning v. Browning, 208 Cal. 518, 282 P. 503, was for a divorce and to set aside a property settlement agreement that had been entered into by the parties prior to the commencement of the action. The court granted a divorce to the plaintiff but found against her upon her allegations of fraud on which she based her prayer for setting aside the property settlement agreement and upheld the agreement. The court directed the defendant to pay her attorney's fees, the same to be payable in monthly installments. The plaintiff appealed from the entire judgment excepting the portion awarding her an interlocutory decree of divorce. The defendant filed a motion to dismiss the appeal on the ground that after the entry of the judgment the plaintiff had received from the defendant monthly payments to which she was entitled under the property settlement agreement, the validity of which she had assailed in her complaint and which had been upheld by the trial court, and had accepted the sum directed by the judgment to be paid on account of costs and attorney's fees. The court denied the motion to dismiss the appeal, distinguishing that case from the cases of Storke v. Storke and McCaleb v. McCaleb, supra.

The briefs on the appeal in this action have not been filed. By appellant's motion she asks this court to determine in advance of the making up of the issues on appeal whether we shall, if the question should arise, follow the rule stated in the Storke and McCaleb cases or distinguish those cases from the instant case and follow the decision in Browning v. Browning.

[2] We have not been cited to any case and we know of none that authorizes an appellate court to inform the litigants what the opinion of the court is upon a question that has not been raised in the action, or what its decision would be if the question should be presented.

Motion denied.

MOORE, P. J., and McCOMB, J., concur.

79 Cal.App.2d 553

GERARD v. WILSON HOLDING CO.

Civ. 15531.

District Court of Appeal, Second District,
Division 2, California.
May 8, 1947.

1. Landlord and tenant 🔑167(8)

Invitee of tenant of apartment was entitled to the exercise of ordinary care on the part of the owner of the premises.

2. Landlord and tenant 🔑164(1), 167(8)

The owner of an apartment building has the duty to provide safe means of entrance and exit both for tenants and for the tenants' invitees.

3. Landlord and tenant 🔑167(8)

Where door from apartment opened onto a narrow platform below which were two steps, then a platform wider than the first followed by a bottom step, and there was a guard rail at the outer edge of upper platform but no rail on outside of steps or lower platform, and tenant's invitee, when leaving apartment at night, stepped onto upper platform and, assuming that guard rail extended down the steps, reached for it and, finding none, lost her balance and fell from the top step, failure of owner of apartment building to install the guard rail was failure to exercise due care, rendering owner liable for the invitee's injuries.

4. Landlord and tenant 🔑169(11)

Where tenant's invitee, when leaving apartment at night, stepped onto upper platform and, assuming that guard rail extended down the steps, reached for it and, finding none, lost her balance and fell from the top step, whether invitee was guilty of contributory negligence was for jury in personal injury action against owner of building, though invitee had come in at such entrance while it was daylight.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Marguerite Gerard against the Wilson Holding Company, to recover for injuries sustained by the plaintiff in a fall on premises owned by the defendant. From a judgment for the plaintiff, the defendant appeals.

Judgment affirmed.

Parker, Stanbury & Reese and White McGee, Jr., all of Los Angeles, for appellant.

Elbert E. Hensley, of Los. Angeles, for respondent.

WILSON, Justice.

Defendant has appealed from a judgment in favor of plaintiff in an action brought by her for personal injuries. Appellant was the owner of a building which was divided into rooms and apartments, each of which was occupied by a tenant. Prior to the accident appellant had leased the entire building and the lessee in turn had leased one of the apartments on the ground floor to a Mrs. Van Dusen. In addition to the entrance which was used in common by all tenants of the building it had a side entrance leading to the driveway. The latter entrance was for the exclusive use of the Van Dusen apartment and was not used by other tenants. The door from the apartment opened onto a narrow platform below which were two steps, then a platform wider than the first, followed by the bottom step. There was a guard rail at the outer edge of the upper platform but there was no rail on the outside of the steps or the lower platform. An electric light bulb was installed outside the door of the apartment and above the upper platform which was controlled by a switch inside the apartment.

On the evening in question respondent visited Mrs. Van Dusen in her apartment, arriving before it was dark and remaining until about 11 o'clock. She entered and departed by way of the side entrance. The light above the platform was unlighted and the entrance was dark at the time of her departure.

As respondent left the door of the apartment she stepped onto the upper platform and assuming that the guardrail extended down the steps reached for it and finding none lost her balance and fell from the top step.

[1, 2] Appellant contends that there was no evidence that it was negligent in any particular. Respondent was the invitee of the tenant Mrs. Van Dusen and as such she was entitled to the exercise of ordinary care on the part of the owner of the premises. Wade v. Buyers, 47 Cal.App.2d 168, 170, 117 P.2d 392; Brown v. Pepperdine, 53 Cal.App. 334, 336, 200 P. 36; Donahoo v. Kress House Moving Corporation, 25 Cal.2d 237, 243, 153 P.2d 349. A landlord cannot expect his tenants to lead a solitary life. It must be anticipated that the tenant of an apartment will invite guests and that they may not be familiar with the premises. It is therefore the duty of the property owner to provide safe means of entrance and exit both for the tenants and for the latters' invitees.

[3] The platform in question was 3 feet 9 inches from the surface of the driveway. When respondent entered the apartment she ascended on the right-hand side of the steps which was next to the wall of the building. She had no occasion to observe the absence of a guardrail, and even if she had done so appellant would not thereby have been excused from its duty to exercise ordinary care for both tenant and invitees. When respondent stepped from the door of the apartment she placed her hand on the guardrail that extended for the width of the platform and, as any reasonable person would have done, expected and reached for a rail to guide her in descending the steps. Appellant, in having failed to install the guardrail, did not exercise the degree of care that it owed to persons who would have occasion to use the steps. The cases cited by appellant holding that the owner of property is not an insurer of persons whom he invites upon the premises need not be discussed since there is no contention that appellant was an insurer of the safety of any person who entered or departed from the apartment.

[4] Appellant contends that respondent was guilty of contributory negligence in that (1) the steps were unlighted and, if the degree of darkness was such that she could not see, then her action in assuming that there was a rail was negligence as a matter of law; and (2) if such a degree of darkness did not exist as to prevent respondent from observing the absence of the rail then its absence was an open and obvious defect which establishes respondent's negligence as a matter of law. We do not agree with either contention. When respondent stepped onto the upper platform her hand engaged the railing and she had a right to expect that the same protection would extend along the steps as that which had been installed on the platform. The cases cited by appellant in support of its contention are of no assistance in the instant action. In some of them the injured person walked along a dark hallway with which he was unfamiliar, and in one at least the plaintiff refused to use a broad and safe stairway but proceeded in the darkness and fell through an open door. The facts shown by the record before us are entirely unlike those in the cases relied on for a reversal of the judgment.

Appellant contends that since respondent entered the apartment while it was daylight the absence of the rail was open and obvious to her. She had no occasion to observe whether a handrail was present or not since she ascended the steps on the side next to the wall and placed her hand on the wall as she climbed the steps.

Considering the entire evidence it is obvious that respondent was not guilty of contributory negligence as a matter of law. The court fittingly submitted to the jury the question whether the steps were safe or dangerous and if dangerous whether the condition was patent and should have been observed by respondent. Oles v. Kahn Bros., 81 Cal.App. 76, 83, 253 P. 158; Long v. John Breuner Co., 36 Cal.App. 630, 634, 172 P. 1132; Neel v. Mannings, Inc., 19 Cal.2d 647, 654, 122 P.2d 576. The jury determined that appellant was negligent and respondent was not.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

79 Cal.App.2d 694

RAWJEE v. HATTON.

Civ. 15560.

District Court of Appeal, Second District, Division 1, California.

May 15, 1947.

Rehearing Denied June 3, 1947.

Hearing Denied July 10, 1947.

1. War ⚷4

Where contract provided for sale of cleaned dillseed at 9 cents per pound but when parties learned that price of cleaned dillseed had been fixed by OPA at 7.5 cents per pound they mutually changed contract to read re-cleaned dillseed and no maximum price of re-cleaned dillseed had been fixed by OPA the contract was binding and buyer was entitled to damages for breach of the contract.

2. Sales ⚷181(11)

In buyer's action for breach of contract to sell dillseed, evidence sustained finding that performance by seller was not rendered impossible by fire.

3. Sales ⚷417

In action by buyer for breach of contract for sale of dillseed, evidence sustained finding fixing date of delivery and market value of dillseed on that date.

4. Appeal and error ⚷1010(1)

Appellate Court may not disturb findings supported by substantial evidence.

◆

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by M. H. Rawjee doing business under the fictitious firm name and style of East India Trading Company against D. M. Hatton doing business under the fictitious firm name and style of D. M. Hatton & Company to recover damages for breach of a contract for purchase and sale of dillseed. Judgment for plaintiff and defendant appeals.

Affirmed.

Alexander K. Ginsburg, of Los Angeles, for appellant.

G. V. Weikert, of Los Angeles, for respondent.

DRAPEAU, Justice pro tem.

Plaintiff and defendant entered into a contract of purchase and sale of dillseed. This product is grown in India, and is used in the bakery trade in the United States in making rye bread. The contract provided for delivery of seed to the plaintiff ex-dock in the United States and fixed the purchase price at 9¢ per pound.

Defendant breached the contract; plaintiff proved the market price of the product at the time of the breach at 15¢ per pound; and was awarded damages in the sum of $7,392.

[1] There is no conflict in the testimony respecting the contract or its breach. The defendant contends that he is not bound by the contract because the purchase price of the dillseed was fixed by OPA at 7.5¢ per pound. However, when the parties learned of this situation they mutually changed the contract to read re-cleaned dillseed in place of cleaned dillseed.

In the trade these terms have a definite meaning. Re-cleaned dillseed is that which has been processed so that practically all impurities have been taken out of it, whereas cleaned dillseed is the product as it comes from the producer.

No maximum price of re-cleaned dillseed was fixed by OPA. Therefore this defense will not avail the defendant in such a case as this, in which the law awards a vendee damages for breach of a contract of purchase and sale.

[2] Defendant also contends that the contract was impossible of performance because of a fire in Bombay, India, which destroyed warehouses and shipping facilities and made it impossible for dillseed to be shipped to fulfil the terms of the contract. The only evidence which defendant presented on this issue were certain communications from his supply houses in Bombay asserting this fact. Plaintiff presented a witness from Bombay who testified that the defendant's supplier's warehouses were not damaged by the fire, and that there was no condition beyond the power of the vendor to supply the dillseed.

[3, 4] Appellant complains of findings by the trial court, fixing the date of de-

livery of the goods, as contemplated by the contracting parties, and establishing the market value thereof on that date, essential proof in these cases. This presents the familiar situation wherein the trial court could have found either way, but having exercised its province to find for the prevailing party, and substantial evidence appearing in the record to support its findings, it is not the province of an appellate court to disturb them.

The evidence fully supports the findings and judgment of the trial court.

Judgment affirmed.

YORK, P. J., and WHITE, J., concur.

79 Cal.App.2d 584

Ex parte MARTIN.

Cr. 2001.

District Court of Appeal, Third District, California.

May 8, 1947.

1. Habeas corpus 🔑99(3)

On petition for writ of habeas corpus to obtain the custody of a minor child, the parent of the child is not absolutely entitled to its custody, since the right of custody is dependent on and qualified by what is for the best interests of the child, and necessarily included therein is the question of the fitness of the parent.

2. Habeas corpus 🔑117(1)

Where it appears on petition by a parent for a writ of habeas corpus to obtain the custody of a minor child that issues have been determined in a former hearing on the same facts and between the same parties, appellate courts deny the writ on ground that the former proceeding is res judicata, but rule is inapplicable where there is a showing of change of circumstances, Superior Court's decision was based on a question of law alone, or where there is before the appellate court no record of the former proceeding.

3. Habeas corpus 🔑3

The question whether a parent is a fit person to have custody of a minor child is one which may best be adjudicated in the trial court, and pending the determination of such issue by the trial court, the District Court of Appeal will not interfere with the custody of the child by habeas corpus.

4. Habeas corpus 🔑120

Mother's writ of habeas corpus to obtain custody of minor child was dismissed without prejudice, where there was no indication of a change of circumstances since denial of former writ, and there was pending in the Superior Court proceedings by the child's mother for letters of guardianship.

Proceeding in the matter of the application of Josephine J. Martin for a writ of habeas corpus for the custody of her daughter, Shirley Ann Martin, a minor child of the age of approximately one year, who had been adopted by Winfred Justin Smith and Sybil Elizabeth Smith, respondents.

Writ dismissed without prejudice.

Anthony J. Chargin, of Stockton, for petitioner.

L. A. Mills and O. C. Parkinson, both of Stockton, for respondents.

PEEK, Justice.

By her petition for a writ of habeas corpus, Josephine J. Martin seeks the custody of her daughter, Shirley Ann Martin, a minor child of the age of approximately one year.

From said petition it appears that on August 29, 1946, petitioner was granted an interlocutory decree of divorce from the father of the child; that by the terms of said decree petitioner was awarded the custody of the child; that on November 8, 1946 petitioner and the father consented that the child be adopted by the respondents herein, Winfred Justin Smith and Sybil Elizabeth Smith; that on December 18, 1946 the parents became reconciled, resumed their marital status and filed a withdrawal of their consent to the adoption of their child with the State Department of Social Welfare. It also appears from the petition that prior to the filing of the same a similar proceeding was commenced in the Superior Court of San Joaquin county, and after a hearing thereon at which testimony was introduced and received, the writ was dismissed on December 24, 1946; that thereafter on January 6, 1947 said Winfred Justin Smith petitioned for letters of guardianship of the person of said child, and on January 30, 1947 the paternal grandmother of said child also petitioned for like letters of guardianship. The petition further alleges that it will be for the best interests of the child to be in the custody of her natural parents who are now able to properly care for and support her.

Upon the filing of the petition for the writ in this court (which petition follows verbatim that of the prior petition in the Superior Court of San Joaquin county, except for the recital of the disposition of the former writ and the now pending guardianship proceedings) an order was issued restraining the Superior Court of said county from proceeding with the guardianship matter until after a hearing and determination could be made thereon.

Thereafter respondents filed their return and in addition have demurred, raising two points: (1) That the same questions presented in this proceeding were likewise presented in the prior hearing, and therefore are res judicata, and (2) that there are now pending in San Joaquin county guardianship proceedings in which the issues of the fitness of the parents to have such custody and what is for the best interests of the child will be determined.

[1, 2] Upon the petition for a writ of habeas corpus for the purpose of obtaining the custody of a minor child, the parent of such child is not absolutely entitled to its custody nor to the issuance of the writ. The right of custody is dependent upon and qualified by what is for the best interests of the child, and necessarily included therein is the question of the fitness of the parent. In re Britt, 176 Cal. 177, 167 P. 863; In re McDaniel, 90 Cal.App. 307, 265 P. 884; In re De Leon, 59 Cal.App.2d 510, 139 P.2d 109. Where it appears that these issues have been determined in a former hearing upon the same facts and between the same parties, the appellate courts of this state have uniformly denied such writs upon the ground that the former proceeding is res judicata. In re Frazier, 50 Cal.App. 45, 194 P. 510; In re Gury, 103 Cal.App. 738, 284 P. 944.

The rule is of course inapplicable where there is a showing of a change of circumstances since the denial of the former writ (In re Gille, 65 Cal.App. 617, 224 P. 784), or the decision of the Superior Court was based upon a question of law alone (In re Livingston, 108 Cal.App. 716, 292 P. 285; In re White, 49 Cal.App.2d 160, 121 P.2d 100), or where there is no record of the former proceeding before the appellate court to show that the issues there raised were also before the Superior Court. In re Landry, 61 Cal.App.2d 230, 142 P.2d 432.

In the present proceeding, however, there is no indication of a change of circumstances since the denial of the former writ. The record of the former proceeding is before us and shows that the issue of fitness was raised in the petition therein and that testimony was introduced and received on the hearing before the trial court.

[3] We are likewise in accord with the second issue raised by respondents, namely, that there are now pending in the Superior Court of San Joaquin county proceedings for letters of guardianship. As we held in the case of In re Green, 67 Cal.App. 504, 226 P. 76, the question of whether the petitioner is a fit and proper person to have the care and custody of the child is one which may best be adjudicated in the trial court, and pending the determination of such issue by that court, this court will not interfere with the custody of a minor by a writ of habeas corpus.

[4] By reason of the foregoing it is our conclusion that respondents' demurrer is well taken, that the restraining order heretofore issued by this court should be discharged and the writ dismissed without prejudice, and it is so ordered.

THOMPSON, Acting P. J., and SCHOTTKY, J. pro tem., concur.

79 Cal.App.2d 543

REINER v. HERMANN et al.

Civ. 13144.

District Court of Appeal, First District, Division 1, California.

May 8, 1947.

Hearing Denied June 30, 1947.

1. Limitation of actions 🔑16

In determining what provisions of statute of limitations applies to particular action, the object of action and not form of action are the determining features.

2. Limitation of actions 🔑185½

Prayer of complaint is to be read in light of facts alleged, in determining what provision of statute of limitation applies to action.

3. Limitation of actions 🔑46(2)

Where contract to convey land was contingent upon marriage, cause of action, if any, for breach of contract accrued on date of marriage, in determining whether action was barred by statute of limitations.

4. Conversion 🔑1

The basis of doctrine of equitable conversion is that equity regards as done which ought to be done.

5. Specific performance 🔑64

Equity will specifically perform any contract for sale of land, since land is regarded as unique.

6. Limitation of actions 🔑24(4)

Contract for sale of land cannot be taken out of statute of limitations governing contract actions by converting action into one for the recovery of real property through the invocation of doctrine of equitable conversion.

7. Limitation of actions 🔑19(3), 24(4)

Where complaint of widow against husband's executor and testamentary beneficiary alleged breach of contract to convey realty in consideration of marriage and sought to recover realty and rents received therefrom, action was for specific performance of alleged contract within four year statute of limitations and was not based on right of possession or to recover possession within five year statute of limitations. Code Civ.Proc. §§ 318, 337, subd. 1.

8. Limitation of actions 🔑46(2)

Where action for specific performance of alleged contract to convey realty in consideration of marriage was not commenced until June 19, 1944, but marriage took place on May 18, 1940, the action was barred by the four year statute of limitations. Code Civ.Proc. §§ 337, subd. 1, 437c.

◆

Appeal from Superior Court, City and County of San Francisco; George W. Schonfeld, Judge.

Action by Mary Reiner against Rudolph P. Hermann and another as executors of the last will and testament of Alois Reiner, also known as Louis Reiner, deceased and others for specific performance of an alleged contract to convey realty. From a judgment granting defendants' motion for summary judgment and dismissing the amended complaint, plaintiff appeals.

Affirmed.

Prior opinion, see 176 P.2d 734.

Wm. G. Condron, of Los Angeles, Wm. H. Kiler, and Wm. Penn Humphreys, both of San Francisco, for appellant.

Tobin & Tobin and Raymond J. Arata, all of San Francisco, for respondents.

WARD, Justice.

After reversing the judgment granting the defendants' motion based on Code of Civil Procedure section 437c for a summary judgment and dismissing the plaintiff's amended complaint, this court granted a rehearing and directed counsel to file memoranda on the subject of the statute of limitations.

The amended complaint, which was designated as a complaint "To Impress Trust on Real and Personal Property and to Recover Possession Thereof," contains no allegation of fraud, accident, mistake, undue influence or wrongdoing on the part of the plaintiff's deceased husband, his executor, Milan Dulik, or Rudolph P. Hermann, the devisee under the last will of decedent of the property in question. It prayed for a judgment declaring that said devisee holds the title to certain property, whereas the said executor holds the rents collected from the property, in trust for plaintiff. It further prayed for an order directing the devisee to convey his interest in the property to plaintiff, ordering the executor to pay plaintiff rents therefrom, quieting plaintiff's title, and ordering that she be put in possession of the property subject to the administration of the estate.

[1, 2] Since in "determining what provision of the statute [of limitations] applies to the particular action, the object and purposes of the suit, and not the form of action * * * are the determining features" (16 Cal.Jur. 429), the foregoing prayer "is to be read in the light of the facts alleged." Bell v. Bank of California, 153 Cal. 234, 244, 94 P. 889, 894; accord, Williams v. Southern Pacific R. R. Co., 150 Cal. 624, 628, 89 P. 599.

As stated in the former opinion, Reiner v. Hermann, — Cal.App.2d —, 176 P.2d 734, 735–736, the pleadings and affidavits considered by the trial court on defendants' motion for summary judgment alleged the following facts: "That Mary Reiner, often referred to as Marie, Mariska or Marka, is the widow of Alois Reiner, sometimes known as Louis or Luis Reiner; that Reiner died on May 4, 1943; * * * that Reiner was the owner in fee simple and was in the uninterrupted possession 'up to the date of his death' of a certain described lot and the improvements thereon, and the personal property in a flat occupied by him on Page Street in San Francisco. Reiner married his first wife, the sister of Mary, prior to 1906; Anna died in 1937. Mary Reiner had married George Biescar and lived in Los Angeles. Biescar died in December 1937. Mary Biescar married Alois Reiner at Riverside on May 18, 1940. According to the amended complaint seven days after the marriage he made a holographic will wherein he devised and bequeathed the property in question, the flats, to appellant Mary. From May 18, 1940, the date of the marriage, until June 12, 1940, Alois Reiner and Mary lived at her home in the City of Los Angeles. On the latter date they separated and Alois returned to the San Francisco flat. Thereafter they lived apart. On November 12, 1941, Alois revoked all former wills and devised the property, which is the subject of this action, to Rudolph P. Hermann, one of the defendants herein. Prior to his marriage to plaintiff, and on September 20, 1938, Reiner wrote a letter in the Czechoslovakian language to the then Mary Biescar, who could read, write and speak that language. The letter reads in part: 'Dear Dear and Dear Marka What would I not give, if on the anniversary of your birthday, love would lend me wings to fly to you. This is but a thought, but it fills me with delight. How happy am I that I know you be mine. My dear Marie it not a dream not an illusion, that you are to me all world can offer. This conviction fills my heart with joy and urges me to send you best wishes for health and happiness and well-being. * * * I am just struggling to spend contently those few years I still have. * * * But you know what the best will be if you come here. I have the house but no housewife so you can have the house after your sister and me with it. The garden is getting dry. I have nice roses but they are already wilted. My red cat needs a cook. He is very particular and I don't cook according to his taste. So write me a love letter how you like me and send me a few kisses so that my monk's life would be sweetened * * * With hearty greetings and I am nicely hugging you and kissing you on both cheeks and your little mouth * * * Repectfully yours your loyal Luis.'"

[3] For the purposes of this opinion it will be assumed that the letter constitutes a promise by Reiner that if Mary would marry him he would convey his real property to her. The parties do not dispute that as such promise to convey was contingent upon the marriage, no cause of action based upon the promise to convey could arise until the marriage, and that as the date of the marriage was May 18, 1940, the cause of action, if any, accrued May 18, 1940.

This suit was commenced June 19, 1944, more than four years (Code of Civil Procedure sec. 337(1), and less than five years (Code of Civil Procedure sec. 318), after May 18, 1940. Defendants maintain now, as at the first hearing, that the complaint was properly dismissed as this is a suit for specific performance barred by Code of Civil Procedure sec. 337(1), pleaded in their answer. Plaintiff urges that the action is for the title and possession of property, and, hence, within Code of Civil Procedure sec. 318.

[4-6] Section 318 provides: "No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the property in question, within five years before the commencement of the action." In an attempt to come within these provisions, plaintiff invokes the rule that a contract for the sale of land may work an equitable conversion, the purchaser being deemed to be the equitable owner of the property and the seller being considered the owner of the purchase price. She assumes that such doctrine is applicable to a contract for a marriage settlement, but cites no authority on this point. At 2 Pomeroy's Equity Jurisprudence, sec. 371, it is said that equitable conversion "may in like manner take place where, by marriage articles or other executory agreement, land is covenanted to be conveyed * * *" The basis of the doctrine of equitable conversion is that equity regards as done that which ought to be done; moreover, equity will specifically perform any contract for the sale of land since land is regarded as unique. (2 Pomeroy's Equity Jurisprudence, secs. 364-371.) A contract for the sale of land cannot be taken out of the statute of limitations governing contract actions by converting the action into one for the recovery of real property through the invocation of the doctrine of equitable conversion. As said in Nicholson v. Tarpey, 124 Cal. 442, 450, 57 P. 457, 460, in discussing the statute of limitations: "This, however, is not an action based upon the right of possession, or to recover possession, but its purpose is to obtain the legal title to the premises in controversy by enforcing the alleged written agreement * * * in other words, the specific performance of said alleged contract."

None of the cases cited by plaintiff is authority for holding that section 318 governs the present case. Murphy v. Crowley, 140 Cal. 141, 73 P. 820, an action for the recovery of real property which the defendant had procured by fraud from plaintiff's father, was held to be governed by the five year period of section 318 and not by the three year period after discovery of fraud established by section 338(4). Accord, Unkel v. Robinson, 163 Cal. 648, 126 P. 485. Section 337 relied upon by defendants herein is not discussed as the suit, unlike the present one, was not based upon any contract.

Plaintiff refers to Bradley Bros. v. Bradley, 20 Cal.App. 1, 127 P. 1044, 1045 as "a case where the title to the real property had never been in plaintiff, or in plaintiff's grantors." In that case the plaintiff's grantor bought and paid for certain land but at his request the deed was made out and recorded in the name of a third party. The property was conveyed to this third party who retained title until he, without the consent of the plaintiff's grantor, conveyed it to the defendant. As defendants point out, the opinion in the Bradley case relies upon the fact that "Plaintiff alleges in its complaint that within five years preceding the commencement of the action it had the seisin and was in the possession of the several pieces of property in controversy. The complaint is not entirely free from ambiguity as to whether the plaintiff or the defendant was in the actual possession of the property at the precise time of the commencement of the action. No demurrer, however, was interposed * * *." The court then proceeds to apply the rule announced in Murphy v. Crowley, supra.

Hillyer v. Hynes, 33 Cal.App. 506, 165 P. 718, is also relied on by plaintiff. In that case the plaintiffs' intestate was never in possession but was the beneficiary under an invalid trust. The court found that a constructive trust arose out of a violation of the invalid oral express trust and said at page 510 of 33 Cal.App., at page 720 of 165 P. that the trustee "may well be considered as the predecessor of the plaintiffs within the meaning of the section [Code Civ.Proc., 318], since if he had carried out the terms of the understanding by virtue of which he acquired an estate in the property, he would have conveyed it to the plaintiffs or their intestate, and thus have been literally their predecessor in interest."

Defendants reply that a better meaning of the word "predecessor" is given in Franklin v. Dorland, 28 Cal. 175, 87 Am. Dec. 111, decided under Stats. 1863, 325, 326, sec. 6: "No action for the recovery of real property, or for recovery of the possession thereof, shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question within five years before the commencement of such action." In the Franklin case the court states 28 Cal. at page 180, 87 Am. Dec. 111: "In the matter of an adverse possession taken by a grantor subsequent to his deed, and continuously held thereafter, the possession is not the possession of the grantee's 'predecessor,' as that term is used in * * * the Statute of Limitations."

The cases relied on by plaintiff are referred to in 16 Cal.Jur. 437–439 under the topic-heading "Recovery of Real Property Where Fraud is Incidentally Involved": "Although the main ground of an action of equitable cognizance is fraud or mistake, whereby the defendant has obtained the legal title to land in controversy, and the chief contention is with respect to the fraud or mistake alleged, yet if plaintiff alleges facts which show as a matter of law that he is entitled to possession of the property, and a part of the relief asked is that he be let into possession, or that his title to the land be quieted, the action is in reality for the recovery of real property and is not barred except by the five-year limitation contained in section 318 of the Code of Civil Procedure * * *" (Hart v. Walton, 9 Cal.App. 502, 99 P. 719, is cited as authority for limiting this rule to cases which involve the features of an action in ejectment or to quiet title.)

An examination of the facts of this case, hereinbefore set out, reveals that plaintiff relies solely upon Reiner's letter offering to convey real property to her if she would marry him, her marriage being wholly in reliance upon said letter—the gravamen being the failure to convey. As in Nicholson v. Tarpey, supra [124 Cal. 442, 57 P. 460], the purpose of the action "is to obtain the legal title to the premises in controversy by enforcing the alleged written agreement * * * in other words, the specific performance of the said alleged contract." An action for specific performance is governed by Code of Civil Procedure sec. 337 (1). Palmer v. Los Angeles O. P. & S. M. Ry. Co., 55 Cal.App. 519, 203 P. 1012; Archer v. Harvey, 164 Cal. 274, 128 P. 410; 16 Cal.Jur., 436, 458.

Plaintiff seeks to avoid section 337 by stating that "inasmuch as this action is based on the aforesaid letter, Reiner became the trustee of an express, or resultant trust," and that only upon the trustee's disavowal of the trust does the statute of limitations run against him. Luco v. De Toro, 91 Cal. 405, 18 P. 866, 27 P. 1082; England v. Winslow, 196 Cal. 260, 237 542; Cortelyou v. Imperial Land Co., 166 Cal. 14, 134 P. 981. This a gument lacks merit in view of the express provisions of Civil Code, sec. 2224: "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." Defendants point out that no fraud, accident, mistake, undue influence, violation of a trust or wrongdoing is alleged. Instead the complaint is based upon the fact that the alleged agreement was breached. The language of O'Melia v. Adkins, 73 Cal.App.2d 143, 149, 166 P.2d 298, 301, bears upon whether such breach created a trust: "It is contended by respondent that decedent's repudiation of his promise to hold the apartment or its equivalent in trust for her constituted a constructive fraud. So to hold would make every breach of contract a fraud. The mere failure of a grantee to perform his oral promise does not create a constructive trust unless he was guilty of fraud in procuring the grant. All v. Prillaman, 200 S.C. 279, 20 S.E.2d 741, 159 A.L.R. 981. In order for a promise to be fraudulent it must be made in bad faith, without any intention of performing it."

[7] Upon this rehearing it is determined that this is not an action based upon

the right of possession or to recover possession. Any language to the contrary in the former opinion (— Cal.App.2d —, 176 P.2d 734, 738) is expressly overruled. It is an action for specific performance of the alleged contract. Nicholson v. Tarpey, supra.

[8] The judgment granting the defendants' motion based on Code of Civil Procedure section 437c for a summary judgment and dismissing the plaintiff's amended complaint is affirmed.

PETERS, P. J., and BRAY, J., concur.

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79 Cal.App.2d 577

ASSOCIATED LUMBER & BOX CO. v. SUPERIOR COURT IN AND FOR CALAVERAS COUNTY.

Civ. 7374.

District Court of Appeal, Third District, California.

May 8, 1947.

1. Contempt ⇨67

On certiorari, a reviewing court may not weigh the evidence upon which the petitioner has been found by trial court to be guilty of contempt except for the purpose of determining jurisdiction and if the record shows that trial court had jurisdiction, the writ shoulld be denied.

2. Appeal and error ⇨455

A timely and proper notice of appeal vests jurisdiction of the case in the reviewing court to which it is appealed and divests the trial court of jurisdiction pending the appeal.

3. Appeal and error ⇨447
Injunction ⇨230(1)

Where court had jurisdiction of action to enjoin discharging of waters and debris into a gulch on plaintiff's property and entered permanent injunction therein, the court had jurisdiction to punish the defendant for contempt for violating the injunction, and fact that an appeal from judgment granting injunction was taken some 19 days after contempt order was rendered did not affect the trial court's jurisdiction in the contempt proceeding.

4. Waters and water courses ⇨164

Defendant acquired no prescriptive right to dump water and debris upon plaintiff's land where it had not previously done so for the statutory period of five years.

◆

Certiorari by Associated Lumber & Box Company to vacate an order made by the Superior Court of the State of California, in and for the County of Calaveras, Hon. J. T. B. Warne, presiding, finding the petitioner guilty of contempt for violating an injunction entered by the court in a pending action.

Order affirmed.

Huberty & Huberty, of San Andreas, for petitioner.

Charles Gilmore, of Sacramento, for respondent.

THOMPSON, Acting Presiding Justice.

By means of certiorari the petitioner seeks to vacate an order made in a suit entitled Bert E. Howe et al. v. Associated Lumber & Box Co., a corporation, et al., finding the petitioner guilty of contempt for violating an injunction restraining it from discharging water and debris into a gulch extending across plaintiff's land, and imposing a fine of $100 as penalty therefor. After the injunction was granted, and while a motion for new trial was pending, the order of contempt was rendered. The defendant subsequently perfected an appeal from the judgment for injunctive relief. That appeal is now pending.

On this petition for certiorari it is contended that the injunction is mandatory and not prohibitory in nature and that the appeal from the judgment in the injunction suit stayed proceedings and deprived the court of jurisdiction to render the order of contempt.

This petitioner owned and operated a sawmill and log pond in Calaveras County, above Sailor's Gulch and the property of

Mr. and Mrs. Bert E. Howe, for more than two years prior to the litigation which is involved in this proceeding. For the use of its mill and pond defendant purchased water from Calaveras Public Utility District, and deposited the excess used water by agreement of the District into Sailor's Gulch, a natural water course communicating with the South Fork of Mokelumne River. The lower property owners, Bert E. Howe and wife, brought suit in Calaveras County against this petitioner for injunction to restrain the corporation from discharging said waters and debris into Sailor's Gulch on plaintiffs' property, and for damages in the sum of $35,000 resulting therefrom. The defendant answered that complaint, denying the material allegations thereof, and affirmatively alleging that the acts complain of were performed by the defendant for a period of more than two years with consent of the plaintiffs and that said damages were fully compensated by subsequent agreement of the parties by furnishing plaintiffs several hundred feet of iron pipe through which they were supplied an agreed quantity of water. No temporary restraining order was made in that suit. After trial of the injunction suit the court adopted findings October 28, 1946, favorable to plaintiffs, determining that defendant did furnish the pipe line and water for the benefit of plaintiffs as alleged in the answer, but held that such service did not fully compensate for all damages incurred by depositing water and debris in said gulch on plaintiffs' property, and that defendant was guilty of wrongfully flowing said water and debris into said gulch upon plaintiffs' property. Judgment was accordingly rendered on the last mentioned date against the defendant, that it be "perpetually enjoined and restrained from flowing or allowing to flow, or discharging or allowing to be discharged any of the water brought by it or them into the watershed of Sailor's Gulch from sources beyond said watershed, or any debris, oil, grease, offal, or waste water or material, the result of any of the work or operations of said corporation, its officers, agents or servants, to, upon or through the lands of plaintiffs described in the complaint on file herein." No damages were allowed in that suit. The judgment was entered November 4, 1946, and notice of the entry of judgment was filed November 12, 1946. Notice of intention to move for a new trial was given November 15th. The motion for new trial was argued and submitted, and on January 4, 1947, it was denied. On the last mentioned date the defendant's appeal from the judgment was perfected.

After the permanent injunction was rendered and entered, and on November 15th, the same day upon which notice of intention to move for a new trial was filed, the defendant was served with an order to show cause why it should not be adjudged guilty of contempt for violating the injunction. That order to show cause was heard and submitted November 29th on affidavits and counter-affidavits of the respective parties. On December 16th, the trial court made its order determining that the defendant "has violated the order and judgment of the Court made in this action on October 28th, 1946, and is therefore guilty of contempt," and imposed a fine of $100 against the defendant for contempt. The court also ordered that said decree of contempt be suspended for a period of thirty days. That order became automatically effective on November 28, 1946.

The petition for a writ of certiorari was filed in this court January 14, 1947, asking this court to review the proceedings in said injunction case and to cancel and annul the contempt order of December 16, 1946.

[1] On certiorari a reviewing court may not weigh the evidence upon which the petitioner has been found by a trial court to be guilty of contempt, except for the purpose of determining jurisdiction. Its sole province is to determine from the record whether the trial court acted within its jurisdiction in rendering judgment in the contempt proceeding. If the record shows that the trial court had jurisdiction to render the contempt order, the inquiry ceases, and the judgment of contempt is final and conclusive. Under such circumstances the writ should be denied. Bridges v. Superior Court, 14 Cal.2d 464, 484, 94 P.2d 983; Taylor v. Superior Court, 20 Cal.2d 244, 246, 125 P.2d 1; Daily v. Superior Court, 4 Cal.App.2d 127, 134, 40 P.2d

936; Sec. 1222, C.C.P.; 5 Cal.Jur. 955, sec. 50; 12 Am.Jur. 407, sec. 26; 28 A.L.R. p. 49, note.

[2, 3] Clearly the trial court had jurisdiction of the parties and of the subject matter in the injunction suit to invest it with authority to hear and determine the question of defendant's alleged contempt for violating the judgment for injunctive relief in that case, unless the appeal from the judgment deprived the court of jurisdiction. It is true that a timely and proper notice of appeal vests jurisdiction of the case in the reviewing court to which it is appealed, and divests the trial court of jurisdiction pending the appeal. Estate of Hanley, 23 Cal.2d 120, 123, 142 P.2d 423, 149 A.L.R. 1250; In re Shafter-Wasco Irr. Dist., 55 Cal.App.2d 484, 486, 130 P.2d 755; 2 Cal.Jur. 415, sec. 178. But the appeal in this case was not perfected until January 4, 1947, nineteen days after the contempt order was rendered. The trial court therefore had jurisdiction to render that contempt order. Nor does it appear that the trial court exceeded its jurisdiction in so doing. Assuming that the final effectiveness of that order is dependent on the validity of the judgment for injunctive relief, which depends on the result of the appeal from that judgment, and that the order is automatically suspended pending the appeal, that fact would not authorize this court to vacate the contempt order on this proceeding of certiorari.

The petitioner correctly asserts that if the injunction in this case is mandatory in character, and not merely prohibitory, it is automatically stayed or suspended pending the appeal. Joerger v. Mt. Shasta Power Corp., 214 Cal. 630, 637, 7 P.2d 706; Baar v. Smith, 201 Cal. 87, 105, 255 P. 827; Byington v. Superior Court, 14 Cal.2d 68, 70, 92 P.2d 896; Feinberg v. One Doe Co., 14 Cal.2d 24, 28, 92 P.2d 640; In re O'Connell, 75 Cal.App. 292, 242 P. 741; 5 Cal.Jur. 920, sec. 26; 3 Am.Jur. 205, sec. 558. Assuming, without so deciding, that the injunction in this case is mandatory in character, it was merely suspended by the subsequent appeal, and it may not be enforced pending the appeal. But that does not render the contempt order void, or authorize this court to vacate and set it aside. That order was made while the trial court had jurisdiction of the case, and before the appeal was perfected. Its final validity may depend upon the outcome of the appeal. We may assume that if and when the injunction is dissolved on appeal, the contempt order will then become functus officio because it would have no valid foundation upon which to base the contempt proceeding. In the meantime, since the trial court had jurisdiction to make the order, it should remain intact pending the appeal, although its present effectiveness is stayed or suspended until the appeal is determined. The foregoing conclusion is based on the assumption that the trial court did not exceed its jurisdiction in making the order.

The petitioner concedes the application of the foregoing authorities to the extent of the announced principles in support of which they are cited. But it is contended that the trial court exceeded its jurisdiction in the injunction suit by invading defendant's property rights of storing and using the water for sawmill and log pond purposes and thereafter flowing it into Sailor's Gulch, as it had previously done for a period of more than two years. In support of that assertion petitioner relies chiefly on the case of Byington v. Superior Court, supra, in which it was held that the trial court exceeded its jurisdiction in granting a mandatory injunction. That case, however, appears to be clearly distinguishable from the facts of this case. We think it is not determinative of this proceeding.

The Byington case was a petition for certiorari in behalf of the Public Utilities Commission of San Francisco to vacate an order of the trial court in Stanislaus County, which was made in a suit instituted by Meridian Ltd. v. The City and County of San Francisco et al., to quiet title to water acquired incident to the Hetch Hetcy project, finding the defendants guilty of contempt for violating the terms of an injunction which was entered therein. In that suit to quiet title to water rights, a decree was rendered June 18, 1936, awarding the City prescriptive rights to store on its property 235,465 acre-feet of water per seasonal year, but enjoining it "from storing water in excess of such amount, which amount represented the then capacity of the city's two reservoirs." From that judgment both parties appealed. While that appeal was pending, and two years after the injunction and decree were rendered, the city increased the height of its dam and enlarged the capacity of its reservoirs, and in May, 1938, filled its reservoirs to capacity with 340,830 acre-feet of water. Those acts were performed long after the appeal was perfected and while it was pending in the Supreme Court. In spite of that fact, upon affidavits presented to the trial court on citation to show cause, that court found the defendant guilty of contempt in violating the injunction by storing in its reservoirs a quantity of water in excess of the amount awarded to it by the decree. Each defendant was fined $100 and upon failure to pay the same, it was ordered that each be imprisoned in jail one day for each $5 remaining unpaid.

On certiorari, the Supreme Court reviewed the evidence in the quieting of title suit for the purpose of determining whether the trial court had jurisdiction to enjoin the defendant, and held that the trial court exceeded its jurisdiction for the reason that the city acquired and owned property rights in the excess water stored in its enlarged reservoirs to the extent of 340,830 acre-feet, and that in so storing and using the water it did not maintain a nuisance or invade the rights of plaintiff. The Supreme Court therefore held that the trial court lacked jurisdiction to determine that defendants were guilty of contempt, and annulled that order. The court said in that regard: "* * * The defendants are and always have been lawfully in possession of their property. In that possession they are engaging in a lawful use thereof. They are not trespassing upon any of the rights of the plaintiff. *They are not maintaining a nuisance.* They are entitled in any event to their proportional share of the water by reason of the fact that their rights and the rights of the plaintiff are correlative, coordinate, and in common as to said opposite riparian lands. * * * *The effect of the order, if enforced, would be to disturb a lawful use of property lawfully in possession, and to disposses the defendants of the use of any of the waters of the stream. It would thus compel the surrender of the lawful possession of real property, and would amount to affirmative relief as contemplated by the decisions.*" (Italics added.)

The Supreme Court concluded from the foregoing that: "* * * Diverting and storing excess waters to the capacity of the enlarged reservoir was not contemptuous and the order characterizing and punishing it as such was in excess of the respondent court's power and jurisdiction and must be annulled. * * * *At no time has the city or its agents diverted or stored water in such manner or quantity as to interfere with the taking by the plaintiff riparian owner of its decreed quantity of water.*" (Italics added.)

[4] It is apparent that the Byington case, and other similar cases relied upon by petitioner, does not apply to the facts or enjoined rights of plaintiff in the present action. In this case there was no issue regarding riparian rights or an equitable distribution of water. Plaintiffs in this case did not contend that they had a right to the use of the water in question, or that their property rights had been invaded by defendant's storing of water for sawmill or log pond use. On the contrary, the plaintiffs in this case complained of the disposition of the water, together with accumulated "debris, oil, grease, offal, or waste * * * material", by dumping it into Sailor's Gulch on their land. It was here contended the disposition of the water and debris became a nuisance and detrimental to the rights and property of the plaintiffs. No such issue was involved in the Byington case. The defendant acquired no prescriptive right to dump the water and debris upon plaintiff's land, for it had not previously done so for the statutory period of five years. The property rights of the defendant were not invaded, and the trial court, therefore, did not exceed its jurisdiction in restraining the unlawful disposition of the water and debris. The Byington case is not authority for holding that this court

may vacate the order finding petitioner guilty of contempt.

If the trial court should attempt to execute the contempt order pending the appeal, as we assume it will not, proper proceedings to stay such execution may be instituted.

The order of contempt is affirmed.

PEEK, J., and SCHOTTKY, J., pro tem, concur.

* * *

79 Cal.App.2d 590

SIMON v. CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 13142.

District Court of Appeal, First District, Division 1, California.

May 9, 1947.

Hearing Denied July 7, 1947.

1. Appeal and error 🔑110, 782

An order denying motion for new trial is not appealable, and attempted appeal therefrom would be dismissed.

2. Trial 🔑178

In passing on a motion for directed verdict, court may not weigh the evidence, but must view all the evidence in the light most favorable to the party against whom the direction is passed and accept every inference and presumption in his favor that can reasonably be drawn from the evidence.

3. Street railroads 🔑117(5)

In action by pedestrian for injuries resulting from being struck by streetcar, trial court invaded province of jury in directing verdict for defendant.

4. Street railroads 🔑81(1)

In action by pedestrian for injuries resulting from being struck by streetcar, jury was entitled to consider the fact that motorman violated company rules in determining whether motorman's conduct constituted negligence.

5. Street railroads 🔑117(5)

Whether motorman had violated company rules was a question of fact for jury in action by pedestrian for personal injuries resulting from being struck by streetcar.

6. Street railroads 🔑113(4), 117(5)

In action by pedestrian for injuries resulting from being struck by streetcar, the company's rules were admissible in evidence and whether violation of rules constituted negligence was a question of fact for the jury and not a question of law for the court.

7. Street railroads 🔑117(11)

In action by pedestrian for injuries resulting from being struck by streetcar, whether motorman in proceeding at full speed and failing to ring his gong after seeing pedestrian standing only five feet from his track exercised due care was a question of fact for the jury.

8. Street railroads 🔑117(17)

In action by pedestrian for injuries resulting from being struck by streetcar, contributory negligence was question of fact for the jury.

9. Negligence 🔑122(1), 136(10)

Where plaintiff by reason of loss of memory is unable to testify respecting his conduct at and immediately before time of accidental injury and produces no witnesses to testify to such facts, he is entitled to the benefit of the assumption that he was exercising due care, and such presumption is itself evidence sufficient to create a conflict with evidence produced by defendant and requires that issues of contributory negligence be submitted to jury.

10. Evidence 🔑591
Trial 🔑140(2)

Evidence produced by examination of adverse witness as on cross-examination cannot be weighed as a matter of law against presumption that witness unable to testify by reason of loss of memory was in exercise of due care at time of injury. Code Civ. Proc. § 2055.

11. Appeal and error 🔑878(2)

Where trial court granted plaintiff's motion to amend complaint by substituting street railway employee's name for one of the "Does" named as defendants and then ruled that such employee could be called as an adverse witness defendants who did not appeal, could not urge that trial court committed error. Code Civ.Proc. § 2055.

12. Parties ⚷54
Process ⚷6

Service of summons is not indispensable to make a person a party defendant, but amendment to the pleadings may be an appropriate method to accomplish such result in a proper case. Code Civ.Proc. § 474.

13. Appeal and error ⚷949
Parties ⚷52
Witnesses ⚷276

Plaintiff's failure to substitute motorman's name for that of "Doe" by proper amendment and service as soon as he discovered motorman's true identity upon taking deposition did not preclude plaintiff from calling motorman for examination as on cross-examination at trial, and whether pleading should be amended so as to make such substitution at the trial and whether the plaintiff was acting in good faith were primarily for the trial court, which committed no abuse of discretion in permitting such substitution, particularly where no objection was made to the taking of deposition of adverse witness. Code Civ.Proc. §§ 474, 2055.

14. Action ⚷66

The trial of a lawsuit is not a game where the spoils of victory go to the clever and technical regardless of the merits, but a method devised by a civilized society to settle peaceably and justly disputes between litigants, and, unless the rules tend to accomplish justice, strict compliance is not always required.

15. Street railroads ⚷117(35), 118(15)

In action by pedestrian for injuries resulting from being struck by streetcar, plaintiff under the evidence was entitled to instruction on the doctrine of last clear chance, and direction of verdict for defendant was error even if it could have been said that pedestrian was guilty of contributory negligence, since it was for jury to determine whether motorman had the last clear chance to avoid the accident and whether such failure was proximate cause of the accident.

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Action by Charles S. Simon against City and County of San Francisco and another for damages resulting from being struck by streetcar. From a judgment based on directed verdict for defendants and from an order denying motion for new trial, the plaintiff appeals.

Appeal from order denying motion for new trial dismissed, and judgment based on directed verdict reversed.

Melvin M. Belli and Guernsey Carson, both of San Francisco, and L. Barbara Berry, of Palo Alto, for appellant.

John J. O'Toole, City Atty., and Thomas C. Ryan, and A. Dal. Thomson, Deputy City Attys., all of San Francisco, for respondents.

PETERS, Presiding Justice.

[1] Plaintiff has appealed from a judgment based on a directed verdict for defendants, and from the order denying his motion for a new trial. The latter is not an appealable order and the appeal therefrom should be dismissed.

The action was brought by plaintiff to recover for personal injuries received by him when he was hit by a streetcar operated by the city, it being alleged that the proximate cause of the accident was the negligent operation of the streetcar by defendants. The defendants, in addition to denying their negligence, affirmatively alleged contributory negligence on the part of plaintiff. At the close of defendants' case the trial court granted defendants' motion for a directed verdict.

The accident happened about 12:30 a. m. on February 1, 1944. Plaintiff, who was 33 years of age in 1944, testified that, prior to the accident, he had worked as a civilian employee in the South Pacific for about eighteen months, working seven days a week, for from ten to fourteen hours per day; that he arrived in Oakland from Honolulu around noon on January 31, 1944, and then came over to San Francisco; that he and a friend, who had arrived with him from Honolulu, first checked in with the U. S. Engineers' office and then the two secured a room at a hotel; that he slept until about 5:30 p. m. and then went to supper with his roommate; that he had one bottle of beer with his meal and prior and subsequent thereto had nothing else to drink; that he had not used whiskey or wine for five years; that after finishing his meal he walked, alone, to the Jewish Center at California and Presidio Avenues in San Francisco; that he arrived there between 8:00 and 9:00 p. m. and read various publications in the library until about 11:00 or 11:30 p. m.; that he then started to walk to his hotel. He described his route with some clarity and testified that he finally arrived at Steiner and Geary Streets. From this point on, his memory failed. He testified on direct examination when asked what he did after that: "I cannot just remember exactly * * *. As far as I can remember, the best I can, I walked down Steiner and I got as far as the curb, and I looked both ways before I go to cross the street. And I did not hear anything. That is all I remember. Two months later I woke up unconscious in the hospital." On cross-examination he testified that he had no recollection of the streetcar hitting him. As a result of being hit by the streetcar he suffered serious head and bodily injuries, and various broken bones. He was in a comatose condition for about eight days and stayed in the hospital until March 23, 1944.

Plaintiff next called Leo Mahoney, motorman of the streetcar, purporting to act under § 2055 of the Code of Civil Procedure. Counsel for the city objected to Mahoney being called as an adverse witness on the ground that Mahoney was not a party to the action and had not been served with summons. At that time Mahoney's name did not appear in the complaint, the defendants being designated as: "City and County of San Francisco, a municipal corporation, Municipal Railway Company, a corporation, First Doe and Second Doe." Counsel for the city admitted, of course, that Mahoney could have been declared to be the First Doe, and summons could have been served upon him, but contended that since this had not been done, he was not a party, and therefore could not be called under § 2055. The trial court sustained the objection, but suggested that the pleadings be amended to include the name of the motorman and the conductor in the place of the First and Second Doe. During the discussion it developed that prior to trial plaintiff, purporting to act under § 2055, had taken the depositions of the motorman and conductor, that at those hearings the witnesses were represented by counsel for the city, and that the city had not raised any objection to the taking of such depositions. Plaintiff, thereupon, moved to amend the complaint by substituting the names of the motorman and conductor for the two Does. This motion was granted, and the court thereupon permitted Mahoney to be called by plaintiff as an adverse witness. The propriety of this ruling will be discussed later in this opinion.

Mahoney testified that at the time of the accident he had been a motorman for about six years; that his hearing and eyesight were good; that at the time of the accident the streetcar was in good working condition and that all the lights were on; that the fender was down and protruding in a normal manner in front of the streetcar; that the night in question was clear and he could see an object, the size of a man, at least two hundred feet down the track; that the accident happened about three hundred feet west of the intersection of Steiner and Geary Streets at approximately 12:30 a. m.; that the streetcar was then proceeding west toward the beach; that he was not late or in a hurry, although the car was crowded; that he was not talking to any of the passengers; that he first saw plaintiff about one hundred feet in front of the car; that at this time the streetcar was going "full speed," which he later fixed at about eighteen miles an hour; that plaintiff was then standing on the northern rail of the inbound track facing the oncoming streetcar; that this track is approximately five feet from the tracks upon which the streetcar was proceeding; that he could see that plaintiff was an adult person and that he appeared to be in possession of his senses; that he did not ring his bell or slow down, but continued at "full speed"; that when the streetcar was approximately fifteen feet from plaintiff, Simon lurched forward; that plaintiff took two or three steps as if to regain his balance; that these steps were taken in the direction of the streetcar; that he, Mahoney, immediately applied his brakes, but the left front of the streetcar came into contract with the whole of the right side of Simon's body; that it took the streetcar approximately sixty-five feet in which to come to a stop; that he could have stopped in less than the one hundred feet after he first saw plaintiff, but believed that this was unnecessary as plaintiff was not on his track but was standing about five feet from his track and apparently looking toward the streetcar. Mahoney denied telling a policeman, or anyone else, immediately after the accident, that he saw plaintiff cross from the north to the south side of the street directly in front of him, and that then plaintiff was hit.

Over the objection of the attorney for defendants, plaintiff was then permitted to introduce into evidence two rules and regulations of the railway company, and to question Mahoney about them. One rule provides that a "car must be run slowly while passing * * * pedestrians * * * near the track." The other rule requires that the "gong must be sounded repeatedly when approaching * * * pedestrians * * * near tracks."

Mahoney testified that he knew of the rules; that his interpretation of the first rule was that it means to slow down if the pedestrian is near the car, but that the rule does not apply to a man standing in a place of safety and facing the car; that the second rule only applies when you are coming close to a pedestrian and think he did not see the car, but that such rule was not applicable to pedestrians who are stopped in a place of safety and looking toward the streetcar.

A police officer connected with the accident prevention detail, and who appeared on the scene immediately after the accident, was next called by plaintiff. He testified that he had a conversation with Mahoney immediately after the accident and that Mahoney then told him that plaintiff had come from the north side of the street and had crossed to the south in front of the streetcar, and then turned around and staggered or fell against the left front corner of the streetcar. His report then prepared so stated, but it did not state that Mahoney had given him that information. The officer was cross-examined and his identification of Mahoney as his informant was somewhat weakened, but it is a reasonable interpretation of his testimony that to the best of his recollection Mahoney had been his informant.

Mahoney was then recalled by Simon, and he admitted that it would have been a violation of the rules not to have slowed down or not to have sounded his gong if plaintiff had crossed in front of his car and then started back. He was most positive, however, that he had not told the officer the facts testified to by the officer, and denied talking to him.

This closed the plaintiff's case. The city thereupon moved for a nonsuit on the grounds (1) that the evidence failed to show any negligence on the part of defendants, and (2) that the evidence showed, as a matter of law, that the plaintiff was guilty of contributory negligence. The motion was denied.

As their first witness defendants produced one Kolish who, on the night of the accident, operated a service station at the corner of Steiner and Geary Streets. He testified that on that night he closed his station shortly after midnight and started to walk to his home which was on Geary Street; that as he was walking along the north side of Geary just beyond Steiner he observed plaintiff; that as the witness approached, plaintiff turned toward the street and started to urinate; that no one else was then on the streets; that he, the witness, did not want to pass plaintiff and so he crossed to the other side of the street; that plaintiff started to follow the witness and started to call and mumble; that plaintiff was then staggering and stumbling; that he, the witness, hurried toward his home on the south side of Geary Street between Steiner and Scott Streets and entered through the garage; that he then heard someone, whom he assumed to be plaintiff, hammering on the garage doors; that in a few moments the hammering stopped; that immediately thereafter he heard streetcar brakes and went outside and saw plaintiff lying in the street, injured; that he then told the conductor that the injured man had followed him from the north to the south side of Geary Street a few moments before; that he did not have the slightest doubt that plaintiff, at the time of the accident, was drunk.

The conductor, called by the defendants, substantiated the motorman's story as to speed, and that the lights on the car were lit. He also testified that Kolish told him that the injured man just prior to the accident had crossed from the north to the south side of Geary Street and that he, the conductor, told that story to the officer who had testified for plaintiff.

The ambulance steward at the scene of the accident testified that Simon had a "heavy alcoholic" breath; one of the officers who arrived at the scene testified that Simon's breath was "very alcoholic"; and another officer testified that at the emergency hospital Simon had a "strong alcoholic" breath.

The defendants' counsel then introduced into evidence various sections of the San Francisco Municipal Code and of the Vehicle Code. These were to the effect that streetcars must always be operated at a speed that is reasonable and prudent under the circumstances and so as not to endanger persons or property, but, subject to these limitations, may be operated at a speed of twenty-five miles per hour in a business or residence zone; that pedestrians must cross streets at right angles to the curb, and if they cross at other than the cross-walk, they must yield the right of way to vehicles.

Aside from the medical testimony, which is not here relevant, this fairly summarizes the evidence produced by each side. The defendants thereupon moved for a directed verdict on the same grounds urged in support of the motion for a nonsuit. The plaintiff likewise moved for a directed verdict on the issue of liability. The court granted the motion of defendants, and, pursuant to the direction of the court, the jury brought in its verdict for defendants. Judgment was entered on the verdict, and, after denial of plaintiff's motion for a new trial, this appeal was taken.

[2] It is now too well settled to require extended discussion that in passing on a motion for a directed verdict the power of the trial court is strictly limited. It has no power to weigh the evidence, but must view all the evidence in the light most favorable to the party against whom the direction is asked, and accept every inference and presumption in his favor that can reasonably be drawn from the evidence. Estate of Flood, 217 Cal. 763, 21 P.2d 579; Hoppe v. Bradshaw, 42 Cal.App.2d 334, 108 P.2d 947; Kataoka v. May Dept. Stores Co., 60 Cal.App.2d 177, 140 P.2d 467; Anthony v. Hobbie, 25 Cal.2d 814, 155 P.2d 826; Turner v. Lischner, 52 Cal.App.2d 273, 126 P.2d 156, and cases there cited.

[3–5] Tested by these standards there can be no reasonable doubt but that in granting the directed verdict the trial court invaded the province of the jury. It cannot be held, as a matter of law, that the evidence was insufficient to show negligence on the part of defendants. There is ample evidence from which the jury could have found that defendants were negligent. In the first place the jury could have found that the motorman violated the company rules, and it was entitled to consider that fact in determining whether the motorman's conduct constituted negligence. It is obvious that whether such rules were violated by the conduct of the motorman is, under the circumstances, a question of fact. Defendants argue that the rules of a carrier are not admissible and may not be considered on the issue of a carrier's negligence where the injured party has no knowledge of the rules and did not rely upon them. That was undoubtedly the rule announced in Smellie v. Southern Pac. Co., 128 Cal.App. 567, 18 P.2d 97, 19 P.2d 982, by the District Court of Appeal, but, the Supreme Court, in denying a hearing in that case, added the following comment at page 583 of 128 Cal.App., at page 982 of 19 P.2d: "Such denial, however, shall not be construed as an approval by this court of that portion of the opinion of the District Court of Appeal which holds that admission of evidence of the rules adopted by the defendant for the government of its business was incompetent and prejudicial." In thus qualifying the appellate court opinion the Supreme Court undoubtedly had in mind its earlier decision in Gett v. Pacific Gas & Electric Co., 192 Cal. 621, 221 P. 376. In that case, the court, after referring to the action of the motorman of defendant's streetcar in suddenly stopping his car in such manner as to blockade a cross-street, stated at page 625, of 192 Cal., at page 378 of 221 P.: " * * * his act in so doing was in violation of an operating rule of the defendant, forbidding its employees to stop the cars so as to block cross-streets or cross-walks. The existence of this rule, of course, did not render its violation by defendant's employees negligence per se, but it was a circumstance proper to be considered by the jury in determining whether or not they were negligent."

[6] In the more recent case of Nelson v. Southern Pacific Co., 8 Cal.2d 648, 67 P.2d 682, the Supreme Court negatively reaffirmed the doctrine of the Gett case in the following language at page 654 of 8 Cal.2d., at page 685 of 67 P.2d: "It cannot be said that the exclusion of the respondent's time-table was erroneous. While the rules of operation are admissible (Gett v. Pacific Gas & Electric Co., 192 Cal. 621, 221 P. 376 * * *), we fail to see the materiality of the time-table to the situation under scrutiny." It follows that the rules were admissible and that it was a question of fact for the jury and not a question of law for the court to determine whether the conduct of the motorman, under the circumstances, constituted negligence.

[7] Moreover, regardless of the rules, it cannot be held that the action of the motorman in proceeding at full speed and failing to ring his gong after seeing plaintiff standing only five feet from his tracks was the exercise of due care as a matter of law. Whether such action was or was not negligence was obviously a question of fact for the jury.

[8–10] It is just as clear that it cannot be held, as a matter of law, that plaintiff was guilty of contributory negligence proximately causing the injuries. These are questions of fact that should have been submitted to the jury. The evidence most favorable to plaintiff shows that, as a result of the accident, he is unable to remember just how the accident occurred. It is now well settled in this state that where a plaintiff by reason of loss of memory is unable to testify respecting his conduct at and immediately before the time of the accident, and produces no witnesses who testify to such facts, he is entitled to the benefit of the presumption that he was exercising due care. This presumption is itself evidence sufficient to create a conflict with the evidence produced by defendant, and requires that the issue of contributory negligence be submitted to the jury. Evidence produced under § 2055 of the Code of Civil Procedure is adverse and cannot be weighed, as a matter of law, against the presumption. Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529; Hoppe v. Bradshaw, 42 Cal.App.2d 334, 108 P.2d 947; McNear v. Pacific Greyhound Lines, 63 Cal.App.2d 11, 146 P.2d 34; Satariano v. Sleight, 54 Cal.App.2d 278, 129 P.2d 35; Scott v. Sheedy, 39 Cal.App. 2d 96, 102 P.2d 575.

The defendants, while recognizing the existence of the above rule, contend that it has no application where the plaintiff either through his own testimony, or that of his witnesses, discloses the acts and conduct of the injured party immediately prior to and at the time of the accident. In such case the presumption has no basis upon which to operate. Mar Shee v. Maryland Assurance Corp., 190 Cal. 1, 210 P. 269; Westberg v. Willde, 14 Cal.2d 360, 94 P.2d 590; Speck v. Sarver, 20 Cal.2d 585, 128 P.2d 16.

[11] The defendants recognize that so far as plaintiff's own testimony is concerned the presumption would apply, but they contend that Mahoney testified to the facts of the accident and that plaintiff is bound by his testimony. They admit that, normally, testimony produced under § 2055 of the Code of Civil Procedure does not rebut the presumption as a matter of law, but they contend that Mahoney was never made a party to the proceeding by service of process, that he was, therefore, not an adverse party, and plaintiff is bound by his testimony. No authority is cited for this somewhat startling conclusion. The trial court

granted plaintiff's motion to amend the complaint by substituting Mahoney's name for one of the Does, and then ruled that Mahoney could be called as an adverse witness. Just how defendants, who have not appealed, can now urge that the trial court committed error, does not appear. Normally, a respondent is precluded from urging error on an appeal and there appears to be no reason urged or argued why that rule should not here apply.

[12-14] If it be assumed that the point can now be urged, it is quite clear that the ruling of the trial court was correct and well within its discretionary powers. Service of summons is not indispensable to make a defendant a party. Amendment to the pleadings may be an appropriate method to accomplish this result in a proper case. Union Tank & Pipe Co. v. Mammoth Oil Co., 134 Cal.App. 229, 232, 25 P.2d 262. Of course, the orderly way for plaintiff to have proceeded was for him to have had Mahoney's name substituted for that of Doe by proper amendment and service under § 474 of the Code of Civil Procedure as soon as he discovered his true identity. Plaintiff made this discovery at least at the time the deposition of Mahoney was taken. But his failure to take the proper steps at that time should not preclude him from the benefits of § 2055 at the time of trial, where there is no showing of injury or prejudice either to Mahoney or to the other defendants. Whether the pleading should have been amended and whether the plaintiff was acting in good faith or was attempting to abuse the fictitious defendant statute, were questions resting primarily with the trial court. Day v. Western Loan & Bldg. Co., 42 Cal.App.2d 226, 108 P.2d 702. In the instant case the attorney for the city allowed Mahoney's deposition to be taken under § 2055 without objection had objection then been made plaintiff could have taken the proper steps before trial to have made Mahoney a formal party defendant. But counsel sat back and made no objection and then sought to take advantage of this oversight of plaintiff at the time of trial. The trial of a law suit is not a game where the spoils of victory go to the clever and technical regardless of the merits, but a method devised by a civilized society to settle peaceably and justly disputes between litigants. The rules of the contest are not an end in themselves. Unless the rules tend to accomplish justice, strict compliance is not always required. Here the ends of justice would have been defeated had the trial court refused to have permitted Mahoney to be called as an adverse witness until after he had been formally served with summons and perhaps given ten days to answer and this is in a situation where Mahoney and the other defendants could not and did not suggest how he or they could have been prejudiced by the ruling. Under the circumstances, the ruling of the trial court was clearly correct. This being so, plaintiff was entitled to call Mahoney as an adverse witness and was not bound by his testimony. It follows that plaintiff was entitled to the presumption heretofore mentioned and that it was error for the trial court to have determined that plaintiff was guilty of contributory negligence as a matter of law.

[15] There is an additional reason why the granting of the directed verdict was erroneous. Even if it be conceded, contrary to the fact, that plaintiff was guilty of contributory negligence, such would not bar him from relief unless such contributory negligence was the or a proximate cause of the accident. Under the facts of this case plaintiff would clearly have been entitled to instructions on the doctrine of last clear chance, so that even if contributively negligent the jury could have found that the motorman had the last clear chance to avoid the accident, and that such failure was the proximate cause of the accident. The elements of the last clear chance doctrine are well settled and need not be discussed at length in this opinion. See Girdner v. Union Oil Co., 216 Cal. 197, 13 P.2d 915; Gillette v. City and County of San Francisco, 58 Cal.App.2d 434, 136 P. 2d 611; Bailey v. Wilson, 16 Cal.App.2d 645, 61 P.2d 68; De Fries v. Market St. Ry. Co., 31 Cal.App.2d 463, 88 P.2d 256; Paolini v. City & County of San Francisco, 72 Cal.App.2d 579, 164 P.2d 916.

In the present case it is probably true that the evidence of plaintiff and the evidence of Mahoney would not be sufficient to raise the last clear chance doctrine. That is so because plaintiff testified that he was sober, and Mahoney testified that until just before the moment of impact, and too late to prevent it, plaintiff was in an apparent place of safety and was not in an apparent position of peril. Such facts would probably have precluded the doctrine from applying. Dalley v. Williams, 73 Cal.App. 2d 427, 166 P.2d 595. But that is not the only evidence in the case. Through the witness Kolish the defendants make plaintiff out very drunk indeed. They have him staggering and stumbling over the street, mumbling to himself, hardly able to maintain his balance. Through other witnesses they have him possessing a "heavy," a "very" and a "strong" alcoholic breath. The defendants perhaps proved too much, at least as far as the last clear chance doctrine is concerned. If just before the accident plaintiff was so drunk that he was staggering and stumbling and hardly able to maintain his balance, it is a reasonable and permissible inference that he was staggering and stumbling during the period after he was observed by Mahoney, and that was at least one hundred feet before the accident. If Mahoney saw plaintiff staggering and stumbling five feet from the tracks on which the streetcar was approaching, then plaintiff was in a place of peril from which, because of his condition, he could not extricate himself. Under these circumstances the common sense observations of Mr. Justice Seawell in the case of Coakley v. Ajuria, 209 Cal. 745, 751, 290 P. 33, 35, are peculiarly applicable. It was there stated: "In Robinson v. Pioche, 5 Cal. 460, 461, this court very early had occasion to consider the same question presented by the instant case, and it was held that a person who voluntarily incapacitates himself by drink does not by reason of his intoxication place himself so far beyond the pale of the law that he may be injured with impunity. It then curtly but pointedly disposed of the case in this brief fashion: 'If the defendants were at fault in leaving an uncovered hole in the sidewalk of a public street, the intoxication of the plaintiff cannot excuse such gross negligence. A drunken man is as much entitled to a safe street, as a sober one, and much more in need of it.'" In the Ajuria case the decedent fell to the street in a drunken stupor voluntarily induced. The defendant, while negligently operating his automobile, ran over and killed the plaintiff's decedent. The trial court granted a nonsuit on the ground that decedent's intoxication constituted contributory negligence as a matter of law. The judgment was reversed on the ground that, although intoxication may be contributory negligence, whether it is a bar depends upon whether such negligence is the immediate or the remote cause, or whether the negligence of the defendant was the sole proximate cause under the last clear chance doctrine, and that such questions should have been submitted to the jury. The reasoning of that case is directly applicable here.

The order denying a new trial being nonappealable, the appeal therefrom is dismissed; the judgment based on the directed verdict is reversed.

WARD and BRAY, JJ., concur.

Hearing denied; EDMONDS, TRAYNOR, and SCHAUER, JJ., dissenting.

79 Cal.App.2d 572

BANKEN et al. v. STATE BOARD OF EQUALIZATION.

Civ. 7327; Sac. 5801.

District Court of Appeal, Third District, California.

May 8, 1947.

1. Licenses ⇨15(1)

The retail sales tax statute defining sale as including the producing, fabricating, processing, printing, or imprinting of tangible personal property for consumers who furnish the materials used, is intended to apply to all transactions of that nature, regardless of the circumstances under which consumers may have acquired the property or whether they were motivated by tax avoidance. Revenue and Taxation Code, § 6006(c).

2. Licenses ⟹15(1)

Where firm was engaged in dyeing new and used fabrics for motion picture studios, retail sales tax was properly assessed on theory that charges for dyeing new fabrics were part of gross receipts from sale of tangible personal property at retail within provision of retail sales tax statute defining "sale", regardless of fact that tax was not imposed with respect to used materials. Revenue and Taxation Code, § 6006(c).

See Words and Phrases, Permanent Edition, for all other definitions of "Sale".

◆

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by J. Banken and others, copartners doing business under the firm name and style of Western Dye House, against the State Board of Equalization for refund of sales taxes. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Loeb and Loeb, of Los Angeles, for appellants.

Fred N. Howser, Atty. Gen., and John L. Nourse, Deputy Atty. Gen., for respondent.

ADAMS, Presiding Justice.

This appeal is taken from a judgment of the trial court that adjudged that appellants are not entitled to a refund of sales taxes paid by them to respondent, for which taxes proper claim was filed and suit for refund instituted.

The stipulation of facts upon which the case was tried shows that appellants operate an establishment under the firm name and style of Western Dye House, which specializes in the dyeing of fabrics. In the operation of this business they have for many years dyed fabrics for the various motion picture studios in southern California. Some of the fabric dyed had previously been used by the studios, while some of it was new.

Respondent assessed the tax in controversy against appellants on the theory that the charges made by them for the dyeing of new fabrics was a part of their gross receipts from the sale of tangible personal property at retail within the meaning of section 6006(c) (formerly 6006(a)) of the Revenue and Taxation Code, which provides: "'Sale' means and includes: * * (c) The producing, fabricating, processing, printing, or imprinting of tangible personal property for a consideration for consumers who furnish either directly or indirectly the materials used in the producing, fabricating, processing, printing, or imprinting."

The material involved in this proceeding which the studios sent to appellants for dyeing had been acquired by such studios as a portion of purchases of large quantities of material made from time to time, some of which was in its natural state at the time of purchase, and some of it already dyed. It is agreed that the purchases by the motion picture companies were not made with the intent to use the material in any particular production or to have it dyed any particular color, that the method of purchasing by them was based upon economic expediency at the time the purchases were made and in anticipation of subsequent production needs, and that this method of doing business was in operation before the effective date of the California Retail Sales Tax Act.

It is not contended that the act is unconstitutional and it is conceded by appellants in their brief that their treatment of the materials dyed—which is described in some detail in the stipulation of facts—clearly constitutes the "processing" of tangible personal property within the usual, ordinary meaning of the term processing. Consequently, if section 6006(c) of the Code be literally construed and applied to all activities which involve the processing for a consideration of tangible personal property furnished by consumers, the service of dyeing materials, such as that engaged in by the appellant, constitutes a sale within its meaning, and charges therefor are subject to the retail sales tax. They argue, however, that the section should not be literally construed, but should be given an interpretation restricting its application.

They concede that where the acquisition of materials by the consumer and the subsequent processing of same are parts of what is essentially one transaction, the tax is properly assessed; but contend that in this case the acquisition of the materials by the consumers and their subsequent arrangements to have them dyed were two separate transactions, that there is no room for the suggestion that this method of conducting their business was engaged in for the purpose of avoiding the sales tax on the relatively small charge for dyeing, and therefore no tax should be imposed. Appellants also state that no tax is imposed by the board where the materials processed are used materials (not new), therefore none should be imposed where the materials are new.

We think appellants' arguments are more properly addressable to the legislature than to the courts. Certainly the language of the act is broad enough to authorize the imposition of the tax under the circumstances of this case, for it is admitted that there was a processing of the goods for a consideration, which goods were furnished by the consumer. No such exceptions as we are asked to recognize appear in the act itself, nor do we believe that they can be read into it, with reason. Nor does the fact that the board has not seen fit to apply the act to used materials furnish adequate ground for holding that the plain language of the statute is not to be applied in this case, as there is always the possibility that the board erred in making the exception rather than that it erred in applying the law to the processing of new materials.

While the record before us does not contain any historical material bearing upon the reasons for the enactment of the statute in its present form, various amendments of same indicate that the legislature did intend that it should apply in such a case as is here presented. The amendment of section 2 of the original act, made in 1935 (Stats. 1935, p. 1256), defined a sale as including "the fabrication of tangible personal property, for consumers who furnish either directly or indirectly the materials used in the fabrication work." In 1939 this provision was enlarged to provide that a sale should include the "producing, fabricating, processing, printing or imprinting of tangible personal property for consumers who furnish either directly or indirectly the materials used in such producing, fabricating, processing, printing or imprinting." Stats. 1939, p. 2170. Subsequently, and in 1941, section 2 of the former acts was codified as section 6006 of the Revenue and Taxation Code, and subdivision (a) of said section defined a sale as including the "producing, fabricating, processing, printing or imprinting of tangible personal property *for a consideration* for consumers who furnish either directly or indirectly the materials used in the producing, fabricating, processing, printing, or imprinting," the words italicized having been added. The section was again amended in 1945, the former subdivision (a) now being subdivision (c).

No such exceptions as appellants urge have been written into the measure, though the statute as construed by the board apparently had been applied by it to similar transactions prior to the amendments. Before the amendment of 1939 a decision had been rendered by the Superior Court of Sacramento County in Bosqui v. Johnson, involving the application of the sales tax to the charges of a printer for adding to printed matter furnished by the consumer the names and addresses of certain of its agents or sub-agents. That court held that the charge for imprinting the additional matter did not constitute a sale within the act as it then read. In the amendment of 1939 the words printing or imprinting were added, indicating that the legislature intended either to clarify the act or to amend it so as to cover just such a transaction.

Also, prior to the codification of the act in 1941 the Supreme Court had rendered a decision in the case of Bigsby v. Johnson, 1940, 99 P.2d 268, 270, 271, in which it had held, contrary to the contentions of appellant, that where the owner of paper material furnished such material to a printer and the latter for a consideration furnished the materials for and impressed certain printing upon the paper furnished to him, there was a sale within the meaning of the statute, and that there was a transfer by the printer of title and possession of the fabricated article within the meaning of section 2(b), now section 6006(g). While a rehearing was granted in that case and the final opinion rendered in October, 1941 (18 Cal.2d 860, 118 P.2d 289), does not cover the matters aforesaid, it appears that the appeal in behalf of the plaintiff had been dismissed, and the final opinion theretofore deals only with matters involved in the appeal of defendant on one issue that had been decided in favor of plaintiff. We cite the Bigsby case, not as a final decision of the Supreme Court, but because it presents the opinion of that court in a comparable case, and because since its rendition the legislature has twice considered the section without changing the applicable provisions thereof. And assuming that the legislature was aware of that decision and the decision in the Bosqui case when it amended the act, its apparent broadening of the statute and its failure to make exceptions such as were contended for in those cases, signify that its intention was that it should be applied to a case such as this one.

[1, 2] Furthermore, the exceptions which appellants would read into the act, that is, that it should not be applied in cases where, as they say, "the circumstances are such as to permit the conclusion that in the normal course of events there would have been two separate transactions, irrespective of the sales tax," and where there was no intention to avoid the tax, would render its effective application practically impossible from an administrative standpoint. The tax is exacted from the consumer originally by the seller—in this case the dyer—and if the exceptions urged by appellants were to be made, in order to know whether to include the tax in his charges to his customer the dyer would have to inquire into the circumstances under which the materials had been acquired and determine whether there had in fact been two transactions so separated by time and circumstances as to justify a conclusion on his part that he should not include the tax as a part of his charge, and whether his customer was or was not attempting to avoid the tax; and if he failed to include it and the board differed from his conclusion as to what the circumstances and the intent of his customer were, he would be liable for the tax personally. One need go no further with this line of reasoning to see that such an exception would render the section practically unworkable.

We think that the legislative intent was that tax should be applied to all transactions which involve the "producing, fabricating, processing, printing or imprinting of tangible personal property for a consideration for consumers who furnish either directly or indirectly the materials used in the producing, fabricating, processing, printing or imprinting," and that the circumstances under which such consumers may have acquired the property or whether or not tax avoidance motivated them, must be disregarded.

The judgment is affirmed.

THOMPSON, J., and SCHOTTKY, Justice pro tem., concur.

TAYLOR v. J. B. HILL CO. *

Civ. 15486.

District Court of Appeal, Second District, Division 3, California.

April 29, 1947.

Rehearing Denied May 19, 1947.

Hearing Granted June 26, 1947.

1. Evidence 🔑450(8)

Contract for sale of 10,000 to 12,000 100-pound sacks of barley of "H–10" symbol and grade, and providing that the barley was being harvested and might be more or less, and that seller did not guarantee weights closer, than one per cent., was ambiguous and extraneous evidence was admissible to explain the contract's meaning.

2. Partnership 🔑15

Where business associates, as between themselves, each obligated himself to pay half of purchase price of barley, and each was to receive his share of the profits, and, if a loss was to be sustained, half of the loss was to fall on each, their rights and liabilities were those of partners, and they attached as of the date when the purchase was made.

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* Subsequent opinion 189 P.2d 258.

3. Partnership 🔑159

In action by buyer against seller of barley under ambiguous contract, to recover for damages sustained by buyer when seller failed to deliver amount of barley set forth in contract, wherein seller contended that contract covered only a certain growing crop and not any specific amount of barley, knowledge of buyer's business associate that contract was intended to cover only certain growing crop was imputable to buyer. Civ.Code, §§ 2403, 2406.

4. Joint adventures 🔑7

The purchase of barley by one for himself and for his co-adventurer could give the co-adventurer no greater rights than the one who made the purchase could have acquired for himself.

5. Sales 🔑87(3)

In action by buyer against seller of barley under ambiguous contract, to recover for damages sustained by buyer when seller failed to deliver the amount of barley set forth in contract, wherein seller contended that contract covered only a certain growing crop and not any specific amount of barley, evidence established that the sale of only a certain growing crop was intended.

KINCAID, Justice pro tem., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Action by D. L. Taylor against the J. B. Hill Company, a corporation, to recover for damages sustained by plaintiff because of defendant's failure to deliver the full amount of barley that defendant allegedly agreed to sell plaintiff. From a judgment in favor of the plaintiff, defendant appeals.

Judgment reversed.

See also 67 Cal.App.2d 581, 154 P.2d 926.

Clyde E. Cate, of Fresno, and Alfred E. Cate, of Los Angeles, for appellant.

Ogden, Crocker & Steelman, of Los Angeles, for respondent.

SHINN, Acting Presiding Justice.

The defendant corporation is engaged in selling hay and grain, with its place of business at Fresno, California. The plaintiff and the witness Peters, at the times in question, were grain brokers with adjoining offices in Los Angeles. Defendant appeals from a judgment in plaintiff's favor in the sum of $1,421.50.

Plaintiff's complaint alleges, and the court found to be true, that on the 4th day of June, 1943, defendant agreed by written instrument to sell to plaintiff, and plaintiff agreed to buy from defendant, 10,000 to 12,000 sacks of barley at the price of $1.95 per hundred weight, to be delivered to plaintiff f.o.b. Los Angeles, California, at the completion of the harvest season of 1943, and to be paid for upon delivery; that although plaintiff has always been ready and willing to receive and pay for the barley, defendant delivered only 6,612 sacks thereof and, on August 25, 1943, upon completion of the 1943 harvest season, refused and still refuses to deliver the minimum balance of 3,388 sacks; that the reasonable market value of such barley was $2.42½ per hundredweight at the time delivery should have been made, and plaintiff has therefore lost profits and sustained damage in the sum represented by the judgment.

Defendant, by its answer, conceded the delivery of only 6,612 sacks to plaintiff but claimed that was all it was required to deliver under the terms of the agreement. It further alleged, by way of affirmative defense, that on June 4, 1943, by telephonic conversation from Los Angeles, plaintiff was told by defendant's representative that the barley to be sold was by a sample and grade "H–10" which sample plaintiff had seen; that this sample represented certain grain which was being produced from the ranch of one Pedro Erro of Fresno County, California; that the sack count was indefinite due to harvesting, but defendant believed from the grower's assurances that this particular lot of grain would amount to in excess of 10,000 sacks at 88¼ pounds per sack. Defendant further alleged that it thereupon caused to be executed and forwarded to plaintiff the following written instrument:

"Phone 3—2281 No. 382
"Postal Phone Date 6/4/43
"J. B. Hill Company
"Hay-Grain-Seed
"Poultry and Stock Feeds
"315 No. H. Street Fresno, California
"To D. L. Taylor
"I. W. Hellman Bldg.
"Los Angeles, Calif.
"Gentlemen:

"We confirm sale to you this day through your
Mr. Taylor By our Mr. Hill
By Peters The following:

Quantity	Commodity	Price	Unit	How Packed
10–12000	sacks Barley	1.95	CWT	'sked

Sample & Grade
H 10
F. O. B. L. A. S. S. Pd. Payment Cash
Shipment WHR
To Sack Count Indefinite acct.
Remarks Now Harvesting May be More or Less

"There are no conditions, representations or warrants except as herein stated, and no agent or representative has authority to modify the printed terms of this contract. This merchandise is sold for food or manufacturing purposes only.

"It is agreed that The J. B. Hill Company shall not be liable for any damages or delays caused by or resulting from embargoes, strikes or labor disturbances, fires, floods, earthquakes, actions of the elements, invasion, war, riot, insurrection, rebellion or interferences by civil or military authority. We do not guarantee weights closer than 1%.

"J. B. Hill Company
"By Roland D. Hill
"Accepted: ———"

Defendant further alleged by way of affirmative defense, that upon the harvesting of the barley on Erro's ranch there was delivered to defendant a total of only 6,612 sacks, being that referred to as "H–10" in the agreement, which was promptly delivered to plaintiff and therefore it has fully complied with the contract. The court found these allegations to be untrue excepting that defendant did agree in writing to sell plaintiff 10,000 to 12,000 sacks at the price specified in its agreement to be delivered to plaintiff at Los Angeles at the completion of the harvest season of 1943, and to be paid for upon delivery; that defendant did inform plaintiff that the barley which was being sold to him was represented by a sample and grade "H-10" and that this sample was procured from certain grain which was being produced and raised from the ranch of Pedro Erro in Fresno County, California; that it was not impossible at the time of the transaction to agree to deliver any definite or specific amount of sack count of barley pursuant to sample "H–10" and that this sample represented a kind and type of barley that could be duplicated and purchased in many parts of the United States.

It was agreed by the parties at the trial that the above set forth written contract embodies all the terms of their agreement relative to the grain in question, and that the market price of the kind of barley covered by the agreement f.o.b. Los Angeles, at delivery time, was $2.42½ per hundredweight. The court found that the measure of plaintiff's damage was the difference between the agreed purchase price of $1.95 and the above subsequent market price, being the sum of 47½ cents per hundredweight, which, at 88⅓ pounds per sack, aggregates the allowed sum of $1,421.50.

[1] The issue was tendered as to whether defendant agreed to sell and deliver from 10,000 to 12,000 sacks of barley or only the proceeds of the crop of one Pedro Erro. This called primarily for an examination of the contract, that is, the confirmation of sale executed by defendant. If its terms had been found to be unambiguous, they would have been controlling. They were regarded by the court and counsel as ambiguous, as we think they were in several respects. Plaintiff introduced the expert testimony of a dealer in grain as to the custom of selling barley by sack, as to whether there was a standard weight per sack, as to usual weight per bushel, and other irrelevant matter. He was asked to explain what the letters

"sked" meant and replied that they meant "sacked." He was questioned as to what the symbol "H–10" meant and replied that it would represent the seller's sample or designation number of that particular lot of barley; also, that "as a matter of trade significance" the symbol did not indicate the source of the barley.

There can be no doubt that the symbol "H–10" as used in defendant's confirmation of sale to Taylor, appearing beneath the words "sample and grade," was clearly meant to identify the grain sold with the sample theretofore furnished by the seller, which it appears was in the form of one sack of barley. But the symbol could have meant more to the buyer and the seller than mere identification of the sample. The undisputed evidence is that Taylor alone was not the purchaser. One W. E. Peters was a grain broker in Los Angeles. Defendant was intending to purchase the barley crop of Pedro Erro on the west side of San Joaquin Valley. Grover B. Hill, president of defendant corporation, contacted Peters with a view to finding a purchaser for the crop and he sent to Peters a sack of barley labeled "H–10." Peters contacted plaintiff Taylor and an agreement was reached between Peters and Taylor that they would purchase the crop jointly, and Peters advised Hill of the joint purchase and requested that the confirmation of sale be sent to Taylor. In addition to the symbol "H–10," there were other expressions which were sufficiently indefinite as to at least accentuate the ambiguity of the symbol "H–10" and to open the door for the introduction of extrinsic evidence. Both Peters and Hill testified at length as to conversations they had both before and at the time of their telephone agreement of purchase and sale. Both testified, and their testimony was undisputed, that the symbol "H–10" meant to them a particular crop of barley. Peters testified that in his first talk with Grover Hill respecting the barley, Hill referred him to the sample number "H–10," which Peters had on file and, said the witness; "He told me that he was negotiating with a man over on the west side who had this lot of grain but had not as yet gotten to the point where he could give me a firm price on it * * *. That 'H–10' represents a specific lot of grain which Mr. Hill sent to me as a lot of grain from a certain farmer which he was negotiating with. * * * Mr. Hill made a reference to him as a sheep herder or a Frenchman or something of that sort, but I did not at the time known the particular name of the farmer. * * * I later heard the name of the farmer. * * * Erro. * * * Well, my knowledge of that [H–10] would mean that that H–10 represents a certain specific lot of grain. * * * That is Mr. Hill's sample number of that particular lot of grain. * * *

"Q. And that particular sample, you say, referred to a specific lot? A. Yes, sir.

"Q. Rather than barley generally? A. That is right.

"Q. And when you had your negotiations with Mr. Hill by telephone how much grain did you expect to recover or receive, if any, after he had delivered all that he got from this H–10 lot? * * * Did you feel that you were entitled to any other grain than this lot H–10? A. I didn't expect it, no, sir."

This witness testified that he repeated to Taylor the conversations he had had with Hill. Grover Hill testified that he had told Peters by phone about the lot of grain that was being thrashed at Mendota and asked him to get a bid on it so that he, Hill, could arrange to buy it; that he told Peters the grain was being thrashed and that it was impossible to get any number of sacks but the farmer estimated he would have about 10,000 or 12,000 sacks of barley, and that Peters called back later and said that he and Taylor were going to buy the lot at $1.95.

"The Court: How much barley did you think you were selling to Mr. Taylor?

"The Witness: Well, I thought I was selling him the lot H–10, the Pedro Erro crop, estimated by Erro to be 10,000 to 12,000 bags.

"The Court: Did you tell Mr. Taylor that there might be only 6,000 sacks?

"The Witness: I told Mr. Peters. I never discussed it with Mr. Taylor.

"The Court: Did you tell Mr. Peters that you thought it might run as low as 5,000 or 6,000?

"The Witness: No, I did not estimate it that way. I told Mr. Peters it was impossible for me to tell how much grain there would be, but we would give him all that was raised and delivered to us by Pedro Erro represented by lot H–10."

The witness further testified that Pedro Erro's crop was dry-farmed on the west side of Fresno County, was practically all the dry-farmed grain in the vicinity, and that it would have been difficult to have bought any of that class of grain in that vicinity. Both Hill and Peters understood that the symbol "H–10" referred to Pedro Erro's crop and to nothing else. That particular crop was further identified to the satisfaction of Hill and Peters by the statement on the confirmation of sale, "Sack Count Indefinite, acct. Now Harvesting May be More or Less." The figures "10–12,000" under the word "Quantity" were understood to be only the grower's approximation of what the crop would amount to. Although it clearly appeared by undisputed evidence that the sale was understood by Peters and Hill to relate only to the Pedro Erro crop and not to any definite quantity of grain, and that they also understood the symbol "H–10" to relate only to such crop, the court made no finding as to what they understood the symbol to mean. The only purpose of extrinsic evidence was to enable the contracting parties to testify as to their understanding of the meaning of the ambiguous language of the writing. Inasmuch as no finding was made upon this point, it must be assumed that the court disregarded this testimony. That this is a reasonable assumption is borne out by the theory upon which the case was decided, which was, as we shall see, that it was immaterial what understanding Peters had of the contract unless Taylor had the same understanding. If Peters had bought the crop for himself he would have had no claim against defendant for damages for failure to deliver more than 6,612 sacks, inasmuch as that was the total of the Erro crop. Taylor could have no greater rights. Peters showed the sample to Taylor, explained to him what was being offered for sale and they agreed to buy the grain jointly, which fact Peters reported to Hill. The confirmation of sale went to Taylor. The arrangement between Peters and Taylor was that they would share equally in the profits, if any, on the purchase. It is true that Taylor denied that Peters had told him the grain was coming from a particular farm or that the amount of grain to be delivered depended upon the amount produced from a particular farm, but the knowledge of Peters at the time he and Taylor agreed to purchase the grain must be imputed to Taylor. Although Peters afterwards withdrew from the purchase arrangement and Taylor acquired the grain, we are concerned only with the relationship which existed at the time of the purchase.

[2-5] We are unable to distinguish the relation of Peters and Taylor in the transaction from that of partners, but whether they be called joint adventurers or partners is immaterial. As joint purchasers, each became obligated to defendant for the purchase price. As between themselves, each obligated himself to pay half of the purchase price, each was to receive his share of the profits, and if a loss had been sustained, half of it would have fallen upon each. Their rights and liabilities were those of partners. Keyes v. Nims, 43 Cal. App. 1, 184 P. 695; Menefee v. Oxnam, 42 Cal.App. 81, 183 P. 379; McSherry v. Market Corporation, 129 Cal.App. 330, 18 P.2d 776. They attached as of the date when the purchase was made. Section 2406 of the Civil Code reads as follows: "Notice to any partner of any matter relating to partnership affairs, and the knowledge of the partner acting in the particular matter, acquired while a partner or then present to his mind, and the knowledge of any other partner who reasonably could and should have communicated it to the acting partner, operate as notice to or knowledge of the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner." Section 2403 declares that every partner is an agent of the partnership for the purpose of its business, and notice to an agent is of course notice to the principal. Carstensen

v. Gottesburen, 215 Cal. 258. 9 P.2d 831. The rule is stated in 40 Am.Jur. 236, sec. 150, as follows: "One partner is usually considered as affected by any knowledge possessed by his copartners in reference to partnership matters, and therefore information acquired by one member while transacting business of the firm and relating thereto is constructive notice to the other members of the firm." Peters, acting for himself and Taylor, communicated to defendant their acceptance of his offer to sell. He did so with the knowledge that defendant was intending to sell only the Erro crop. The trial judge was evidently of the opinion that Peters' knowledge of this fact was not to be imputed to Taylor, for he stated: "There seems to be required only one question and that is whether or not Mr. Taylor ever had a conversation with either Grover Hill or Roland Hill. As I understand it, however, those two witnesses have testified that they had no conversation with Mr. Taylor." It was evidently the court's theory that Taylor was not chargeable with knowledge of facts which Peters had acquired prior to the agreement to purchase the crop jointly. The rule of the Restatement on that point is found in Agency, sec. 276, reading: "Time, Place, or Manner of Acquisition of Agent's Knowledge. Except as stated in section 281, the time, place, or manner in which knowledge of an agent or servant is obtained is immaterial in determining the liability of a principal or master because of it." Comment a reads as follows: "Relevant knowledge may have been acquired by the agent before the time of his employment or after he becomes agent, either while acting for himself or for the principal. In any case, except where the knowledge is acquired confidentially (see section 281), the important matter is not how the agent acquired it, but whether or not he has the knowledge at the time when it becomes relevant in his work for the principal. If he has the information in mind, the principal is bound, under the rule stated in this Section, equally where it was not acquired because he was acting as an agent, as where he obtained it as such agent. In this respect the rule stated in this Section differs from that stated with respect to notification in section 269." (Section 281 relates to confidential information acquired by the agent.) This rule obtains in California. In Cooke v. Mesmer, 164 Cal. 332, 338, 128 P. 917, 920, it was stated by Mr. Justice Angellotti as follows: "While the decided weight of authority is in favor of the rule that knowledge *possessed* by an agent while he occupies that relation and is executing the authority conferred upon him, as to matters within the scope of his authority, is notice to his principal, *although such knowledge may have been acquired before the agency was created,* it is universally recognized that this rule is subject to the qualification that 'knowledge acquired by an agent before the commencement of the agency is not notice to the principal unless it is shown or appears that knowledge was present in his mind at the time he acted for the principal.' 1 Clark & Skyles on Agency, § 482. In Christie v. Sherwood, 113 Cal. 526, 45 P. 820, in discussing the question whether knowledge acquired by the cashier of a bank while he was acting as agent for another was notice to the bank in a subsequent transaction, this court said: 'But whether it is notice to the bank depends upon whether the previous transaction was present in his mind at the time the loan was made by the bank.' See, also, Wittenbrock v. Parker, 102 Cal. 93, 102, 103, 36 P. 374, 24 L.R.A. 197, 41 Am.St. Rep. 172." The evidence clearly established facts which called for application of the rule, and it was undisputed. In the very conversation between Peters and Hill, in which defendant's offer of sale was orally accepted, the grain being sold was referred to as a specific crop. In making the purchase for himself and his co-adventurer, Peters could have acquired for the latter no greater rights than he could have acquired for himself. There is no question as to a conflict of evidence or of inferences. The defense that the subject of the sale was Erro's crop of barley and nothing more was established by unconflicting evidence. The record shows beyond question that judgment rests upon an erroneous application of rules of law to admitted facts.

The judgment is reversed.

WOOD, J., concurs.

KINCAID, Justice pro tem. (dissenting).

I dissent. Defendant concedes that with the exception of mailing the contract to plaintiff it had no direct dealings with him as to the transaction. Defendant relies upon the fact that, prior to the execution by it of the agreement to sell the barley, oral negotiations for such sale were completed by telephonic conversation with W. E. Peters, defendant's then grain broker who became plaintiff's joint adventurer in this particular grain purchase transaction.

Plaintiff denied that Peters ever told him the grain covered by the contract with defendant was coming from a particular farm, ever mentioned the name of any particular farmer or that the amount of grain to be delivered under the contract depended upon the amount of grain produced from a particular farm. The trial judge was not required to believe the testimony of Peters and Grover B. Hill as to the nature of the claimed conversations between them, that they in fact ever occurred, nor that Peters ever related them to plaintiff. This is particularly true in the light of the evidence that Peters and Hill had known each other for 30 years, Peters was a grain broker and had been in the business for 25 years, had done work for defendants and was acting in the capacity of broker for them in the sale of the very grain in question at the time at least part of the alleged conversations were claimed to have been had. The court was further entitled to take into consideration the fact that Peters withdrew from the joint adventure agreement with plaintiff shortly thereafter, never put any money into the transaction and, notwithstanding defendant's reliance upon the prior oral conversations with Peters, it chose to sell the grain to plaintiff individually under a written contract prepared by it in specific terms. As a part of this writing defendant caused to be inserted the following clause: "There are no conditions, representations or warrants except as herein stated, and no agent or representative has authority to modify the printed terms of this contract." By this provision, as well as the facts surrounding the transaction in question, it seems evident that defendant intended that all the conditions, prior negotiations and understandings of the parties should be merged therein and that the wording of the written contract itself should govern and be looked to in ascertaining the terms of the sale and purchase.

Under the circumstances here existing the court cannot be aided by the declarations of the parties as to their understanding of the meaning and construction of the terms of the contract. The parties will be taken to have meant precisely what they have said unless, from the whole tenor of the instrument, a definite meaning can be collected, which gives a broader interpretation to specific words than their literal meaning would bear. 6 Cal.Jur. 275, par. 170. The intention of the parties is to be ascertained from the writing alone if possible. Purdy v. Buffums, Inc., 1928, 95 Cal. App. 299, 303, *272 P. 770*; Civ.Code, sec. 1639. "In the absence of fraud, confidential relations, or circumstances indicating excusable mistake, one will be presumed to know the meaning of unambiguous language and will be bound by the solemn execution of a written instrument." Fraters Glass & Paint Co. v. Southwestern Const. Co., 1930, 107 Cal.App. 1, 6, *290 P. 45*, 47. "The terms of the contract are to be understood in their ordinary and popular sense and as a man of average intelligence and experience would understand them." Burr v. Western States Life Ins. Co., 1931, 211 Cal. 568, 575, *296 P. 273*, 276; see also Restatement of Contracts, Vol. 1, p. 310, par. 230.

The only provision in the contract which may seem ambiguous is "Sample & Grade H–10." The evidence shows, however, that this symbol was marked on the sample which the defendant had forwarded to Peters, as a broker, in order that he might exhibit it to any prospective purchasers as a sample of the kind and grade of grain which was being offered for sale. Nothing was written thereon which would advise any ordinarily intelligent and experienced man that such symbol carried with it any additional meaning. The evidence seems clear, and the trial judge was entitled to believe, that the words and figures represented by this symbol carried no special significance in the grain trade, but were merely an identification number of the sample which was delivered to plaintiff for the convenience of both the seller and the buyer. Had the defendant seller intended otherwise it could very easily have so stated both on the sample and in the contract.

No ambiguity may properly be claimed by the use of the terms "Quantity 10-12000 sacks" and "May be More or Less" in the written contract. The leading cases on the construction of such terms are cited in New York Oversea Co. v. Warfield-Pratt-Howell Co., 1925, 70 Cal.App. 724, 234 P. 405, and, taken together are settled authority for holding such terms to here mean that the defendant seller can be required to deliver the minimum of 10,000 sacks, but that the plaintiff buyer can be required to accept delivery of the maximum of 12,000 sacks. Since the defendant delivered less than the minimum number required by the contract the court correctly based its measure of damages upon the difference between those delivered and such minimum.

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79 Cal.App.2d 644

McNEW v. RENCH.

Civ. 3566.

District Court of Appeal, Fourth District, California.

May 12, 1947.

1. Evidence 🔑433(8)

In vendee's action to require conveyance of mineral interests evidence was admissible to show an intention to reserve the mineral interests to vendors in contract for sale of realty notwithstanding intention to reserve did not appear in the contract, where pleading put in issue mutual mistake in omitting a reserving clause. Code Civ. Proc. § 1856.

2. Mines and minerals 🔑55(8)

In vendee's action to require conveyance of mineral interests not mentioned in contract for sale of realty, evidence sustained finding for vendor that a reservation to vendor of the oil rights was omitted from contract by mutual mistake and that the intention of the parties had been to include a clause reserving the rights.

3. Evidence 🔑272

In vendee's action to require conveyance of mineral interests not mentioned in contract for sale of realty wherein defendant vendor alleged that omission of clause in contract reserving the interests to defendant was due to mutual mistake, evidence that plaintiff had informed third persons that defendant owned the interests was admissible as a declaration against interest. Code Civ. Proc. § 1870.

4. Evidence 🔑433(8)

In vendee's action to require conveyance of mineral interests not mentioned in contract for sale of realty wherein defendant vendor alleged that omission of clause in contract reserving the interests to defendant was due to mutual mistake, evidence that plaintiff had informed third persons that defendant owned the interests was admissible under statute authorizing evidence outside of the terms of the contract where a mistake or imperfection of the writing is put in issue. Code Civ. Proc. § 1856.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action by Effie W. McNew against Shirley M. Rench for reformation of a contract for sale of realty and for specific performance wherein defendant cross-complained. From an adverse judgment, plaintiff appeals.

Judgment affirmed.

Siemon, Maas & Siemon, Alfred Siemon, Walter L. Maas, Jr. and Bennett Siemon, all of Bakersfield, for appellant.

T. R. Claflin, of Bakersfield, for respondent.

BARNARD, Presiding Justice.

This is an action for reformation of the description in a contract, and for specific performance.

On February 15, 1941, the defendant and her husband contracted to sell about 40 acres of land to the plaintiff. All business in connection with this transaction, both before and after the signing of the contract, was handled for the plaintiff by her husband, H. L. McNew. The defendant's husband subsequently died and she has succeeded to all of his interest in the property. Among other things, the contract provided that the plaintiff should subdivide the property, and that upon the payment of $400, to be applied upon the purchase price, the defendant would convey any lot to the plaintiff or to any person designated by her. It was then provided that when the purchase price was fully paid, the defendant would "convey all of said real property not previously conveyed" to the plaintiff or to any one named by her. Nothing was said in this contract about any reservation of oil or mineral rights in the defendant or her husband.

In September, 1941, at the request of the plaintiff, the defendant and her husband executed two deeds conveying portions of the property to third parties. By each of these deeds an undivided one-half interest in all minerals in and under the land was reserved to the grantors. In December, 1943, the defendant conveyed the remainder of the property to H. L. McNew, the husband of the plaintiff. This deed contained a clause excepting therefrom an undivided 3% interest in all oil, gas and kindred substances which had theretofore been granted to other parties, and also one reserving to the grantor an undivided 47% interest in and to all oil, gas and similar substances. At the same time, and as part of the same transaction, H. L. McNew gave back a trust deed in favor of the defendant securing the balance of the original contract price of the property. This trust deed, in connection with the description of the property, contained the following: "Except therefrom 50% of all oil, gas and other minerals in and under said land, as reserved and excepted in the deed from Shirley M. Rench dated December 6, 1943 and filed for record concurrently herewith." At the same time the plaintiff gave to her husband H. L. McNew a quitclaim deed covering the property described in the trust deed and containing the same exception as above quoted. Under date of November 30, 1944, a community oil lease was executed leasing to the Richfield Oil Corporation the property here involved and a number of other properties owned by other parties. The defendant signed this lease, leasing the 50% oil interest here involved, and the plaintiff's husband, H. L. McNew, also signed it, leasing other property owned by him.

This action was filed on February 15, 1945. The complaint alleged a mutual mistake in the description of the property and asked that the contract be reformed by correcting that description. It was then alleged that on December 28, 1942, the defendant, at the request of the plaintiff, conveyed certain described property to H. L. McNew, the deed containing no reservation whatever; that at sundry times the defendant and/or her husband had made conveyances to the plaintiff or to persons purchasing said lands from her, which included all of the lands covered by the contract in question; that each and all of said conveyances, other than the one of December 28, 1942, specifically reserved in the grantors 50% of all oil, gas and mineral rights; that all of such reservations were made at the direction and for the use and benefit of plaintiff or were made by the defendant for the use and benefit of the plaintiff; that, with the exception of the property covered in the deed of December 28, 1942, neither the defendant nor her deceased husband has ever conveyed to the plaintiff the 50% of the oil rights; that on or about January 5, 1944, the plaintiff paid the entire balance of the purchase price to the defendant; that on or about December 1, 1944, the plaintiff demanded from the defendant a conveyance of the 50% of the oil rights which had been thus reserved; that the defendant refused this demand; that the plaintiff is the owner and entitled to a conveyance of such 50% interest; that before the contract between these parties was executed the defendant and her husband had conveyed to persons not parties to the action 3% of the oil rights in and under these lands; that the reasonable value of the 3% thus conveyed is $1,500; and that the Richfield Oil Company accepted a lease from the defendant with full knowledge of the rights of the plaintiff. The prayer was that the contract be reformed by correcting the mistake in the description of the property; that the defendant be required to convey to the plaintiff 47% of oil and gas substances which had been reserved in the previous conveyances; and that the plaintiff have judgment for $1,500 as the value of the 3% interest in the oil rights which had previously been conveyed to others.

The Richfield Oil Corporation filed an answer denying that it had taken its lease with knowledge of the plaintiff's rights, and alleging that when the lease was executed it had been informed by the plaintiff that the defendant owned 50% of the mineral interest in question and was entitled to lease the same. Later on, the Richfield Oil Corporation filed an amended answer disclaiming all interest in the property.

The defendant filed an answer and cross-complaint. The answer denied the allegations of the complaint which are material here, and alleged that no conveyance had been made pursuant to the contract without a reservation of the oil rights, with the exception "that an exchange of parcels of land was made for the purpose of enabling H. L. McNew to construct a road." The cross-complaint alleged, among other things, that it was the purpose and intention of the parties to the contract to include therein a clause reserving to the vendors 50% of all oil rights in the land; that by mutual mistake the scrivener inadvertently omitted such a reservation therefrom; and that all parties to the agreement in all of their subsequent dealings with each other have acted as though said reservation was contained in the contract. The prayer was that the plaintiff take nothing, and that the contract be so reformed as to provide therein for such a reservation.

The court found that a mistake had been made in the description of the property; that it was the purpose and intention of the parties to reserve to the defendant and her husband 50% of the oil rights; that in reducing the agreement to writing the scrivener had inadvertently omitted such a reservation; that the mistake was mutual; and that both parties had acted throughout their subsequent dealings with each other as though the omitted clause had been included in the contract. Judgment was entered accordingly, reforming the contract with respect to the mistake in the description, and restraining and enjoining the plaintiff from asserting any right or claim in or to the 50% of the oil rights which had been reserved in the various conveyances. From this judgment the plaintiff has appealed.

[1] Both parties agree with that portion of the judgment which corrects the mistake in the description of the property, and the only controversy here relates to the reservation of oil rights as contained in the several conveyances made. The appellant claims that these were made for her benefit and not for that of the defendant. She first contends that she is entitled to a full conveyance of both the land and the oil rights, in accordance with the contract; that since there is no ambiguity the intention of the parties must be found in the terms of the contract itself; that all preliminary negotiations were merged in and superseded by the written contract; and that parol evidence was not admissible to show an intention contrary to that appearing in the contract. These contentions are sufficiently answered by the provisions of section 1856 of the Code of Civil Procedure, which expressly authorizes evidence outside of the terms of the agreement in cases where a mistake or imperfection of the writing is put in issue by the pleadings.

It is next contended that the evidence is not sufficient to support the finding that a reservation of 50% of the oil rights was omitted from the contract by mistake. The respondent testified that Mr. McNew came to their home to negotiate for the purchase of the property; that she and her husband talked the matter over with him; that they talked over the matter of a reservation by the Renches of 50% of the oil and gas rights; that it was stated that "We were to retain fifty per cent, that is forty-seven per cent, because Art already sold three per cent"; that it was agreed between them that a written contract should be prepared which should contain a reservation of 50% of the oil and gas rights; that the contract was not finished by the attorney until some two weeks later; that several changes were made in drafts of the contract but no change had anything to do with any such reservation; that when the contract was completed she signed it but did not read it; that she left the matter largely to her husband; that before the contract was ever written she heard her husband tell the attorney about this reservation; that after the contract was executed she had several conversations with Mr. McNew in which he made no claim to 50% of the oil rights but "he always spoke of it as being mine"; that neither Mr. or Mrs. McNew ever said anything to her about claiming to own this 50% of the oil rights; that shortly before the Richfield lease was executed Mr. McNew called her on the phone and told her that the Richfield men wanted a lease out there; that she asked McNew what he was going to do; that he replied he was going to cooperate all he could but said: "I don't know, I haven't got too much over there"; that he said nothing about either him or his wife claiming the 50% oil interest; that she later signed the Richfield lease and received a bonus of $470.85 for her 47%; and that until this suit was filed she did not know that the contract did not contain a reservation of this 50% interest in the oil.

The appellant testified that he had been engaged in the real estate business in that community for 40 years; that during the last ten years he had been engaged in subdivisions and buying and selling properties with oil rights; and that in talking with the Renches nothing had been said about any reservation of the oil rights. He admitted calling the respondent about the Richfield lease, and that he asked her if she was willing to lease any interest she had, to which she agreed. He then stated that immediately after that he began to search through his files to find out what his papers showed; that he failed to find anything but later happened to find his contract; and that this was the first time he had read it since it was signed. This testimony is somewhat inconsistent with his explanation as to why he had accepted conveyances of all, or practically all, of the property with deeds reserving 50% of the oil rights to the respondent. He said he did this because he wanted to reserve 50% of the mineral rights in himself "with a view if it become necessary to sell some people at some subsequent sales of subdivisions to use some of the mineral rights perhaps as a bonus to cash their paper." The natural inference from his entire testimony is that he changed his mind when he found and reread his contract, long after all of the property had been conveyed.

There are other circumstances which could and should be considered in this connection. It would appear from the record that the Renches originally owned only 50% of the oil rights in connection with this land. They had previously sold 3% to other parties and it is hardly to be assumed that they would agree to again sell that portion. This tends to confirm respondent's testimony that she and her husband intended to reserve the oil rights. There is other evidence indicating that the appellant had the same intention. The contract itself called for the making of partial conveyances from time to time. This would call for deeds for particular parts of the property, but such deeds would naturally be expected to cover all that was to be conveyed in that portion of the land, in the absence of special arrangements to the contrary. The contract further provided for a final deed conveying "all of said real property not previously conveyed." It was stipulated that the appellant prepared all of the deeds which were given, and submitted them to the respondent and her husband for signature. All of these deeds contained clauses reserving 50% of the oil rights to the respondent or to her husband, with one possible exception which will be mentioned. The appellant prepared and accepted all of these deeds, including the final deed, and no objection or claim was made that she or her husband was entitled to any further conveyance. Nearly a year later, he signed a community lease with Richfield, with respect to other property owned by him, and encouraged the respondent to sign this lease, with respect to the 50% interest in question, knowing that Richfield was paying her a bonus. Two employees of the Richfield Oil Company testified that about the middle of November, 1944, in a conversation with the appellant and her husband, Mr. McNew told them that the respondent owned this 50% and had the right to lease it, and that he offered to call the respondent on the phone and tell her that a lease was desired, which he did. McNew later found his contract and told the Richfield people that he claimed this 50%.

It is contended that the respondent actually recognized the appellant's right to the conveyance here demanded in that the deed of December 28, 1942, contained no reservation of oil rights in favor of the respondent. This deed covers a narrow strip some 600 feet long and a few feet wide. It is stated in the pleadings that it was a part of an exchange of deeds for the purpose of enabling Mr. McNew to put in a road. The respondent owned other property there, and we cannot tell from the record whether or not this deed included a small part of the land covered by the contract. Whether or not this is true appellant's counsel stated to the trial court "I think there is no proof any conveyance was made to the plaintiff by Mrs. Rench or her husband without reservation." The most that can be said in so far as this deed is concerned is that it added to the conflict in the evidence.

[2] In our opinion, the evidence, including that which discloses the manner in which these parties dealt with respect to their rights under this contract, is sufficient to sustain the finding in question.

[3, 4] In her final brief the appellant argues, for the first time, that the court erred in admitting the testimony as to conversations between her husband and herself and agents of the Richfield Oil Company. It is argued that the only purpose of this testimony was to support the claim of mistake and that it should have been excluded under the rule that parol testimony cannot be admitted in the absence of contractual ambiguity. The evidence was admissible under the provisions of section 1856, Code Civ.Proc., and as an act, declaration or omission against interest under section 1870, Code Civ.Proc.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.

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79 Cal.App.2d 359

SUTERA v. PALMIERI et al.

Civ. 15629.

District Court of Appeal, Second District, Division 2, California.

April 28, 1947.

1. Appeal and error 🔑931(1), 1008(1)

The findings of court sitting without jury are conclusive and every substantial conflict must be resolved in favor of a finding made upon conflicting evidence.

2. Negligence 🔑121(3)

Plaintiff seeking to recover for injuries sustained when a fire door which plaintiff attempted to close for defendants fell upon him had burden of proving negligence of defendants since mere fact that accident occurred raised no presumption or inference that defendants were negligent.

3. Negligence 🔑121(2)

For doctrine of "res ipsa loquitur" to operate, accident must be of a kind that does not ordinarily occur in absence of negligence, it must be caused by agency or instrumentality within exclusive control of defendant, and it must not have been due to any voluntary action or contribution on part of plaintiff.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

4. Negligence 🔑121(3)

Where plaintiff was asked by manager of cleaning establishment to assist in closing a fire door weighing between 700 and 1000 pounds and plaintiff pulled the door which rolled easily for about six feet when something caused it to stop and plaintiff shook the door and door fell injuring the plaintiff, res ipsa loquitur doctrine did not apply so as to render store owners liable for resulting injuries.

5. Negligence 🔑32(3)

Where defendants were engaged in wholesale and retail cleaning and dyeing business, and rear fire door was used for receipt and delivery of garments and other materials that were handled in wholesale lots and such door was not used by public, and small amount of retail business received and delivered from public was handled through front door, rules pertaining to entrances and exits used by public did not apply to rear door which caused injuries to plaintiff when he attempted to close the door at request of store manager.

◆

Appeal from Superior Court, Los Angeles County; Benjamin G. Jones, Judge.

Action by Anthony J. Sutera against Jack Palmieri and others to recover for injuries sustained because of alleged negligence of defendants. From a judgment for defendants, plaintiff appeals.

Affirmed.

David A. Matlin, of Los Angeles, for appellant.

Crider, Runkle & Tilson, of Los Angeles, for respondent Jack Palmieri.

Chase, Rotchford, Downen & Chase, of Los Angeles, for respondent Y. H. Donny.

WILSON, Justice.

Plaintiff appeals from a judgment refusing to award damages to him in a personal injury action.

Respondent Donny was the owner and respondents Palmieri the lessees of the storeroom in which the accident occurred. Respondents Palmieri were engaged in the wholesale and retail cleaning and dyeing business. At the rear of the premises there was a fire door approximately 8 feet high, 8 feet wide and 4 inches thick, sheathed in steel and weighing between 700 and 1,000 pounds. It was a sliding or rolling door to which three iron bands were attached and on the ends of the bands were rollers on which the door rolled northerly and southerly on an overhead iron bar. On the day of the accident Norma Palmieri was the manager of the business. When she determined to close the store in the evening she was unable to operate the door by reason of its weight. She called appellant from his place of business across the street and asked him to assist her. Appellant walked with her to the rear of the premises where he found that the door was open for the entire distance of the doorway. The handle of the door was on the south or right-hand side. Appellant, using his left hand, took hold of the handle and pulled the door from left to right. It rolled easily for about six feet when something caused it to stop. There is a conflict in the evidence as to the cause of the accident, whether the door fell while being pulled along the rollers or fell from the track as a result of appellant's action in shaking it. Mrs. Palmieri testified that she helped appellant in his attempt to close the door and that while he was pulling on the handle with both hands she was at the rear of the door pushing it; that when the door ceased rolling appellant forcefully shook it with both hands attempting to shake it loose when it fell on him. Appellant denied that Mrs. Palmieri assisted him, stated that he used only his left hand in pulling on the door, and denied that he shook or "jiggled" it before it fell on him.

[1] The court resolved the conflict by finding that none of the respondents managed or controlled the door at the time it fell; that at said time the door was under the management and control of appellant; that the door was not negligently maintained or operated by respondents, and that appellant's injuries were not as a direct and proximate result of any negligence on the part of any of the respondents. The findings of the court are conclusive and every substantial conflict must be resolved in favor of a finding made upon conflicting evidence. Shapiro v. Equitable Life Assur. Soc., 76 Cal.App.2d 75, 172 P.2d 725; Buckhantz v. R. G. Hamilton & Co., 71 Cal. App.2d 777, 779, 163 P.2d 756, and cases cited.

[2] The burden was on appellant to prove negligence on the part of respondents. The mere fact that an accident occurred raises no presumption or inference that respondents were negligent or careless. Miller v. Cranston, 41 Cal.App.2d 470, 476, 106 P.2d 963; Diamond v. Weyerhaeuser, 178 Cal. 540, 542, 174 P. 38; Hubbert v. Aztec Brewing Co., 26 Cal.App.2d 664, 688, 80 P.2d 185, 1016.

[3, 4] Appellant invokes the doctrine of res ipsa loquitur contending that all ele-

ments of that doctrine are present, to wit, the door caused the injury, it was under the management of respondents, sliding doors do not ordinarily fall unless the owner was negligent, and there was no explanation by respondents of their conduct. The doctrine of res ipsa loquitur has three conditions: (1) the accident must be of a kind that does not ordinarily occur in the absence of negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff. Ybarra v. Spangard, 25 Cal.2d 486, 489, 154 P.2d 687, 162 A.L.R. 1258; Olson v. Whitthorne & Swan, 203 Cal. 206, 208, 263 P. 518, 58 A.L.R. 129; Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 457, 150 P.2d 436. The evidence of Mrs. Palmieri, which must have been believed by the court in view of the findings, shows that two of the elements above enumerated were not present: (1) the door was not within the exclusive control of respondents but was being operated by appellant; (2) the accident was due to the action of appellant in forcefully shaking the door in his attempt to dislodge and close it.

Appellant asserts that the doctrine as stated in the Escola case is applicable because, according to the contention in his brief, the door was on the premises of respondents, they had control of it and there had been no change in its condition prior to the time appellant attempted to close it. The door was under respondents' control to the extent that it was on their premises, but it was being actively controlled and operated by appellant at the time it fell, and it was caused to fall by appellant's act in attempting to force it to close. Jack Palmieri, one of respondents, testified that he had been in possession of the premises for several months prior to the accident; that he had opened and closed the door many times and had never experienced any difficulty in its operation. The doctrine of res ipsa loquitur is not applicable under the facts in this case. Hubbert v. Aztec Brewing Co., 26 Cal.App.2d 664, 688, 80 P.2d 185, 1016; Biddlecomb v. Haydon, 4 Cal.App.2d 361, 364, 40 P.2d 873.

[5] Respondents Palmieri were engaged in the cleaning and dyeing business both wholesale and retail, but the greater amount of their business was wholesale. The rear door was used for the receipt and delivery of garments and other materials that were handled in wholesale lots. The door was not used by the public but only by deliverymen and employees of respondents Palmieri. The small amount of retail business received and delivered from the public generally was handled through the front door. The rules pertaining to entrances and exits used by the public are not applicable to the door that caused appellant's injuries.

The door was neither a dangerous instrumentality nor a trap, as contended by appellant, nor was it inherently dangerous to life or limb. According to the evidence it had been operated for a long period of time without accident and without difficulty in opening or closing it.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

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79 Cal.App.2d 568

BISHOP v. RAINBOLDT.

Civ. 15847.

District Court of Appeal, Second District, Division 2, California.

May 8, 1947.

Rehearing Denied May 22, 1947.

Hearing Denied June 30, 1947.

1. Appeal and error 🔑110, 782

An order denying a motion for a new trial is not appealable, and an attempted appeal therefrom would be dismissed.

2. Appeal and error 🔑1011(1)

Finding of trial court on conflicting evidence as to true date to which lease had been extended was binding on appeal.

3. Alteration of instruments 🔑29

Evidence showed that defendant altered agreement extending lease so as to give him an additional five years without the knowledge or consent of landlord.

4. Pleading 🔑291(2)

In action to quiet title, where defendant did not set forth in answer a copy of extension of lease, the landlord was not required to file an affidavit denying genuineness and due execution thereof. Code Civ. Proc. § 448.

5. Alteration of Instruments 🔑27(3)

Where defendant relied upon extension agreement which showed on its face an alteration, burden was on defendant to account for such alteration. Code Civ.Proc. § 1982.

6. Alteration of Instruments 🔑18

Where tenant altered extension agreement so as to give him an additional five years without the knowledge or consent of landlord, landlord was entitled to immediate possession notwithstanding landlord intended to extend lease to February 28, 1950. Civ.Code, § 1700.

7. Alteration of Instruments 🔑18

The intentional or material alteration of a written contract by a party entitled to any benefit under it destroys the integrity of the instrument and extinguishes all executory obligations of the contract in his favor. Civ.Code, § 1700.

◆

Appeal from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Action by Edith H. Bishop against Daniel A. Rainboldt to quiet title. From a judgment for plaintiff, and from an order denying motion for a new trial, the defendant appeals.

Judgment affirmed, and appeal from order denying new trial dismissed.

A. G. Van Deventer, of Pasadena, for appellant.

Archie McWilliams, of Glendale, and Henry F. Walker, of Los Angeles, for respondent.

WILSON, Justice.

Action to quiet title to real property. Appellant answered asserting a possessory interest in the second floor of the building located on the property by reason of a lease dated January 31, 1935, and a written extension thereof dated May 31, 1939.

The court found (1) that respondent is the owner in fee and entitled to possession of the property; (2) that the lease and the extension above mentioned were executed by respondent; (3) that the memorandum of May 31, 1939, was intentionally altered in a material way by appellant who was entitled to benefits under the contract, and that the alteration was made while the agreement was in appellant's exclusive possession and under his control; that the alteration consisted of a change in the figure "1950" to "1955" and thereby the agreement as executed by respondent extending the lease to February 28, 1950, was altered so as to extend it to February 28, 1955; (4) that respondent did not consent to the alteration and had no knowledge of it until February, 1945; (5) that only one copy of the agreement dated May 31, 1939, was executed and that it was always in the possession and under the control of appellant; (6) that appellant was not in rightful possession of the second floor of the building as alleged in his answer.

The judgment quieted respondent's title against appellant's claims to any part of the property and decreed that respondent have and recover possession of the entire property.

[1] Appellant has appealed from the judgment and from the order denying a new trial. The latter is a non-appealable order and the appeal therefrom will be dismissed.

Appellant contends that the evidence is insufficient to sustain findings (3) and (4) above outlined.

Under date of January 31, 1935, respondent executed a lease to appellant covering the second floor of the building on the property for the term beginning February 1, 1935, and ending on the last day of February, 1940. Appellant was granted an option to lease the premises for an additional five-year period. The option was exercised on October 17, 1935, and the lease was thereby extended to February 28, 1945.

In May, 1939, appellant, who was a practicing dentist, desired a further extension of the term of the lease and rights that were not given him by the original lease, such as parking privileges, the right to erect electric signs on the roof, and permission to make certain alterations in the premises. His attorney prepared a memorandum of agreement embodying all the changes he desired and thereafter respondent and appellant met in the latter's office, no one else being present. At the conclusion of their conference one copy of the agreement was signed by the parties and it was retained by appellant. Respondent did not see it again until some time in 1945.

As originally drafted the agreement provided for an extension of the term of the lease from February 28, 1945, to February 28, 1955. Appellant testified that the last figure "5" in the latter date was not clearly typed and that during the conference between the parties he traced the figure in ink over the typed figure.

Respondent testified that when she received the typed draft of the document the figure was "1955;" that she objected to the date; that she would not have signed it with that date as the expiration year; that she wrote a cipher "0" over the last figure "5" in the date, making the expiration year "1950." Both parties initialed the change.

[2] Appellant contends that respondent's testimony is not worthy of belief because in responding to further questions on cross-examination she was confused and that taking her testimony as a whole it cannot be determined whether she or appellant made the alteration. By its findings the court has resolved the confusion in respondent's testimony as well as the conflict between her evidence and that of appellant and we need pursue the inquiry no further.

Clark Sellers, an examiner of questioned documents, testified that underneath the figure "5" as it now appears in the document there was both a typewritten figure and an ink figure; that both had been erased and subsequently the ink figure "5" now in the document was placed over that area. Because of the erasure he was unable to say what figure had been effaced, but he stated that the erased ink numeral "is closed on the left side, which would indicate that it was a cipher." This confirms respondent's testimony that she wrote "0" over the typed figure "5."

[3] When appellant wrote the figure "5" after the document had been signed and while he was the sole possessor of the only signed copy, he apparently was not aware of the modern scientific methods of comparing inks after they have been applied to paper. On the page on which the questioned alteration occurs there are other alterations in ink, each one of which is initialed by appellant and by respondent. Mr. Sellers testified that all the alterations and all the initials were written with the same ink except the figure "5" in question, and that the ink used in writing that figure is different from all other ink on the page. The difference found by the expert demonstrates that appellant's scheme was totally lacking in the ingenuity with which the author of the fraud thought it to be imbued. The preponderance of the evidence is that appellant made the alteration after the document had been signed and left in his possession and that respondent did not know of or consent to the change.

[4, 5] Appellant alleges error in the admission of evidence relating to the alteration because he did not have notice as required by section 448 of the Code of Civil Procedure that the genuineness of the document would be questioned. The objection is without merit. Since a copy of the document was not set forth in appellant's answer respondent was not required to file an affidavit denying the genuineness and due execution of the instrument (sec. 448), and there was no occasion to put in issue, by pleading or affidavit, a mistake or imperfection in the writing. Moreover, the burden rested on appellant to account for the alteration. Code Civ.Proc, sec. 1982. He assumed the burden, stipulated to respondent's ownership of the property and offered himself as the first witness in his effort to establish the genuineness of the instrument and his right of possession thereunder.

[6, 7] Appellant asserts that since, according to respondent's evidence, she intended to extend the lease to February 28, 1950, he is entitled to retain possession until that date and that the court erred in rendering judgment for respondent's immediate

possession. His own act has deprived him of all rights whatsoever under the lease and its purported extension. The intentional or material alteration of a written contract by a party entitled to any benefit under it destroys the integrity of the instrument and extinguishes all executory obligations of the contract in his favor. Civil Code, sec. 1700; California Savings & Comm. Bank v. Wheeler, 216 Cal. 742, 746, 16 P. 2d 737; Walsh v. Hunt, 120 Cal. 46, 50, 52 P. 115, 39 L.R.A. 697; Nissen v. Ehrenpfort, 42 Cal.App. 593, 594, 183 P. 956.

Judgment affirmed. Appeal from order denying new trial dismissed.

MOORE, P. J., and McCOMB, J., concur.

79 Cal.App.2d 703

HUGHES v. HEARST PUBLICATIONS, Inc., et al.

Civ. 13295.

District Court of Appeal, First District, Division 2, California.

May 16, 1947.

1. New trial 🔑162(1)

Where trial judge after reweighing evidence on motion for new trial, determines that amount of verdict is too high, court has power to make order denying a new trial on plaintiff's remission of portion of award which trial judge determines to be excessive.

2. Jury 🔑31(7½)

An order requiring plaintiff to remit portion of judgment as condition of denying motion for new trial does no violence to defendant's constitutional right to a jury trial. U.S.C.A.Const. Amend. 7.

3. Appeal and error 🔑933(4)

Order requiring plaintiff to remit portion of judgment as condition of denial of motion for new trial does not indicate that court impliedly found that verdict was product of passion or prejudice.

4. New trial 🔑76(1)

The granting of new trial on ground that damages awarded are excessive need not depend on finding that award was made by jury under influence of passion and prejudice.

5. New trial 🔑76(1)

It is within sound discretion of trial court, in ruling on motion for a new trial on ground of excessive damages, to grant the same when there is substantial conflict in evidence regarding extent of damage.

6. Appeal and error 🔑1004(3)

Where trial court has required a remission as condition to denying new trial, verdict is reviewed on appeal as if it had been returned in the first instance by jury in the reduced amount.

7. Appeal and error 🔑1004(1)

A verdict will not be disturbed unless it is so grossly disproportionate to any reasonable limit of compensation as shown by evidence that it shocks one's sense of justice and raises a presumption that it was based on passion and prejudice rather than sober judgment.

8. Damages 🔑130(2)

$15,000 verdict including almost $3,000 special damages to 57 year old man who was earning $36 per week as a bus boy at time of injuries which included comminuted fracture of the tibia and fibula of right leg and fracture of right arm was not excessive.

◆

Appeal from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

Personal injury action by Raymond Hughes against Hearst Publications, Inc., and another. Judgment for plaintiff and defendants appeal.

Affirmed.

George M. Naus, Donald Seibert, and Harold B. Lerner, all of San Francisco, for appellants.

J. Horton Beeman and Harold A. Harwood, both of San Francisco, for respondent.

DOOLING, Justice.

Plaintiff was awarded $22,500 by a jury for personal injuries. On motion for new trial he was required to remit all in excess of $15,000 as a condition of the denial of the motion. Defendants appeal from the judgment, their sole attack being directed against the action of the trial judge in making his conditional order on motion for new trial and the claim that the judgment as reduced is still excessive.

[1, 2] The power of the trial court, where the judge after reweighing the evidence on motion for new trial determines that the amount of the verdict is too high, to make an order denying a new trial upon the plaintiff's remission of the portion of the award which the trial judge determines to be excessive, is so thoroughly settled in our law by an unbroken line of decisions commencing with the case of George v. Law, 1 Cal. 363, that we consider this court foreclosed from reconsidering that question. Appellants argue that "in the case of the tainted verdict at bar, only the plaintiff has consented to the present amount of $15,000.00. The defendant has not consented to it. The right of defendant to a verdict of an impartial jury has been invaded." The Supreme Court of the United States has consistently ruled that such an order does no violence to the defendant's constitutional right to a jury trial, U.S. Const. Amend. 7. (Northern Pacific R. Co. v. Herbert, 116 U.S. 642, 647, 6 S.Ct. 590, 29 L.Ed. 755; Arkansas Valley Land & Cattle Co. v. Mann, 130 U.S. 69, 72-76, 9 S.Ct. 458, 32 L.Ed. 246; Gila Valley, G. & N. R. Co. v. Hall, 232 U.S. 94, 103-105, 34 S.Ct. 229, 58 L.Ed. 521; and see the discussion in the majority and dissenting opinions in Dimick v. Schiedt, 293 U.S. 474, 482–485, 493, 494, 55 S.Ct. 296, 79 L.Ed. 603, 95 A.L.R. 1150), as have a large majority of the state courts which have considered the question (see cases collected in the notes in 53 A.L.R. 783 et seq. and 95 A.L.R. 1166 et seq.), including our own. Draper v. Hellman Commercial Trust & Savings Bank, 203 Cal. 26, 41, 263 P. 240; 20 Cal. Jur. 207, collecting many cases in note 7.

[3–6] In requiring the plaintiff to remit the portion of the judgment in excess of $15,000 as a condition of his denying the motion for new trial the trial judge has not, as appellants assert, "impliedly found the taint from the passion and prejudice". The granting of a motion for new trial on the ground that the damages awarded are excessive need not depend on a finding that the award was made by the jury under the influence of passion and prejudice since "it is within the sound discretion of the trial court in ruling upon a motion for a new trial on the ground of excessive damages, to grant the same when there is a substantial conflict in the evidence regarding the extent of the damage." Koyer v. McComber, 12 Cal.2d 175, 181, 82 P.2d 941, 944. Ballard v. Pacific Greyhound Lines, 28 Cal.2d 357, 362, 170 P.2d 465. Nor, where the plaintiff is put to his election to remit a portion of the award or suffer a new trial, is it "to be assumed from the making of such conditional order that the trial court concluded that the verdict was the product of passion or prejudice." Standiford v. Cantrell, 87 Cal.App. 736, 743, 262 P. 800, 803; Swett v. Gray, 141 Cal. 63, 74 P. 439; Turner v. Whittel, 2 Cal. App.2d 585, 589, 38 P.2d 835; Muench v. Gerske, 139 Cal.App. 438, 444, 445, 34 P. 2d 198; Hepner v. Libby, McNeill & Libby, 114 Cal.App. 747, 754, 300 P. 830; Dreyer v. Cyriacks, 112 Cal.App. 279, 283, 284, 297 P. 35. On the contrary the rule adopted by our courts is that where the trial court has required a remission as a condition to denying a new trial "a verdict is reviewed on appeal as if it had been returned in the first instance by the jury in the reduced amount." Sherwood v. Jackson, 126 Cal. App. 441, 444, 14 P.2d 861, 862; Howard v. Adams, 16 Cal.2d 253, 260, 105 P.2d 971, 130 A.L.R. 1003; Smith v. Brown, 102 Cal. App. 477, 487, 283 P. 132. In view of these settled rules the different view taken by the supreme court of Wisconsin as expressed in Heimlich v. Tabor, 123 Wis. 565, 102 N.W. 10, 66 L.R.A. 669 (cited in appellants' closing brief) can be of no controlling force in California.

[7] We must approach the question of excessive damages, therefore, under the settled rule that "a verdict will not be disturbed by an appellate court unless it is so grossly disproportionate to any reasonable

limit of compensation as shown by the evidence that it shocks one's sense of justice and raises a presumption that it is based on passion and prejudice rather than sober judgment." Roedder v. Rowley, 28 Cal. 2d 820, 823, 172 P.2d 353, 354.

[8] The plaintiff, aged 57 years, while in a marked pedestrian crosswalk on April 13, 1945, was struck by a truck owned by the corporate defendant and driven by the other defendant, its servant. There was evidence that the truck was traveling at a rate of speed in excess of 50 miles per hour and that the force of the impact hurled the plaintiff more than 60 feet. Plaintiff had been employed variously as a track laborer, janitor, hospital porter and bus-boy in a department store restaurant. At the time of his injury he had just been re-engaged as bus-boy at $36 per week. The force of the impact rendered plaintiff unconscious and he had abrasions about the head and face, although X-rays of the head disclosed no fractures of the skull.

Plaintiff's most serious injuries were a comminuted fracture of the tibia and fibula of the right leg about two inches above the ankle and a fracture of the right humerus with a sliding forward displacement. The broken bones in the leg necessitated the insertion of a metal pin through the heel and the subjection of the leg to traction for approximately two months. On May 3 and May 10 the fractures of the leg bones were remanipulated to secure a better alignment of the broken bones. The plaintiff was confined to a hospital until July 14 and continued thereafter to be an out patient until November. The cast on his leg was finally removed on August 27. At the time of the trial, in April 1946, plaintiff testified that his ankle was stiff and "I can't walk up and down steps like I used to." From the long immobilization of his leg he has some pain, stiffness and limitation of motion in his knee which will be permanent.

A nonoperative reduction of the fracture of the arm was first attempted but proper conjunction was not obtained and open surgery of the arm was found necessary. A steel plate was inserted over the fracture, to hold the severed bones in position, attached to the bones by steel screws. At the time of trial the bone was well knit and in good alignment. The steel plate will remain in the arm unless the screws become loose which would necessitate a further operation to remove the plate. Plaintiff testified that his arm was not as strong as it was before the accident and "I tried to lift a box the other day, and I coulden't lift it up.". He has a permanent disability of the shoulder with some limitation of motion and a permanent lack of ten degrees in flexion and extension of the elbow. A medical witness testified that these permanent disabilities in his arm "would not allow him to do any stevedoring at the present time. But he could return to some light form of work." The plaintiff testified that he had sought light work but had not been able to obtain any.

He had suffered a second fracture of the right arm on November 23, 1945, disconnected with the original accident. However the same medical witness testified "that it frequently happens that such an arm that has become shrunken with lime salts will break, not at the point of fracture, but elsewhere, there usually being more lime salts at the site of a well healed fracture than in the rest of the arm which has lost its lime salts because of disuse."

The plaintiff suffered considerable pain as a result of his extensive injuries and was still suffering some pain at the time of trial. He is not disabled permanently from doing work of the kind that he was doing immediately before his injury and appellants make much of this fact. However, he has some permanent incapacity for heavy work, such as lifting. He is a man who is compelled to earn his living by manual labor of some sort and the jury and judge were entitled to consider his handicaps in a competitive market for unskilled labor by reason of his permanent physical impairment.

Deducting special damages, an amount slightly in excess of $12,000 is attributable to general damages. We are not prepared to say that this is so excessive as to shock our sense of justice or raise a presumption of passion and prejudice. A mechanical comparison with awards of some years ago which were reversed or reduced, considered in vacuo, might support the conclusion that the award in this case was too large to stand; but we cannot blind ourselves to the changing value of the dollar, a factor which has frequently been referred to by our courts in recent years in considering awards for permanent injuries. This court has so recently considered this matter in Foster v. Pestana, 77 Cal.App.2d 885, on pages 890, 891, 177 P.2d 54, that a reference to the cases cited, and our discussion of this question will suffice.

"The question of what may be reasonable compensation in cases of this kind is a matter on which there legitimately may be a wide difference of opinion" (Roedder v. Rowley, supra, 28 Cal.2d 820, 823, 172 P.2d 353, 354) and we see no reason to interfere with the considered determination of the trial judge that the $15,000 to which he required plaintiff's remission was not excessive.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.

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79 Cal.App.2d 550

PHYSICIANS ELECTRIC SERVICE CORPORATION v. ADAMS et al.

Civ. 15690.

District Court of Appeal, Second District, Division 1, California.

May 8, 1947.

1. Trade-marks and trade-names and unfair competition 🔑67

Protection is given a trade name not because there is property in the word, but on theory that it is a fraud on person who has established a trade, and carried it on under a given name, that some other person should assume the name, or a slightly different name, so as to induce persons to deal with him in belief that they are dealing with person who has given reputation to the name.

2. Appeal and error 🔑1051(1)

The reading from pamphlet to witness as part of questions of plaintiff's counsel was not reversible error where contents of pamphlet appeared in testimony of other witnesses.

3. Appeal and error 🔑1056(1)

In suit to enjoin use of trade name similar to plaintiff's name, exclusion of evidence showing volume of plaintiff's business was not reversible error where volume of business was not essential to prove ultimate facts.

4. Appeal and error 🔑1047(3)

In suit to enjoin use of trade name similar to plaintiff's name, denial of motion to strike from the record a contract which was not in use during time defendants were operating their business was not reversible error.

5. Appeal and error 🔑1056(1)

In suit to enjoin use of trade name similar to plaintiff's name, sustaining objection to question whether plaintiff's business with general public was a substantial part of that business was not reversible error, where evidence established that business of both parties was with members of medical profession.

6. Trade-marks and trade-names and unfair competition 🔑93(3)

Where principal business of both plaintiff and defendants was servicing of electrically operated machines used by physicians, and there was substantial evidence to support finding that defendants' name "Physician's Electronic Service" tended to deceive customers and injure business of plaintiff previously established under name "Electric Service Corporation", plaintiff was entitled to injunction forbidding defendants to use their name.

◆

Appeal from Superior Court, Los Angeles County; George A. Dockweler, Judge.

Suit by Physicians Electric Service Corporation against Irving Adams and another, doing business under the fictitious firm name and style of Physician's Electronic Service, to enjoin the defendants from using the fictitious name "Physician's Electronic Service". Judgment for the plaintiff and the defendants appeal.

Judgment affirmed.

William Katz, of Los Angeles, for appellants.

Clifford Thoms, of Los Angeles, and Robert P. Dockeray, of Burbank, for respondent.

DRAPEAU, Justice pro tem.

Physician's Electric Service Corporation, a California Corporation, was granted an injunction forbidding a copartnership to use the fictitious name Physician's Electronic Service. Testimony before the trial court shows that the plaintiff has used its name, either as a fictitious name or as a corporation since 1928. The business consists in selling to physicians, and servicing, electrically operated machines used in the treatment of diseases, such as lamps for heating purposes, and machines using tubes to change electric energy into short wave radio impulses. The defendants started their business and adopted their name in 1945.

The words "electric" and "electronic" are not synonymous. Such machines as use tubes are known as radionic machines. But both types of machines use electric energy derived either from plugging into public utilities electrical circuits or from electric energy storage batteries.

The principal business of both plaintiff and defendants consists of the servicing of these machines. Defendants contend that they service only the types using tubes, and are therefore strictly radionic, and that their name as such does not infringe upon business rights of plaintiff.

[1] The rule in California is well settled. In the early case of Weinstock, Lubin & Co. v. Marks, 1895, 109 Cal. 529, 536, 42 P. 142, 144, 30 L.R.A. 182, 50 Am.St.Rep. 57, it is stated: "* * * the principle upon which the cases on this subject proceed is not that there is property in the word, but that it is a fraud on a person who has established a trade, and carried it on under a given name, that some other person should assume the same name, or the same name with a slight alteration, in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name."

In Rosenthal v. Brasley, etc., Co., 1937, 19 Cal.App.2d 257, 64 P.2d 1109, it was held that a defendant who named a business "Family Shoe Store" adding his own name to the front of it could be enjoined when there had been in existence the same business with the same name but with a different first name, i. e. "Rosenthal's Family Shoe Store". It is sufficient to enjoin the use of such names by competing businesses if the imitation name tends to deceive customers and injures plaintiff's business.

For other cases involving the application of the rule see: Carolina Pines v. Catalina Pines, 1932, 128 Cal.App. 84, 16 P.2d 781; Hoover Co. v. Groger, 1936, 12 Cal.App.2d 417, 55 P.2d 529; Hoyt Heater Co. v. Hoyt, 1945, 68 Cal.App.2d 523, 157 P.2d 657, and California Prune, etc., Ass'n v. H. R. Nicholson Co., 1945, 69 Cal.App.2d 207, 158 P.2d 764.

[2-5] Appellants urge error in the admission and exclusion of evidence: (a) A witness for the plaintiff was permitted to read from a pamphlet over the objection of the defendants. (b) The court sustained objection to evidence showing the volume of business of plaintiff. (c) The court denied a motion to strike a contract from the record, which it developed during the trial was not in use during the time defendants were operating their business. (d) The court sustained objection to a question whether or not the plaintiff's business with the general public was a substantial part of that business.

Assuming that the rulings were erroneous, a review of the record as a whole discloses that no prejudice resulted to the defendants which would be grounds for a reversal of the judgment. 5 C.J.S. Appeal and Error, § 1715, p. 931; Larson v. Blue & White Cab Co., 24 Cal.App.2d 576, 75 P.2d 612; Townsend v. Perry, 43 Cal.App.2d 380, 110 P.2d 1019.

The contents of the pamphlet which were read to the witness as part of the questions of plaintiff's counsel appears in the testimony of other witnesses; the volume of business transacted by plaintiff was not essential to prove the ultimate facts found by the trial court; no prejudice resulted to the defendants from the refusal of the court to strike from the record the contract in question; and the evidence established that the business both of plaintiff and defendants was with members of the medical profession.

[6] The trial court heard the evidence in the case and rendered its decision enjoining defendants from using the trade name. There is substantial evidence to support the finding that the defendants' name tended to deceive customers and injure plaintiff's business. This court is therefore without power to reverse the judgment.

The judgment is affirmed.

YORK, P. J., and WHITE, J., concur.

79 Cal.App.2d 613

BROWN v. PACIFIC ELECTRIC RY. CO. et al.

Civ. 15641.

District Court of Appeal, Second District, Division 2, California.

May 12, 1947.

Hearing Denied July 10, 1947.

1. Appeal and error 🔑1050(1)
Evidence 🔑219(3)

In action for personal injuries sustained when a defendant's electric interurban train struck codefendant's automobile causing it to collide with plaintiff's automobile, evidence that defendant railway had reimbursed codefendant's insurer for cost of repairing codefendant's automobile was not admissible as an admission against interest, and admission of such evidence was prejudicial error. Code Civ.Proc. § 2078.

2. Compromise and settlement 🔑2

The policy of the law is to discourage litigation and to encourage compromise of doubtful rights and controversies. Code Civ.Proc. § 2078.

3. Evidence 🔑219(3)

Where culpability of a defendant in an action based on his alleged negligence is an issue, court should not be guided by compromise settlement which defendant has made of other claims arising out of the same facts. Code Civ.Proc. § 2078.

4. Evidence 🔑219(3)

In action for personal injuries arising out of negligence, evidence of settlement with another claimant for injuries caused by the same tort alleged by plaintiff, not connected up with any act admitted by defendant and which shows his liability for the accident, is inadmissible. Code Civ.Proc. § 2078.

5. Evidence 🔑219(3)

It is contrary to public policy to subject a person who has compromised a claim to the hazard of having his settlement proved in a subsequent lawsuit of another person asserting a cause of action arising out of the same transaction. Code Civ.Proc. § 2078.

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Personal injury action by Jack J. Brown against Pacific Electric Railway Company and another. From an adverse judgment, the named defendant appeals.

Reversed. Attempted appeal from order denying motion for new trial dismissed.

Frank Karr, C. W. Cornell and O. O. Collins, all of Los Angeles, for appellant.

Irving E. Read, of Los Angeles, for respondent.

MOORE, Presiding Justice.

Defendant railway company appeals from an adverse judgment in the sum of $15,000 for personal injuries alleged to have been received by appellee as the result of a collision involving an electric interurban train of appellant. Two automobiles suffered from the impact, to wit, plaintiff's automobile, and the motor car of defendant Champion. The accident occurred on the late afternoon or March 21, 1944, at the intersection of Hollywood boulevard and Wilton Place in the city of Los Angeles. When the train was about 100 feet east of Wilton Place appellee's car came to a stop at that intersection. Immediately thereafter a large automobile driven by Champion veered from its lane of travel onto the track in front of the interurban. The motorman testified that he put the electric train into emergency and sounded his bell and whistle but lack of space rendered it impossible for him to bring the train to a standstill before striking the Champion car, causing it to collide with the automobile of appellee which resulted in the injuries on account of which this action was prosecuted.

It was contended by appellant at the trial that Champion turned in front of the trolley car when it was so close to the automobile of appellee that it could not be stopped by the exercise of ordinary care on the part of the motorman. On the contrary appellee contended that the distance between the train and the automobile of Champion was such that the former could have been stopped in the exercise of ordinary care before a collision. In support of such contention appellee produced a number of witnesses who testified that their attention was attracted by the clanging of the bell or the blowing of the whistle when the trolley was some distance behind Champion's car, the estimates varying from 50 to 150 feet.

In addition to its general denial appellant alleged as an affirmative defense that the accident was caused solely by the negligence of Champion in the operation of his motor car. After the trial had continued for about six days he was called to testify on his own behalf. The following question was asked by his counsel, "Did the Pacific Electric Railway make a settlement with you for the injuries you sustained?" The proceedings which followed indicate that the trial judge and all counsel regarded the objection as directed to the incompetency of the testimony in that it was an attempt to establish defendant company's liability by proof that it had settled a third party's claim for personal injuries sustained in the same accident complained of by plaintiff. Champion's counsel stated that he offered the testimony as an admission against interest. Outside the presence of the jury appellant moved the court for a mistrial on the ground that appellant could not possibly have a fair trial before that jury by reason of Champion's affirmative answer.

[1] The motion for a mistrial having been denied the court admitted, over objection as to its relevancy, evidence to the effect that an adjuster for the insurance carrier of Champion caused the latter's automobile to be repaired at a cost of $771.37, which was paid by the insurer and for which sum the latter was reimbursed by appellant. The order of the court in overruling appellant's objection to such testimony is assigned as prejudicial error. Numerous authorities have been presented on both sides of this issue, a review of which has led to the unavoidable conclusion that both by reason and by the weight of authority the ruling was prejudicial error. Inadmissibility of Compromise Settlements.

[2] While it is the policy of the law to discourage litigation and to encourage compromise of doubtful rights and controversies (Hamilton v. Oakland School Dist., 219 Cal. 322, 329, 26 P.2d 296), appellee contends in effect that proof of a settlement of the controversy made by the defendant in an action with a third party who was injured in the same accident as that which constitutes the basis of plaintiff's claim is not inhibited by section 2078, Code of Civil Procedure. That statute declares that "an offer of compromise is not an admission that anything is due." While it refers to offers only, yet the doctrine that a plaintiff may prove that the defendant has satisfied the demands of a third party who was a victim of the same tort as that alleged by plaintiff is so tenuous and rests upon such precarious support that it should not be extended without legislative enactment. The general rule is to reject such evidence as irrelevant and incompetent.

[3] Evidence of a compromise settlement by the defendant of a claim which originated in the very tort alleged by the plaintiff is inherently harmful in the trial of an action for personal injuries. It invades the province of reason in the exercise of its function to ascertain the truth as to whether

the alleged tort-feasor has committed actionable negligence or has failed to perform an act which in the exercise of reasonable care he should have performed, to the detriment of the claimant. Where the culpability of a defendant in an action based upon his alleged negligence is in issue it should be the aim of the court to endeavor to derive a determination of factual liability by competent proof of the circumstances and occurrences constituting the transaction alleged, and it should not be guided by compromise settlements which the defendant has made of other claims arising out of the same facts. In such a trial there is no proper alternative to the art of presenting only competent evidence and of making sound deductions and drawing reasonable inferences therefrom. When the fact finders enter upon their task poisoned with the recital of some irrelevant event that transpired subsequent to the alleged negligent act they are under a handicap which is not only difficult to disregard but which cannot be eliminated because it has the obvious approval of the judge whose views juries are prone to follow in determining facts if an opportunity is presented for them to ascertain the judicial trend. Moreover, the extrajudicial admission of a party not learned in the law that he is liable amounts to no more than a legal opinion at its best. A fully blown legal opinion asserted by an agent of the alleged tort-feasor outside of court would not be admissible as competent evidence.

[4, 5] Proof of the settlement made by the corporation with Champion contains no evidence of the admission of the corporation's negligence. It shows no more than the diligence of appellant to buy its peace with the party whose claim was modest and whose automobile had actually been struck by the train. The bare statement that Champion had been compensated for his losses falls far short of an admission of a fact showing the motorman's actionable negligence. It appears to be the prevalent rule in California and in the other states of the Union that in actions for personal injuries arising out of negligence evidence of a settlement with another claimant for injuries caused by the same tort alleged by plaintiff, not connected up with any act admitted by the defendant and which shows his liability for the accident, is clearly irrelevant and therefore inadmissible. Citti v. Bava, 204 Cal. 136, 138, 266 P. 954; Curtis v. McAuliffe, 106 Cal.App. 1, 288 P. 675; Georgia Ry. & Electric Co. v. Wallace & Co., 122 Ga. 547, 50 S.E. 478, 480; Smith v. Sanders, 296 Ky. 6, 168 S.W.2d 359; Moore v. Stetson Machine Works, 110 Wash. 649, 188 P. 769; Quiel v. Wilson, Ohio App., 34 N.E.2d 590. It is contrary to public policy to subject a person who has compromised a claim to the hazard of having his settlement proved in a subsequent lawsuit by another person asserting a cause of action arising out of the same transaction. To receive such evidence would inevitably tend to discourage settlements out of court if one's purchase of his peace with one person were to be thereafter taken as an admission of his liability for an occurrence which brought injury to another. Reasonable and compelling circumstances might very well influence the defendant to make settlement with the third person while denying all liability to the plaintiff. No party to a justiciable controversy should be discouraged from amicably adjusting his claim by the fear that he might subsequently be confronted with the contention that his concession there was an admission of liability. The rule protecting compromises is too salutary to be whittled away. Hawthorne v. Eckerson Co., 2 Cir., 77 F. 2d 844; Olshove v. Pere Marquette Railroad, 263 Mich. 579, 248 N.W. 906; Pfiffner v. Kroger Grocer & Baking Company, Mo.App., 140 S.W.2d 79; Paster v. Pennsylvania R. Co., 2 Cir., 43 F.2d 908; Louisville etc. Ry. Co. v. Roberts, 13 Ind. App. 692, 42 N.E. 247; T. M. Deal Lumber Co. v. Jones, 137 Kan. 480, 21 P.2d 933, 935; Whitney v. Louisville & N. R. Co., 296 Ky. 381, 177 S.W.2d 139; Fulton Iron & E. Works v. Kimball, 52 Mich. 146, 17 N.W. 733; Comstock v. Georgetown Township, 137 Mich. 541, 100 N.W. 788; Creighton v. Chicago, R. I. & P. Ry. Co., 68 Neb. 456, 94 N.W. 527; Nadler v. Willen, 190 N.Y.S. 577; Skelly Oil Co. v. Johnson, 190 Okl. 45, 120 P.2d 626; Rookard v. Atlanta etc. Ry., 84 S.C. 190, 65 S.E. 1047, 27 L.R.A.,N.S., 435, 137 Am.St.Rep. 839; Svea Fire & Life Ins. Co. v. Spokane etc.

Ry., 175 Wash. 622, 28 P.2d 266, 267; Hill v. Hiles, 309 Ill.App. 321, 32 N.E.2d 933.

Appellee's Thesis and Authorities.

As against such doctrine and the authorities above cited appellee fervently contends (1) that the only evidence excluded by such general rule is the offer of compromise by one of the instant litigants to the other (Code Civ.Proc. 2078), and (2) that evidence of a settlement by the defendant with a person injured in the accident out of which plaintiff's cause arose is admissible. Smith v. Whittier, 95 Cal. 279, 296, 30 P. 529; Story v. Nidiffer, 146 Cal. 549, 551, 80 P. 692; Fitts v. Mission Health etc. Shop, 58 Cal.App. 362, 365, 208 P. 691; Harris v. Miller, 196 Cal. 8, 18, 235 P. 981; Dugger v. Kelly, 168 Iowa 129, 150 N.W. 27; Texas & N.O.R. Co. v. Commercial Union Assurance Co., Tex.Civ.App., 137 S.W. 401, 402; Weiss v. Kohlhagen, 58 Or. 144, 153, 113 P. 46; Smith v. Telford, 118 Wash. 502, 504, 203 P. 938; Nickles v. Seaboard Air Line Ry., 74 S.C. 102. 131, 54 S.E. 255; Tennessee Coach Co. v. Young, 18 Tenn.App. 592, 80 S.W.2d 107; Magnolia Petroleum Co. v. Owen, Tex.Civ. App., 101 S.W.2d 354; Chicago, R. I. & P. Ry. Co. v. Rhodes, 21 Colo.App. 229, 121 P. 769; Coffin v. Plymouth, 49 N.H. 173; Goddard v. Berlin Mills Co. (Goddard v. Brown Co.), 82 N.H. 225, 229, 131 A. 601; Thweatt v. Ocean A. & G. Corp., Tex.Civ. App., 62 S.W.2d 250, 254; Magnolia Petroleum Co. v. Reed, Tex.Civ.App., 42 S.W. 2d 274. Certain of these authorities tend to support appellee's contention while others are of no value upon the question at issue. In some instances the evidence was received on a proper redirect examination of a witness; in some the proof was a completed settlement between the parties before the court; in some the court misconstrued the decision cited as authority for the admissibility of the evidence of compromise, while in others the holding is dictum, or the settlement contained an admission of a fact that proved liability, or supported the general rule.

Whether evidence of a compromise with a third party injured in the accident alleged in plaintiff's complaint is admissible as proof of defendant's liability appears to have been decided both ways by the courts of Texas. It is possible that the authorities that permitted such evidence (Magnolia Petroleum Co. v. Owen; Thweatt v. Ocean Accident & Guarantee Corporation, Ltd.; Magnolia Petroleum Company v. Reed) might be distinguished upon case study. However, that problem will be left to the skill of the Texas courts. Four Texas decisions (Missouri, Kansas & Texas Railway Company of Texas v. Smith, Tex.Civ. App., 101 S.W. 453; International & G. N. R. Co. v. Ragsdale, 67 Tex. 24, 2 S.W. 515; St. Louis, San Francisco & Texas Railway Co. v. Knowles, 44 Tex.Civ.App. 172, 99 S.W. 867; Simmons v. Perkins, Tex.Civ.App., 193 S.W.2d 737, 738) clearly hold that proof of settlement with a third party is inadmissible. The latest expression is that in the Simmons case wherein the court held that "these payments were made as a result of compromises, and evidence relating thereto should have been excluded."

Appellee's Thesis Rejected.

Adverting to appellee's argument that the statute merely forbids the admission of an offer of compromise in proof of liability, this exact question came recently before the Kentucky Court of Appeals in Whitney v. Louisville & Nashville Railroad Co., 296 Ky. 381, 177 S.W.2d 139, 140. By its settlement of the claim for the death of a truck driver the railroad company agreed to pay a further sum in the event the widow should not recover the maximum award before the Workmen's Compensation Commission. In attempting to collect from the company the sum he was obliged to pay the widow, Whitney offered evidence of a settlement between the administratrix of the truck driver's estate and the company. On appeal he contended that while proof of an offer of compromise is inadmissible, proof of a consummated settlement is admissible. The court held that "the reason for rejecting offer of compromise remains under conditions like those appearing in this case where the issue was liability or nonliability for the accident, and the settlement agreement contained no statement of fact constituting an admission against interest. We have ruled in accordance with the basic principles of judicial policy that where there are two causes of action arising from the same act or accident a compromise with one party may not be proved in the action of the other. * * * The court properly refused to allow the plaintiff to introduce the settlement in evidence."

From the foregoing it is clear that the weight of authority favors the exclusion of a defendant's settlement with a third person for injuries caused by the same accident in which the plaintiff's claim arose as evidence of defendant's liability. By reason of this conclusion it will be unnecessary to discuss the other assignments.

The order denying a motion for new trial being nonappealable the attempted appeal therefrom is dismissed. The judgment is reversed.

McCOMB and WILSON, JJ., concur.

Hearing denied; CARTER, J., dissenting.

EDWARDS v. BILLOW.

Civ. 15506.

District Court of Appeal, Second District, Division 1, California.

May 6, 1947.

Rehearing Denied May 28, 1947.

Hearing Granted June 30, 1947.

1. Brokers ⇨60

Where purchasers procured by broker and vendor signed agreement for sale of property on specific terms and purchasers were ready, able, and willing to perform such agreement, broker was entitled to commission and could not be barred therefrom because purchasers and vendor thereafter modified agreement which was not consummated because of refusal of holder of junior trust deed to subordinate lien thereof to lien desired by vendor to replace existing first trust deed lien on property.

2. Brokers ⇨60

It is the production by the broker of a purchaser ready, able, and willing to buy that determines the right of such broker to his commission, regardless of the consummation of the sale or the execution of a deed.

3. Brokers ⇨54

Acceptance by owner of real property of a person produced by broker employed to make the sale admits the readiness, willingness, and ability of purchaser to consummate the sale.

4. Brokers 86(7)

In action by broker for commission, finding that there existed a confidential relationship between broker's employee and owner of property involved, and that latter did not disclose to owner that property was reasonably worth some $20,000 more than sale price of which owner was unaware, was unsupported by any substantial evidence.

Appeal from Superior Court, of Los Angeles County; Benjamin C. Jones, Judge.

Action by Sam A. Edwards, doing business under the fictitious firm name and style of Mill-Edwards-Mill, against Sue E. Billow to recover commission allegedly due for procurement of purchaser of certain property of the defendant. From a judgment for defendant, the plaintiff appeals.

Judgment reversed.

Maurice Gordon, of Los Angeles, for appellants.

William Ellis Lady, of Los Angeles, for respondent.

WHITE, Justice.

Plaintiff appeals from a judgment rendered for defendant in an action brought for the recovery of a real estate commission.

By his complaint, plaintiff alleged that on or about the 24th day of December, 1944, defendant by an instrument in writing employed and authorized plaintiff to procure a purchaser for certain of defendant's property at a price of $105,000, and further agreed in said written instrument to pay plaintiff, in compensation for his services, a sum equal to 5% of said purchase price. It is then alleged that pursuant to the authority in said instrument contained, and in reliance thereon, plaintiff in his capacity of agent for the defendant procured and induced Mr. and Mrs. Don MacQuarrie to make an offer on or about December 27, 1944, to purchase defendant's aforesaid property; that said offer was in writing, subscribed by Mr. and Mrs. MacQuarrie and the defendant. That the instrument in question read as follows:

"Offer to Buy

"Los Angeles, Calif. 12–27, 1944

"We offer the sum of—($105,000.00), One Hundred Five Thousand Dollars, for that certain, Brentshire Motel, consisting of, Furniture, Furnishings & property, except furniture in living quarters, located at 12226 Wilshire Blvd. Santa Monica, California, we agree to the following terms,—($35,000), Thirty Five Thousand Dollars, —cash—, the balance, payable, monthly at the rate of—($800.00), or more,

"Eight Hundred & No/100 dollars,—or more, including, interest at the rate of—(5%), per annum, $400.00 on First and $400 on 2nd, T. D.

"We are, herewith making a deposit of ($1000.00), One Thousand & no/100 dollars, to substantiate this offer.

"It is fully agreed and understood that Mill-Edward-Mill will return this deposit, in full, if the above offer is not acceptable to the seller.

"Subject to Satisfactory Inventory.

"Above includes 5% Commission.

"Sue E. Billow "Don MacQuarrie
"Mrs. Don MacQuarrie"

It is further alleged that at all times said Mr. and Mrs. MacQuarrie have been ready, willing and able to purchase the property upon the terms specified in the aforesaid offer, but that defendant has refused to consummate the sale of said property to them.

By a second cause of action incorporated in his complaint, plaintiff alleged that defendant was indebted to him in the amount of said commission for services, work and labor performed by him for defendant at her special instance and request.

By her answer, defendant specifically denied any and all liability to the plaintiff as set forth in both of his pleaded causes of action.

As a further answer to plaintiff's complaint, defendant alleged that neither Mr. and Mrs. MacQuarrie, nor anyone else, have paid to defendant the sum of $105,000, either in cash or promissory notes, by reason whereof defendant has not received any monies out of which plaintiff is entitled to be paid his claimed commission of $5,250; that at the time the aforesaid agreement was entered into on December 24, 1944, the condition of defendant's eyes was such that she was unable to read, that she so informed the plaintiff, whereupon the latter advised defendant that it was unnecessary for her to read the agreement and that the same provided that plaintiff was to receive a commission only in the event that defendant should actually convey said property to a purchaser produced by plaintiff. That relying on such alleged false representations and for that reason alone, defendant signed said instrument. Finally, it was alleged that there was no consideration for the agreement in question.

Prior to trial an amendment to the answer was filed wherein it was alleged that there existed a confidential relationship between plaintiff's agent A. V. Siders and defendant; that her property was worth $125,000, of which fact she was unaware until discovery thereof during the taking of the deposition of said A. V. Siders, wherein he stated his personal opinion to be that defendant's property was worth $125,000; that had he disclosed such opinion on his part to her defendant would have been unwilling to sell the property for less than that amount.

When the taking of testimony was completed at the trial, the court permitted defendant to file a further amendment to her answer in which it was alleged that after execution of the foregoing offer to buy, escrow instructions were executed between defendant and the proposed buyers Mr. and Mrs. MacQuarrie, which provided that the consummation of the transaction was contingent on the obtaining of an agreement from the holders of a second trust deed on the property subordinating their lien to a proposed first lien in favor of defendant in the amount of $44,000. The failure to obtain such agreement is alleged, and that by reason of such failure and through no fault of defendant the transaction could not be consummated, by reason of which defendant was relieved of her obligation to pay plaintiff a commission.

The trial court made findings in which it found as true the execution of the aforesaid listing agreement and the offer to buy. Although not pleaded, the court found that it was the intention of the parties to the offer to buy as well as of plaintiff and his agent A. V. Siders, that the terms and conditions of sale, including payment of the commission, were to be incorporated in a further written agreement "in the form of written escrow instructions"; that in accordance therewith such escrow instructions were prepared and signed and contained the provision concerning procurement of the aforesaid subordination agreement. It was further found that at no time were the buyers willing or able to purchase "upon the terms offered, or upon any terms within the contemplation of the parties." That plaintiff did not produce a ready, willing and able buyer "upon the terms upon which she (defendant) offered to sell and dispose of the same by her listing contract with plaintiff or otherwise" and that defendant is therefore, not obligated to plaintiff. The court further found that the buyers had not paid to defendant $105,000 from which the claimed commission could be paid.

In accordance with the first amendment to the answer, the court found that a confidential relationship did exist between plaintiff's agent A. V. Siders and defendant; that the property was worth $125,000, of which fact defendant was unaware, but that such fact was known to said A. V. Siders; that the latter failed to disclose to defendant his opinion of the value of the property, and that had defendant known of such opinion she would have been unwilling to sell for any lesser sum; that by reason thereof plaintiff, through his agent, did not act in good faith.

As to the affirmative defense wherein it was alleged that a commission should be paid only on an actual conveyance and further that there was a lack of consideration for the agreement entered into between plaintiff and defendant, the court made no findings for the declared reason that defendant had "abandoned such defenses".

Finally, the court found in favor of defendant upon the second amendment to her answer, which was filed at the completion of the taking of testimony, and in which it was alleged that escrow instructions were executed between defendant and the proposed buyers Mr. and Mrs. MacQuarrie and that the same provided for the obtaining of a subordination agreement as hereinbefore narrated.

The situation with which we are here confronted may be epitomized by saying that the defendant was the owner of certain real property which she desired to dispose of for the sum of $105,000. To that end she entered into a listing agreement with plaintiff, who was a licensed real estate broker. Acting upon the authorization conferred upon him by such listing agreement, plaintiff procured the offer of Mr. and Mrs. MacQuarrie to purchase such property in accordance with an agreement titled "Offer to Buy," which is hereinbefore set forth, and which was signed by the MacQuarries and defendant owner. At the time the agreement was entered into there were two trust deeds outstanding upon the property in question, each payable at the rate of $400 per month; one in favor of the Santa Monica Commercial Savings Bank and the second in favor of Peter and Betty Xeniades, husband and wife. After an escrow was established by the parties, defendant owner desired to take over, as beneficiary, the first trust deed held by the bank. Defendant requested plaintiff's agent to secure from Mr. and Mrs. Xeniades an agreement subordinating their second trust deed to the new first trust deed in favor of the defendant. Mr. and Mrs. Xeniades refused to execute a subordination agreement in favor of defendant but were agreeable to the execution of such an agreement in favor of the bank as beneficiary under a proposed new trust deed.

At the trial it was established that the MacQuarries were ready, able and willing to purchase defendant's property for the sum of $105,000 and were willing and able to perform precisely in accordance with the terms of the aforesaid offer to buy, namely to deposit $35,000 in cash in an escrow as a down payment and to pay $800 or more per month on the balance of the purchase price, to be divided equally on a first and second trust deed. Mr. MacQuarrie deposited $10,000 in escrow and it was proved without refutation that he was able and willing to deposit the remainder of the required down payment.

The transaction was not consummated by reason of the fact that Mr. and Mrs. Xeniades, holder of a junior trust deed on the property in question, refused to subordinate their lien to a first trust deed lien that the defendant wanted placed on the property, running in her favor to replace the then existing first trust deed lien held by the aforesaid Santa Monica Commercial and Savings Bank.

[1, 2] Appellant first contends that the evidence is insufficient to support the judgment in respondent's favor. We are persuaded that in this contention appellant must be upheld. The terms of the foregoing "offer to buy" agreement signed by respondent are clear and unequivocal. In her brief respondent states her position as follows:

"It is the contention and position of the defendant that there never was a binding agreement of sale by defendant and purchase by the MacQuarries until the execution and delivery of the agreements in the form of escrow instructions prepared by the bank not only at the request but in the performance and in the interest and with the help of plaintiff, through his representative Mr. Siders, and consequently defendant was and is under no obligation to plaintiff for the payment of a commission."

Appellant's obligations under his contract were completed when he produced a buyer ready, able and willing to purchase in conformity with the agreement, and he therefore, was entitled to the agreed commission. The agreement with appellant broker as to his commission was not in any way contingent upon either appellant or the prospective buyers obtaining a subordination agreement from the holder of the second trust deed. The subject of such subordination did not arise until after the written offer to buy was made and accepted by the respondent and after the appellant had produced a ready, willing and able buyer in conformity with the aforesaid agreement. Whatever may have been the contractual obligations imposed by the escrow instructions upon either or any of the parties to the offer to buy, the terms of such instructions did not in any way affect appellant broker, because he completed his contract and was entitled to his commission when he presented an able, ready and willing purchaser to his principal and they entered into an agreement. Respondent cannot evade payment of the broker's commission by changing the terms originally agreed upon, by refusing or neglecting to consummate the sale or by selling the property to another. It is the production by the broker of a purchaser ready, able and willing to buy that determines the right of such broker to his commission, and that, regardless of the consummation of the sale through the execution of a deed. Grove v. Lewis, 125 Cal.App. 357, 360, 13 P.2d 847; Purcell v. Firth, 175 Cal. 746, 749, 167 P. 379; Dixon v. Malloy, 70 Cal.App.2d 322, 327, 160 P.2d 896; Coulter v. Howard, 203 Cal. 17, 25, 262 P. 751; Justy v. Erro, 16 Cal.App. 519, 522, 117 P. 575.

[3] In so far as the questioned ability of the purchaser to buy is concerned, the case of Grove v. Lewis, supra, 125 Cal.App. at page 359, 13 P.2d 847, 848, contains the following quoted from the syllabus of Sobaje v. Schubert, 37 Cal.App. 709, 174 P. 364: "Where an owner of real property accepts the offer therefor made by a person produced by the broker employed to make the sale, he thereby admits the readiness, willingness, and ability of the purchaser to consummate the sale."

The cases cited by respondent in support of her position herein are not helpful because they have to do with contracts between the vendor and vendee, and do not involve a controversy between the seller and a broker regarding the latter's commission. We are not here confronted with a dispute between the seller and buyer as to their contract, but are concerned only with a contract between the seller and her broker, in connection with which the escrow instructions form no part.

Respondent's claim that the property was never actually sold, and that no money was paid to respondent or made available to her out of which appellant's commission could be paid is without merit. As heretofore pointed out, under her contract, respondent became obligated to pay appellant broker his commission when he produced a purchaser, ready, able and willing to buy regardless of whether the sale was actually consummated.

The case of Irwin v. Klimper, 56 Cal.App. 434, 205 P. 714, is not in point. It concerned an *unwritten* request of the defendant to plaintiff broker to procure a purchaser for certain real property and was therefore held not to be in compliance with subdivision 5, section 1624 of the Civil Code. Hargrave v. Moody, 56 Cal.App. 498, 205 P. 890, holds that where the written contract of employment to sell real property specifies the terms upon which the broker is authorized to sell the property, the vendor has a legal right to object to consummating the sale for a lesser amount of cash than that specified in the authorization of employment. In the instant case the broker produced an able, willing and ready buyer in exact accordance with the terms contained in the contract of employment. In Cannon v. Selmser, 85 Cal.App. 783, 260 P. 332, cited by respondent, it was held that where a broker's contract specified that the latter's commission was to be paid when the vendee made his first installment payment, such commission was not earned untill the contingency occurred.

[4] Appellant challenges as unsupported by the evidence the court's finding that there existed between appellant and respondent a confidential relationship which the former breached through his agent A. V. Siders in that the latter did not disclose to respondent that "it was his personal opinion that said real property was reasonably worth the sum of $125,000.00 at the time of the transactions mentioned and described in plaintiff's complaint on file herein," of which respondent was unaware, and that had she been aware of the opinion of appellant's agent she would not have consented to a sale for $105,000; and that by reason of the foregoing, appellant did not act in good faith.

These findings are not only unsupported by any substantial evidence but are directly contradicted by the testimony of the respondent herself. We quote the following from the reporter's transcript:

"Q. By Mr. Gordon (Appellant's attorney): What was your opinion of the value of the place in December of 1944? A. Well, I have answered that.

"Q. How is that? A. I thought it was —at the time I thought it was worth $125,000.00, but I was willing to take $100,000.00 and get out, because that's what I put into it, and I wanted to get out on account of my health and my eyes. They meant more to me than anything else at that time."

There is no evidence whatever in the record before us that an innocent principal was misled to her damage by any duplicity or concealment on the part of an agent charged with a fiduciary relationship. The foregoing testimony of the principal negatives any assumption or inference that she was damaged by an agent's abuse of confidence reposed in him.

The foregoing conclusions at which we have arrived renders it unnecessary to discuss or decide appellant's final contention that the trial judge committed prejudicial error in overruling appellant's objections to certain questions propounded to his agent A. V. Siders during cross-examination of the latter.

For the foregoing reasons the judgment is reversed.

YORK, P. J., and DORAN, J., concur.

CHILDS v. CITY PLANNING COMMISSION OF CITY OF SACRAMENTO et al. (JENSEN, Intervener).

Civ. 7317.

Sac. 71915.

District Court of Appeal, Third District, California.

May 21, 1947.

Rehearing Denied June 20, 1947.

Hearing Denied July 17, 1947.

1. Municipal corporations ⚷621

Record established that application to Planning Commission of City of Sacramento for a variance permit to erect a service station on property located in a two family zone adequately complied with all procedural requirements.

2. Evidence ⚷83(2)

Determination of Planning Commission of City of Sacramento as to whether a variance under zoning ordinance should be granted under the facts was presumed to be correct. Code Civ.Proc. § 1963, subd. 15.

3. Mandamus ⚷168(4)

Petitioner for peremptory writ of mandate commanding Planning Commission of City of Sacramento to vacate a variance permit granted by commission to erect a service station on property located in a two family zone did not meet burden of overcoming presumption of correctness of the determination of the commission. Code Civ.Proc. § 1963, subd. 15.

4. Municipal corporations ⚷621

The decision of an administrative board in granting a variance permit under a zoning ordinance will not be disturbed by the courts in the absence of a clear and convincing showing of an abuse of the discretion vested in such board.

5. Mandamus ⚷87

Trial court could not substitute its own discretion for that of Planning Commission of City of Sacramento as to whether a variance permit under zoning ordinance should be granted in absence of showing that the commission abused its discretion or that the discretion of the commission was not supported by the evidence introduced at the hearing of the commission.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Proceeding by Harold S. Childs against City Planning Commission of the City of Sacramento, Charles O. Busick, and others, as the individual members thereof, for a peremptory writ of mandate commanding the planning commission to set aside and vacate a variance permit, wherein Thorwald Jensen intervened. From an order granting the peremptory writ of mandate, intervener and defendants appeal.

Judgment reversed.

Richard J. Lawrence and W. P. Dwyer, Jr., both of Sacramento, for appellants.

Ralph H. Lewis and Clifford R. Lewis, both of Sacramento, for petitioner.

PEEK, Justice.

This is an appeal from an order of the trial court granting petitioner a peremptory writ of mandate commanding the appellant Planning Commission to set aside and vacate a variance permit previously granted by said Commission to the intervener and appellant Jensen.

The record discloses that the present controversy had its inception in an application filed with the Commission by Jensen on October 4, 1946 wherein he sought a variance permit in order that he might erect and maintain a service station on property owned by him located at the southeast corner of Twelfth Avenue and Franklin Boulevard in the city of Sacramento.

Under the zoning ordinance entitled "Ordinance No. 1000, Fourth Series Zoning Regulations, Land-Use Plan", regularly adopted by the City Council of said city on December 14, 1943, said real property came within what is therein termed a "Two-Family District". Jensen's application set forth the location of the property and the use which he desired to make of it. The Commission thereupon gave notice to the adjacent property owners in accordance with sections 25 and 26 of said ordinance. On October 10, 1946, after a public hearing the Commission granted Jensen a variance permit in accordance with his application. Several days after the permit had been granted petitioner Childs purchased a lot and dwelling house situated immediately east of and adjacent to the Jensen property. On October 13 and 15, owners of property in the vicinity filed with the city clerk their appeals from the order of the Commission under the appropriate sections in the ordinance. On December 7 and 10 their appeals were denied, whereupon Jensen applied for and received a building permit to erect a service station on his property. Childs then filed in the Superior Court of Sacramento County his petition for a writ of mandate praying for an order of said court directing the Commission to vacate and set aside the variance permit previously granted to Jensen. Upon issuance by the court of its alternative writ in accordance with said petition, Jensen filed his complaint in intervention and the respondent Commission filed its answer. After a hearing thereon the court, in issuing the writ, made findings of fact generally in favor of the contentions of petitioner and in particular that Jensen's application for a variance permit was not filed as provided in section 22 of the ordinance and contained no statement of the reason why the same should be granted; that no showing was made at the hearing before the Commission that said property could not be used profitably for a one or two family dwelling, or that hardship, special circumstances, or other facts existed upon which the Commission could base its order; that the Commission did not act in accordance with the provisions of said ordinance, but solely upon whim and caprice in granting the permit; and that the City Council of said city sitting as an Appeal Board acted arbitrarily, wrongfully and capriciously in confirming the action of the Commission.

The main points raised by appellants are that the findings of fact and judgment of the trial court are not supported by the evidence, and that in light of the whole record there was a total failure of proof that the action of the Planning Commission was not supported by substantial evidence.

All procedural requirements of said ordinance are found in sections 22, 26 and 27 or the subsections thereof. The pertinent portions of section 22 merely provide that when there are "practical difficulties or unnecessary hardships in the way of carrying out the strict letter" of the ordinance, the Commission shall have power to "vary or modify any of the rules, regulations, or provisions" thereof to the end that the "spirit of the ordinance shall be observed, public welfare secured, and substantial justice done." Additionally there is set forth the method of filing an application for a variance, the fee therefor, and the manner in which notice shall be given. No provision is made as regards the contents of the application. Section 25 refers to the number and type of hearings to be held by the Commission and the Council, while section 26 specifies how notices shall be given by the Commission and the Council with respect to original proceedings for a variance permit and appeals therefrom. Lastly, section 27 relates to appeals to the City Council from an order of the Commission.

[1] It is apparent from an examination of the record that Jensen's application described the property affected and stated that a variance permit was requested for the purpose of erecting a "service station", adequately complied with the provisions of the ordinance. And inasmuch as his application met all procedural requirements, and since the meetings of the Commission and the council were held and the notices thereof were given in strict conformity with the ordinance, it necessarily follows that the finding of the trial court to the contrary is not supported.

[2] Therefore it becomes necessary to determine whether or not petitioner in assuming the burden of clearly and convincingly showing that the findings of the Commission were irregular or improper under the facts as presented has overcome the presumption in favor of the correctness of the Commission's determination. Section 1963, subsection 15, C.C.P.; also see concurring opinion of Mr. Justice Schauer in Sipper v. Urban, 22 Cal.2d 138, 144, 137 P.2d 425.

Since zoning ordinances not alone affect unimproved portions of a city but long established business, industrial and residential areas as well, and since conditions in each area may change from time to time, it is obvious that no hard and fast rule could be adopted which would operate equitably in all cases. What may constitute hardship or difficulty in one case may not do so in the next. In other words each application for a variance should be determined upon the facts of that particular case, bearing in mind the admonition contained in section 22-1 that the power given to the Commission to vary or modify should be so used that "the spirit of the ordinance shall be observed, public welfare secured, and substantial justice done."

Here the record discloses direct testimony by petitioner merely to the fact that he was the owner of adjacent property; that he made a down payment on his property approximately ten days after the permit was granted; that his first knowledge of the granting of the Jensen permit was the night of the first Council meeting which he attended; that when he complained about the erection of the station to the realtors who had sold him his property they agreed to resell it and to waive commissions, but that because of other elements involved he did not accept their offer.

The testimony of Jensen, who was called by petitioner under section 2055 of the Code of Civil Procedure, was limited to his acquisition of the property in question and the date thereof. A further witness for petitioner was excused when it was determined that she had not attended the meeting before the Commission.

Mr. Faig, Deputy City Clerk and Secretary of the Commission, was the only other witness called by petitioner. He testified generally concerning the testimony and the manner in which it was given before the Planning Commission, and to the introduction of certain exhibits; that all persons both for and against the granting of the permit were allowed to speak; that in 1943 all corners of the intersection of Twelfth Avenue and Franklin Boulevard were designated as retail zones but later changed to their present classification; that after the testimony was concluded discussion was had by members of the Commission and a vote taken, and that a petition was filed by persons who favored the variance.

Petitioner then rested and Jensen moved for a nonsuit, which was denied. Thereupon appellants called two members of the Planning Commission, its secretary and the intervener. A summation of their testimony shows that the corner immediately north of the Jensen property now is and for a long time has been put to commercial use as a drive-in market, drug store and beauty parlor; that such use is "nonconforming" within the provisions of the ordinance; that the third and fourth corners are unimproved and that the owners thereof have not objected to the granting of the variance; that both Franklin Boulevard and Twelfth Avenue are arterial streets within said city; that said streets have been regularly designated as "truck routes" by the city council; that Franklin Boulevard and Twelfth Avenue, easterly from said intersection are regularly established bus routes; that the Jensen property is not adapted to the use specified in the ordinance; that because of these existing conditions it is adaptable only for retail use, the prohibition of which would result in economic loss; that there is no service station within several blocks of said intersection; that the intersection is hazardous and that the intended grading of the Jensen property to street level would reduce such hazard; that the service station proposed to be erected would be modern, eye appealing and would not diminish or impair the value of surrounding properties.

[3] The conclusion appears to be inescapable that petitioner has not satisfactorily met the burden cast upon him in challenging affirmatively the action of the Commission.

[4] If, as stated in Otis v. City of Los Angeles, 52 Cal.App.2d 605, 613, 126 P.2d 954, the decision of an administrative board in refusing to grant a variance permit will not be disturbed by the courts in the absence of a clear and convincing showing of an abuse of the discretion vested in such board such conclusion is equally applicable to a situation such as the present where a board has granted a permit, and we so hold. See also Rubin v. Board of Directors, 16 Cal.2d 119, 104 P.2d 1041.

[5] In the absence of the requisite showing that the Commission abused it discretion or that its decision is not supported by the evidence introduced at the hearing it necessarily follows that the trial court

erred in substituting its own discretion for that of the Commission. Otis v. City of Los Angeles, supra.

The disposition made herein of the present proceeding makes unnecessary the consideration of the other points presented.

The judgment is reversed.

SCHOTTKY, J. pro tem., and THOMPSON, Acting P. J., concur.

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79 Cal.App.2d 639

RECOVERY OIL CO. v. VAN ACKER et al.

Civ. 3550.

District Court of Appeal, Fourth District, California.

May 12, 1947.

1. Mines and minerals 🔑74

Transferee of oil and gas lease had constructive notice of assignments of a royalty interest in proceeds of the oil produced, as respects rights of holders of such assignments to share in proceeds of oil produced, where assignments were recorded in office of county recorder before transferee acquired any interest in lease.

2. Mines and minerals 🔑5

Statutes and administrative regulations relating to assignment of oil and gas leases from the United States or any interest therein are for the benefit and protection of the government, and their prohibition is available only to the government and not to an individual. 30 U.S.C.A. §§ 187, 189.

3. Mines and minerals 🔑5

Transferee of oil and gas lease from the United States could not defeat rights of assignees under assignments of a royalty interest in proceeds of oil produced on ground that rights of assignees had lapsed because of failure to file assignments in a land office, even though such assignments were made under oil and gas prospecting permit and operating agreement before lease was executed. 30 U.S.C.A. §§ 187, 189.

4. Mines and minerals 🔑74

Assignee of proceeds from stated percentage of oil, gas, and other substances produced and sold from premises covered by assignor's operating agreement with holder of prospecting permit was entitled to share in proceeds of oil produced by transferee, who, with constructive notice of assignments, acquired oil and gas lease subsequently given permittee, and such right was not barred by limitations in absence of showing of when assignee could have claimed a payment under assignment.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Recovery Oil Company against R. E. Van Acker and others to guiet title to interests under an oil lease. From a judgment quieting plaintiff's title against an assignment of a royalty interest in the proceeds of the oil produced from described land, defendants Ada M. Crawford and husband appeal.

Judgment reversed.

Franklin B. Hansen, of Los Angeles, for appellants.

H. H. Bell, of Bakersfield (Walter H. Hewicker, of Bakersfield, of counsel), for respondent.

MARKS, Justice.

This is an appeal from a judgment quieting plaintiff's title to interests under an oil lease against an assignment of a royalty interest in the proceeds of the oil produced from certain described land in Kern County.

The complaint is in the usual form of an action to quiet title, and the answer of Ada M. Crawford, one of the appellants, sets up her claim to certain proceeds from the oil produced from the property. The only interest of Harry J. Crawford, husband of Ada M. Crawford and the other appellant, seems to be his community interest from the marriage relationship. Some of the defendants filed disclaimers, the action was dismissed as to others, so Mr. and Mrs.

Crawford are the only defendants before this court.

The land involved belongs to the United States. On April 21, 1923, an oil and gas prospecting permit was issued to M. A. Knapp by the Secretary of the Interior covering the property involved in this action as well as other land in Kern County. Extensions of the prospecting permit were granted and, on May 2, 1928, M. A. Knapp and A. Bruce Frame entered into an operating agreement whereby Frame agreed to drill on the property, produce oil if it was found, pay the required royalties to the United States, he being entitled to the remaining production. On November 20, 1928, A. Bruce Frame and his wife executed the following written assignment:

"THAT, referring to that certain Oil and Gas Prospecting Permit, Visalia Serial 010101, M. A. Knapp, Assignee, and referring to the Operating Agreement dated May 2, 1928, executed by said M. A. Knapp to the undersigned, covering the following described premises: (Description.)

"The undersigned hereby assigns, transfers and sets over to N. E. Grable the proceeds from Fifteen per cent (15%) of the oil, gas and other hydrocarbon substances produced, saved and sold from the said premises so covered by said Operating Agreement, (less amount used in operations on the premises) until such time as said assignee shall have received the sum of Twenty Thousand Dollars ($20,000.00) and no more; and upon full payment of said sum this assignment shall terminate and be at an end."

On April 10, 1929, N. E. Grable executed the following instrument:

"In Consideration of the receipt, by the undersigned, of TEN and no/100 ($10.00) DOLLARS, N. E. GRABLE, unmarried, of Los Angeles County, State of California, does hereby remise, release, assign and Quitclaim to ADA M. CRAWFORD of Los Angeles County, State of California, the following: This instrument is intended to transfer all right, title and interest now held by the Grantor in and to one half (½) of the interest acquired by the Grantor under that certain instrument dated November 20, 1928, and recorded November 27, 1928, in Book 272, page 431 of Official Records of Kern County, California, without any warranty or assurance of title whatsoever."

[1] The assignments were duly recorded in the office of the County Recorder of Kern County prior to the time plaintiff acquired any interest in the property so it it had constructive notice of them. No consent of the Secretary of the Interior was obtained to either assignment and neither was filed in any land office.

On December 15, 1930, M. A. Knapp was given a lease on the property involved here, as well as on other property in Kern County, by the Secretary of the Interior acting for the United States. On August 17, 1938, plaintiff, through mesne conveyances, became owner of so much of Knapp's former interest in the property involved here, as remained after any legal assignment of portions of it.

If we interpret the findings of fact and conclusions of law correctly, the judgment is based on the finding that the assignment under which defendants claim was not "filed for record purposes in the appropriate district land office of the Department of the Interior of the United States pursuant to the rules and regulations of the General Land Office, or at all"; and the conclusions (1) that whatever rights defendants might have had lapsed because of their failure to so file the assignments, and, (2) that the instrument did not assign any interest in the land but merely constituted a personal promise to pay money out of a particular fund.

The lease contained a provision against assignment, except with the consent of the Secretary of the Interior, which is in accordance with the provisions of law. See, Sec. 187, Title 30 U.S.C.A. Plaintiff also points to section 192.42d of the Code of Federal Regulations of the United States of America, promulgated by the Secretary of the Interior under authority of Statute (Sec. 189, Title 30 U.S.C.A.), which prohibits any lessee from assigning "his lease or any interest therein, whether by operating agreement, working or royalty interest * * *" without the written consent of the Secretary of the Interior and requiring all assignments to "be submitted in triplicate within 30 days from the date of execution * * *."

[2, 3] These and similar laws and regulations against assignments have been before the courts numerous times. It is the established rule that they are for the benefit and protection of the government. Their prohibition can only be raised by the sovereign, is "available only to the government" and is "not available to an individual." Dougherty v. California Kettleman Oil Royalties, Inc., 9 Cal.2d 58, at page 88, 69 P.2d 155, at page 170. That this assignment was made before the lease was executed is unimportant. Such a situation was before the Ninth Circuit Court of Appeals in the case of Isaacs v. De Hon, 11 F. 2d 943, 944, where it is said:

> "Attention is called to section 12½ of the Regulations of the General Land Office concerning oil and gas permits, promulgated under the authority of section 13 of the Act of February 25, 1920, 41 Stat. 441, Comp.Stat.Supp.1925, § 4640¼ff [30 U.S.C.A. § 221]. This regulation is as follows:
>
> "'Assignment of Permits.—Permits, after being awarded, may be assigned to qualified persons or corporations upon first obtaining consent of the Secretary of the Interior. Mere rights to receive a permit are not assignable.'
>
> "Appellant is in no position to take advantage of this regulation. It may be that plaintiffs will lose the fruits of this litigation by the refusal of the Secretary to approve the assignment of interests in the permit. But appellant is nevertheless held in a court of equity to the obligations he assumed in his grubstake contract."

Defendants argue that the assignment conveyed to them an interest in the real property, a profit a prendre; that plaintiff took with notice thereof and subject thereto so that it must pay defendants their share of the value of the oil produced. In support of this argument they cite such cases as Callahan v. Martin, 3 Cal.2d 110, 43 P.2d 788, 101 A.L.R. 871; La Laguna Ranch Co. v. Dodge, 18 Cal.2d 132, 114 P.2d 351, 135 A.L.R. 546, and Austin v. Hallmark Oil Co., 21 Cal.2d 718, 134 P.2d 777.

Plaintiff points out that the instrument before us assigned a portion of the *proceeds* from the oil, gas and other substances produced from the leased property, while that involved in the Callahan case assigned an interest in the oil and gas produced. From this they argue that the assignment can be construed to be no more than a promise on the part of the assignor to pay the assignee a sum of money out of a specific fund and that at most it could only be construed as creating a lien on the oil produced, which lien has long since been barred by the statute of limitations.

The lease in question was for a period of twenty years with the right of renewal under certain circumstances for additional periods, so were it necessary to decide the question we might be constrained to hold it was for an indefinite period of time.

[4] However, we do not need to pass upon this question, for the case of Schiffman v. Richfield Oil Co. of California, 8 Cal.2d 211, 64 P.2d 1081, 1082, is controlling here. The assignment in that case was in legal effect exactly similar to the one before us. As described by the Supreme Court it "assigned to plaintiff stated percentages of the proceeds to be 'derived and received * * * from the sale * * * of net production' of the well which should remain after payment of expenses."

In holding that the assignee of the royalty interest of the proceeds was entitled to participate in the *proceeds* from the sale of oil produced as against a subsequent assignee of the lease with notice, the Supreme Court said:

> "The right of profit survives the conveyance of the fee in the general estate in the land, and gives the royalty assignee the right to receive his percentage of the proceeds from whoever produces oil on the premises. * * *
>
> "The rights of the holders of royalty assignments to an interest in the proceeds of oil produced by an assignee of the leasehold should not depend on whether the assignment is of a percentage of the oil 'to be produced, saved and sold,' as in Western Oil, etc., Co. v. Venago Oil Corporation, supra [218 Cal. 733, 24 P.2d 971, 88 A.L.R. 1271], or is of a percentage of the net proceeds as in the instant case. * * * The royalty assignee's interest in the pro-

ceeds must be upheld whether the assignment is of oil to be produced, saved and sold, or of proceeds of such oil."

There is nothing in the record which enables us to determine whether or not any statute of limitations might be invoked by plaintiff if that question were important here. As far as we can determine from the record, it was not raised in the trial court. The pleadings were silent on it. We do not know when the first well on the leased property was put on production except that this must have occurred before the lease was executed. We do not know when, or if ever, the well or wells produced more than enough to pay the government royalty and more than enough gas or oil to take care of operations on the land. It is impossible to determine when, if at all, defendants could have claimed a payment under their assignment. Also it should be observed that the obligation to pay was a continuing one until defendants had received $10,000.

The judgment is reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

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79 Cal.App.2d 696

WOOLLOMES et al. v. WOODY,
County Auditor.
Civ. 3564.

District Court of Appeal, Fourth District, California.
May 15, 1947.

1. Counties 🔑46

Provision of Health and Safety Code that each member of district board shall receive certain compensation created an exception to previously enacted provision of Political Code that salaries and fees provided therein for county board of supervisors should be in full compensation for all services rendered by them unless otherwise provided. Health and Safety Code, § 4733; Pol.Code, § 4290.

2. Statutes 🔑225

The language of a subsequently enacted statute should never be so construed as to nullify the will of the Legislature or to cause law to conflict with apparent purpose had in view by the Legislature.

3. Statutes 🔑207

A particular statutory intent will control a general one that is inconsistent with it. Code Civ.Proc. § 1859.

4. Counties 🔑70

The limitations of Political Code on salaries paid to officers are limitations on officials rendering services to county as such. Pol.Code, § 4290.

5. Officers 🔑100(1)

Where new duties are delegated by statute to a public officer which are without the scope or range of his office and additional compensation is provided therefor, the statutory increase is not affected by constitutional provision prohibiting any increase in compensation of a public officer after his election or appointment. Const. art. 11, § 5.

6. Officers 🔑100(2)

Where members of county board of supervisors automatically became members of three county sanitation district boards, the supervisors were entitled to receive, in addition to their regular compensation as members of county board of supervisors, compensation for services as members of the three sanitation district boards. Pol. Code, §§ 4238, 4290; Health and Safety Code, §§ 4730, 4733; Const. art. 11, § 5.

Appeal from Superior Court, Kern County; Charles P. Blackstock, Judge Assigned.

Proceeding in mandamus by W. R. Woollomes and others against S. A. Woody, Auditor of the County of Kern, State of California, directing defendant as auditor to draw warrants for compensation of plaintiffs as members of board of directors of a county sanitation district. From a judgment for petitioners, defendant appeals.

Affirmed.

Norbert Baumgarten, Co. Counsel, of Bakersfield, for appellant.

Harvey, Johnston, Baker & Palmer and Oran W. Palmer, all of Bakersfield, for respondents.

GRIFFIN, Justice.

This is a proceeding in mandamus brought by the individual members of the Board of Directors of a County Sanitation District (also members of the Board of Supervisors) against the auditor of Kern County, in his ex officio capacity as auditor of all County Sanitation Districts in said County, directing him, as such auditor, to draw warrants for compensation of plaintiffs, as such directors, for three years of service, based on the compensation purportedly authorized by sec. 4733 of the Health and Safety Code. Defendant demurred to the petition. It was overruled. The trial court later gave judgment for petitioners and granted a peremptory writ of mandate. Defendant appealed.

The material facts alleged and admitted as true are: (1) That there are three county sanitation districts in Kern County; (2) all are in unincorporated territory and by virtue of sec. 4730 of the Health and Safety Code, the members of the Board of Supervisors of that county automatically became the governing body in each of said districts. Athough the governing board approved and allowed such claims, the auditor refused to draw warrants in payment thereof, upon the ground that he was uncertain whether plaintiffs were legally entitled thereto. See, Opinions of the Attorney General of California, Vol. 5, p. 188.

The question here presented is whether the supervisors, as members of each district board, may, in addition to their regular compensation as members of the Board of Supervisors, each receive compensation for services as a member of the three boards specified.

Section 4730, supra, reads in part: "If the whole of the district is unincorporated territory, the board of supervisors of the county in which the district is formed constitutes the district board."

Section 4733, supra, provides: "Each member of the district board shall receive as compensation for his services as a member ten dollars for each meeting of the district board attended by him, together with expenses necessarily incurred by him in traveling between his place of residence and the place of meeting. However, no member shall receive compensation for attending more than three meetings of the board during any calendar month."

Section 5, Article XI of the Constitution provides in part that "The Legislature, by general and uniform laws, shall provide for the election * * * in the several counties, of boards of supervisors * * * and * * * prescribe their duties and * * * regulate the compensation * * *". It then provides that: "The compensation of any county, township or municipal officer shall not be increased after his election or during his term of office * * *."

Section 4290 of the Political Code provides that "The salaries and fees provided in this title shall be in full compensation for all services of every kind and description rendered by the officers named in this title either as officers or ex officio officers * * * unless in this title otherwise provided, * * *." A proviso then follows containing certain exceptions as to certain designated officers, and provides that such officers may receive and retain for their own use certain commission and fees therein specified.

It is conceded that the courts of this state have not squarely passed upon the question here involved.

Appellant argues (1) that, as compared to sec. 4733 of the Health and Safety Code, sec. 4290 of the Political Code is the latest expression of the legislature and is therefore controlling; (2) that the purpose of said sec. 4733 is to compensate only in those cases where the appointment of directors is not ex-officio; and (3) that the history of the construction of sec. 4290, supra, shows it was intended to cover compensation of all duties, officio and ex-officio, and that said section controls, in case of doubt, over other and special fee statutes.

Respondents contend that sections 4730 and 4733 of the Health and Safety Code are later and more specific expressions of legislative intent than are sections 4290 and

4238 of the Political Code; that sections 4733 and 4290, supra, are in pari materia; that the services rendered to the Sanitation District by the members of the Board of Supervisors are foreign to and not ex-officio services rendered to the county, and consequently are not subject to the limitations provided under section 4290 of the Political Code.

The legislative history of the two statutes shows that section 4290 of the Political Code was enacted in 1907 (Stats.1907, chap. 282, pp. 354, 545), and last amended in 1933 (Stats.1933, chap. 843, p. 2212). The language of paragraph one of that section (so far as here involved) is still in the same language as that used in 1907. The organic act providing for county sanitation districts was not enacted until 1923. Stats. 1923, chap. 250, p. 498. No provision was then made for compensation of the directors of such district. In 1927 sec. 5½ was added and it provided for a compensation of ten dollars plus expenses for the "directors." Stats.1927, chap. 229, p. 415, 418. This language remained the law and was carried into the Health and Safety Code as adopted in 1939 (Stats.1939, chap. 60, p. 482), except when it was enacted, the language was changed to provide that each "member," rather than "director," shall receive compensation for his services as indicated. Sec. 2 thereof provides that "The provisions of this code in so far as they are substantially the same as existing statutory provisions relating to the same subject matter shall be construed as restatements and continuations, and not as new enactments."

Section 9605 of the Government Code provides that "Where a section or part of a statute is amended, it is not to be considered as having been repealed and reenacted in the amended form. The portions which are not altered are to be considered as having been the law from the time when they were enacted, and the new provisions are to be considered as having been enacted at the time of the amendment."

[1] Compared to section 4290 of the Political Code, it appears that section 4733 constitutes the latest expression of legislative intent on the question involved. Section 4733, supra, without qualification or exception, directs that *"Each* member * * * shall receive * * * for his services * * * ten dollars for each meeting * * *." An exception to the provision of the first paragraph of section 4290 is therefore indicated. That section provides that exceptions may be made. It also provides that the salaries paid supervisors, either as officers or ex-officio officers, shall be in full compensation for all services of every kind that are rendered by them *"unless* in this title otherwise provided * * *." Certain exceptions are therein provided.

A similar question was raised in County of Ventura v. Barry, 202 Cal. 550, 262 P. 1081, 1082, in construing section 4290 of the Political Code with section 4252 of the Political Code in relation to the retention, for his own use, by the County Assessor, of certain percentage fees in the collection of unsecured personal property taxes. It was there held that the two statutes were in pari materia and that the general section 4290 was to apply in all cases not "otherwise provided" for in some other section of the same title, and "where otherwise provided for the general law is not repealed, but remains in abeyance only," and that a subsequent expression of the law making power on the same subject must be given control over the provisions of earlier statutes.

The case of People v. Ely, 71 Cal.App.2d 729, 163 P.2d 453, 455, involved the repeal of Vehicle Code sec. 500, and the revival of Penal Code sec. 192. In that case there was an attempt to distinguish the holding in County of Ventura v. Barry, supra, from that of the Ely case. It was argued that the exception must be contained *in the same title,* otherwise it could not be considered an exception. The court there said:

"Without disputing the soundness of this reasoning, it should be pointed out that in both the cited and instant situations the Legislature did nothing more than create an exception to the applicability of a statute which otherwise remained in force. In the cited case the original statute expressly contemplated exceptions to its application. In the instant case the subsequent statute alone created the exception. Both cases clearly come within the rule quoted from

25 Ruling Case Law 934, and approved by the Supreme Court in the case cited."

[2] So in the instant case, we are convinced that sec. 4733, supra, created an exception to section 4290 of the Political Code. The language of a subsequently enacted statute should never be so construed as to nullify the will of the legislature or to cause the law to conflict with the apparent purpose had in view by the law makers. Lucchesi v. State Board of Equalization, 137 Cal.App. 478, 482, 31 P.2d 800.

[3] A particular intent will control a general one that is inconsistent with it. Code Civ.Proc. sec. 1859; 23 Cal.Jur. p. 725, sec. 107.

Appellant cites County of Humboldt v. Stern, 136 Cal. 63, 68 P. 324. There a county clerk, for extra compensation, entered in to a contract with the Board of Supervisors to search records of the Board to support the County's claim against the State. The Clerk was prohibited from recovering from the County under the provisions of sec. 4290 of the Political Code. That case did not involve the construction of any subsequent legislative enactment creating an exception to sec. 4290 of the Political Code.

In County of San Diego v. Bryan, 18 Cal. App. 460, 123 P. 347, a proceeding was instituted to compel defendant Justice of the Peace to pay into the County Treasury fees collected by him for solemnizing marriages. Section 4300e of the Political Code then required a fee of $3 for such service. It was held that such fees were returnable with other fees to the County Treasurer. No provision of law allowed the retention of such fees. See Richardson v. Morrison, 101 Cal.App. 418, 281 P. 726.

Likewise, it may be noted that in County of Humboldt v. Stern, supra, 136 Cal. at page 66, 68 P. 324, it was held that section 4290 provides that the officers therein enumerated shall not receive any compensation *from the county* other than the salaries therein stated for any services they may render *to the county,* either in the line of their official duties or otherwise.

[4] In the instant case a service is being rendered *to the Sanitation District,* and the compensation is made payable by such district and not the County of Kern. The limitations of sec. 4290 are on officials rendering services to the county, as such.

As counties are dividing more and more into these special taxing districts, it can readily be seen that a supervisor, if appellant's contention is correct, could be required, in order to perform his functions as a director of such districts, to attend meetings at all points of the county at all times of the week without any compensation or remuneration whatever.

[5] It is a general principle of law that where new duties are delegated by statute to a public officer which are without the scope or range of his office, and additional compensation is provided therefor, the statutory increase is not affected by a constitutional provision prohibiting any increase in the compensation of a public officer after his election or appointment. 21 A.L.R. 258; Love v. Baehr, 47 Cal. 364; San Luis Obispo County v. Felts, 104 Cal. 60, 37 P. 780.

The case of County of Sacramento v. Pfund, 165 Cal. 84, 87, 130 P. 1041, involved sections 4235 and 4290 of the Political Code pertaining to the salary of the County Clerk. Under Statutes of 1909, p. 663, chap. 389, sec. 2, a county clerk was allowed to retain for his own compensation out of the Game Preservation Fund, 10 per cent of the sales of hunting licenses. It was there held, in allowing the county clerk to retain such commission, that the legislature clearly designed to differentiate between the county clerk in his official capacity and the county clerk in his private capacity. See, also, McAuliffe v. Kane, 54 Cal.App.2d 288, 128 P.2d 932.

[6] In all the situations set forth in sec. 4730 of the Health and Safety Code, the district board of a county Sanitation District is comprised of officials either of a city or county, or both. The services which these persons render to the district are not, necessarily, for the benefit of their respective cities or county, but for the benefit of the district. An examination of that section will disclose that there are five different combinations of circumstances which are applicable to determine the personnel of the board of directors of a Coun-

ty Sanitation District. In four of these combinations, one or more members of the Board of Supervisors become directors, and in only the last combination do all the supervisors become members. In none of the combinations, however, are any of the directors compensated because of the fact that they are such members. On the contrary, they are compensated only *if they attend meetings,* and then only for such meetings as are not in excess of three in any calendar month.

It therefore appears here that the legislature has designated certain persons to act as members of the Board of Directors of the County Sanitation Districts. These persons may be all city officers, all county officers, or part city and part county officers. They do not hold office by virtue of their incumbency as such officers, but by virtue of a combination of circumstances which may be different in each district. The duties to be performed are foreign to their office. That the legislature has made provision for the compensation of such director members is the only reasonable construction that can be put on section 4733 of the Health and Safety Code, which section is the latest legislative expression on the subject.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

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79 Cal.App.2d 519

PEOPLE v. BJORNSEN.

Cr. 1989.

District Court of Appeal, Third District, California.

May 7, 1947.

As Modified on Denial of Rehearing May 21, 1947.

Hearing Denied June 19, 1947.

1. Homicide 🔑238

Evidence supported conviction of murder in the first degree as against defense of intoxication.

2. Homicide 🔑22(2)

The facts of a homicide case must disclose substantial proof or reasonable inferences of malicious, deliberate, and premeditated killing of victim before defendant may be found guilty of first-degree murder, but it is not necessary that there be express evidence of a deliberate purpose to take life of another.

3. Criminal law 🔑260(11), 1159(5)

The question of degree of the crime is one exclusively for determination of trial judge or jury, and his or its conclusion in that regard will not be disturbed when there is any substantial evidence to support it.

4. Homicide 🔑22(1)

To support a judgment of murder in the first degree it is not necessary to show personal enmity on defendant's part toward deceased.

5. Homicide 🔑151(1)

Upon a trial for murder, commission of homicide by defendant having been established, burden rests upon defendant, in absence of evidence adduced by prosecution tending to show that killing was justifiable or excusable, or that it amounts only to manslaughter, to prove circumstances in mitigation or excuse. Pen.Code, § 1105.

6. Homicide 🔑253(3)

Proof that deceased was shot twice, and that before second shot was fired defendant was required to extract discharged cartridge and reload the gun, and that defendant must have thoughtfully taken precaution to carry with him additional load of cartridges when he left cabin with his gun, sufficiently supplied necessary proof of premeditation, deliberation, and malice to support trial judge's determination that defendant was guilty of murder in the first degree.

7. Homicide 🔑146

Where it appeared that deceased was deliberately shot twice, or killed with a deadly weapon without sufficient provocation under circumstances indicating that act was performed by defendant with an abandoned and malignant heart, malice may be presumed. Pen.Code, § 188.

8. Homicide ⚷180

Question of defendant's intoxication at time offense was allegedly committed was competent for trial court sitting without jury to consider under all circumstances in determining motive or intent with which homicide was committed, whether defendant was incapable of premeditating or deliberating performance of the act or to understand nature of his extra judicial statements, and to ascertain degree of the crime. Pen.Code, § 22

9. Homicide ⚷174(8)

In murder prosecution, defendant's voluntary statement to deputy sheriff after his arrest that, "I don't know why I did it. I guess I must have been crazy. * * * We were arguing," was competent as evidence tending to show who killed deceased and that some controversy existed between defendant and deceased before commission of the homicide.

10. Witnesses ⚷380(2)

In murder prosecution, where defendant at trial declared that he did not kill deceased and claimed that he had no recollection whatever of the homicide, a voluntary statement made by defendant to deputy sheriff after his arrest admitting that he shot deceased would be competent to impeach defendant.

11. Criminal law ⚷384

Question of competency, relevancy, or admissibility of evidence on ground of being too remote is ordinarily subject to trial judge's discretion.

12. Criminal law ⚷436

In murder prosecution, trial judge did not abuse his discretion in excluding hospital records of defendant's case while he was an inmate of county hospital on three previous occasions, the date of his last confinement being seven months before the offense charged, on ground that such evidence was too remote.

13. Criminal law ⚷436, 444

In order to render hospital records admissible as an exception to hearsay rule, entries in hospital records must be made in ordinary course of business by persons whose duty it is to make them, they must be made contemporaneously with the facts to which they relate or within such time thereafter as to be part of the transaction, must refer to matters which persons making the entries have the duty to record, and must be duly authenticated, and they must have been made by person having knowledge of the facts set forth or one competent to predicate a medical and scientific opinion on the facts.

14. Stipulations ⚷14(7)

Even if hospital chart of defendant's case during time he was patient at county hospital a few days after deceased was shot showing that he was suffering from delirium tremens should have been admitted in support of defendant's contention that he was incapable of premeditating or committing homicide or of disposing of body on date that deceased was shot or of subsequently making extra judicial admissions against interest, defendant was not prejudiced by sustaining of objection to the record, where case was tried by trial judge sitting without a jury, and it was stipulated that hospital chart showed entry that defendant was suffering from delirium tremens. Code Civ.Proc. § 1953f.

15. Criminal law ⚷489

In murder prosecution, restricting cross-examination of physician, who was acting superintendent of county hospital, regarding defendant's condition when he was an inmate of the hospital a few days after deceased was shot, was not error, where physician stated that he had not seen defendant and that he had no personal knowledge of his condition.

16. Criminal law ⚷260(11)

In murder prosecution tried to court sitting without a jury, whether defendant was so incapacitated from intoxication or delirium tremens that he was not responsible for his acts, conduct, or admissions against interest was for trial judge's determination.

17. Witnesses ⚷380(2)

Where defendant in murder prosecution denied killing deceased and declared that he did not remember what statements he had previously made regarding the homicide, permitting cross-examination of defendant to test his recollection of the homicide and his memory of extrajudicial statements made by him was proper, and defendant's admissions against interest previously made in two extrajudicial statements taken by a court reporter and transcribed were competent for impeachment purposes.

18. Witnesses ⟹389

Where witness testifies that he does not remember his previous statements, it is competent to prove previous statements for purpose of impeachment.

19. Witnesses ⟹388(5, 7)

The statute providing that, if previous statements alleged to have been made by witness were in writing, they should be shown to witness before any question was put to him concerning them, applies only to written statements signed by witness, and not to unsigned memorandums or statements made by other parties. Code Civ.Proc. § 2052.

20. Criminal law ⟹1170½(1)

In murder prosecution, where written statements alleged to have been made by defendant, to officers after his arrest were not signed by defendant, defendant was not prejudiced by introduction of written statements for impeachment purposes without first handing statements to him to read. Code Civ.Proc. § 2052.

◆

Appeal from Superior Court, San Joaquin County; R. M. Dunne, Judge.

Bernie Bjornsen was convicted of murder in the first degree, and he appeals.

Affirmed.

W. V. Anderson, of Los Angeles, and H. J. Tye, of Stockton, for appellant.

Fred N. Howser, Atty. Gen., and Jas. Reavis, Deputy Atty. Gen., for respondent.

THOMPSON, Justice.

The defendant was charged with murdering Leland F. Martin on April 11, 1946. He was tried by the court sitting without a jury. The evidence was circumstantial with the exception of several extrajudicial statements which were made by the defendant. He was convicted of murder of the first degree and sentenced to life imprisonment. A motion for new trial was denied. From that judgment and order this appeal was perfected.

The defendant and the deceased had been friends and associates. They drank liquor together. They lived on a small island in the San Joaquin River near Stockton. On the day of the homicide they started to drive to town in the defendant's automobile. When they reached Paradise Point Inn a dispute arose over the deceased's proposal to stop there. The defendant refused to do so. The deceased reached over and turned off the ignition switch. The car stopped and he got out. The defendant drove on to town without him. About six o'clock that evening the defendant returned to the island and went to bed. The deceased arrived about nine o'clock the same night. They drank some liquor together and then quarreled over their separation at Paradise Point. The defendant kept a single barrel 20-gauge shotgun and a box of loaded cartridges in his room. There was no other gun on the premises. There were no witnesses to the affair other than the two men who participated in it. No other person was on the island. The deceased was shot twice at short range with defendant's gun. Evidently he was first shot in the stomach, and then, after the shell had been extracted from the gun and the gun reloaded, he was again deliberately shot in the head, blowing a gaping hole in the skull. A medical expert witness testified that the wound in the abdomen would have knocked him down, and that the head wound would have instantly killed him. The deceased was evidently shot outside the cabin near the walk, for an empty shell and a two-inch piece of his skull were found there. Also there was a spot near the walk where the body evidently lay, from which surface dirt had been recently removed, with the possible purpose of disposing of the mess of blood and brains. Several yards of log-chain and two heavy weights, taken from the warehouse on the island, were attached to his body with bailing wire, and he was thrown into the river. A triangular three-foot piece of canvas was taken from the porch awning of the cottage, with which the body was either wrapped or upon which it was dragged to the boatlanding. The body was discovered some distance from the island eight days later. The motorboat which the deceased had used to return to the island was set adrift. It was picked up the day following the homicide one and one-half miles below the island. The court found that the defendant wilfully and deliberately killed the deceased, and attempted to conceal the body and evidence of the murder. There is an abundance of evidence to support that conclusion. There was no other person who could have committed the homicide. Self-defense is not involved. The defendant merely claimed that he did not kill the deceased.

The only issue of merit on appeal is the question as to whether the defendant was so intoxicated at the time of the homicide that he was incapable of premeditating or deliberating the commission of the crime. The defendant argues that he was too weak and incapacitated from delirium tremens to have committed the homicide or to have disposed of the body. Those were problems for the determination of the trial judge, with which we may not interfere since there is very convincing evidence that the defendant not only could, but that he actually did, commit the homicide and cunningly dispose of the body. After a chain of incriminating circumstances had been adduced in evidence at the trial, the defendant was called and merely asked his age, his weight, and the one question, "Did you kill Leland F. Martin?" to which he replied that he did not. On cross-examination answers to all material questions were avoided by a claim of amnesia resulting from intoxication. He asserted that the same lapse of memory existed regarding the details of his several former extrajudicial statements. We think the court correctly ruled upon all objections regarding such testimony and that the judgment is adequately supported by the evidence.

Since the judgment of conviction is dependent very largely on circumstantial evidence, it becomes necessary to recite in greater detail some of the essential facts of the case.

Mr. and Mrs. E. R. Crowell owned a ranch about fifteen miles from Stockton, on the northerly side of the San Joaquin River in the Empire Tract. A deep water channed had been constructed in the river from Stockton to Suisun Bay. In so doing a small twenty-acre piece of land was severed from the northerly end of Tinsley Island opposite the Crowell property. A strip of water several hundred feet in width intervened between that island and the mainland on the northerly side. The severed portion of the island was erroneously called Ward Island. The real Ward Island is located just above Tinsley Island. We shall refer to the little severed portion which is involved in this case as Crowell Island, to avoid confusion. It also belonged to the Crowells. It was covered with small trees and brush to the margin of the water, and surrounded by tules. It contained a group of buildings near one end of the island, and a few yards from the water, consisting of a cottage, a warehouse and a small shack. Adjacent to the buildings a garden was cultivated. A pathway led from the buildings to the river's edge where a dock was constructed for landing boats. Across the expanse of water on the northerly side, Mr. Crowell also maintained another wharf, where he usually kept several boats including a cat-fishing boat and an outboard motor boat, for crossing the river and for going back and forth to the island. Ashley Ferry crossed the river about two miles from the Crowell property.

The deceased, Leland F. Martin, was Mrs. Crowell's brother. He was unmarried. He weighed 140 pounds and was 49 years of age. He usually worked as a farmhand. For several years he was engaged as caretaker of Crowell Island. He lived in the cottage on that island and took care of the buildings and garden. The warehouse contained old machinery and accumulated junk, including the weights and logchain which were attached to the body of the deceased before he was dumped into the river. The defendant, who was forty years of age and weighed 118 pounds, was an acquaintance of the deceased. They occasionally associated and drank liquor together. A few days before the homicide, with the consent of Mr. Crowell, the defendant went to live with the deceased on the island. He lived in the little shack, where he kept the shotgun and cartridges previously mentioned. The deceased lived in the cottage. There is evidence that several empty wine jugs were also found in defendant's room after the homicide. The defendant owned an automobile which he usually parked on the levee on Crowell's side of the river. No other person lived on the island, and except for the Crowell family and their immediate friends, other people rarely visited the island. It was commonly called the "hide-out."

About 11 o'clock in the forenoon of Thursday, April 11, 1946, the defendant and the deceased started to drive from the levee to town in defendant's automobile. The roadway ran from the levee across the Empire Tract past the home of Mr. and Mrs. Baeta. They stopped at the Baeta house, and Mr. Martin borrowed from Mr. Baeta the sum of $5. Mrs. Edith Baeta knew both the defendant and the deceased. She saw them at her home that morning. Between five and six o'clock that evening she saw the defendant returning alone in his car and going toward the Crowell landing on the levee opposite the island. There can be no doubt that the defendant returned to the island about six o'clock Thursday evening. He admitted that he returned to the island that evening and that he went to bed there. In an extrajudicial statement made by the defendant he said that when they reached Paradise Point Inn on their way to town, the deceased insisted on stopping and having a drink, but that he said, "No, we won't stop." He declared that the deceased then reached over and turned off the ignition switch, stopped the car and got out, and that he went on to town alone, and subsequently drove back to the levee and crossed to the island that same night. There is no doubt that Mr. Martin was at Paradise Point Inn Thursday afternoon and that he returned to the island about 9 o'clock that night. Mr. William Oberly testified that he saw Martin at the Inn and asked him to have a glass of beer with him, which he refused, saying "He had enough to drink." When Oberly was asked if he seemed intoxicated, he replied "Absolutely not." Between eight and nine o'clock that evening Oberly took the deceased back in his automobile and left him at the Ashley Ferry. Oberly testified that Martin was then on his way back to the island. The defendant admitted the return of Martin that night, and told of a dispute between them. He stated: "I got back Thursday night and I was in bed and he come in and he woke me up, and we sat there and drank for quite a while. * * * I know we were arguing, I suppose it was, and he was mad because I had left him at Paradise Point and gone on to town alone."

Mr. Crowell went to the island about three o'clock Thursday afternoon, after the defendant and Martin had left to go to town. There was then no one else on the island. Crowell went to prepare to paint the interior of his cottage. He left the island prior to six o'clock, before the defendant returned. Crowell did not go to the island on the following day, Friday, but he did return on Monday the 15th. He then went to the shack and talked with the defendant. He said that the defendant appeared to have been drinking, but that he talked intelligently and answered his questions. Crowell said that he then saw defendant's shotgun in the corner of the room and the box of shells on the table. He missed Martin and asked the defendant where he was. The defendant falsely replied that he did not know, that the last time he had seen Martin was when he left him at Paradise Point Inn. Crowell then had no intimation that Martin had been murdered. He was complaining of having to hire a boat to get over to the island. He said, "Funny a man's got a boat here and he's got to go hire a boat to get on the island." The motor boat was then gone. Crowell left the defendant on the island when he departed that night. He returned to the island on the following days of Sunday and Monday, to resume his painting of the cottage. Neither the defendant, Martin, nor anyone else was on the island on either of those last mentioned days.

On Tuesday morning, April 16th, Richard Hamel, a friend of the Crowells, visited the island and he then saw the defendant sitting on a log in the yard near his shack. The defendant told him he had had "an awful night," and that he "vomited all night." Hamel told him that his stomach was upset and needed something substantial in it.

He offered to prepare some coffee and eggs for him. The defendant ate the eggs and drank the coffee. Hamel then asked him what in the world had become of Martin. The defendant falsely replied, inconsistent with the previous statement which he made to Crowell, that "I don't know * * *. He borrowed $5.00 from me *and took off in the boat* for Paradise Point." Evidently the defendant was trying to create the impression that Martin had gone alone in the outboard motor boat to Paradise Point, and had fallen overboard and was drowned. The motor boat had been set adrift from the island. It was found floating on the river two or three miles below the island. Mr. Fraser, who lived on Ward Island, discovered the body of the deceased on April 19th, floating on the surface among the tules eight hundred feet or more from the island. On cross-examination of the defendant at the trial, he was asked if he did not make a statement at the hospital on April 20th in which after he was told that they had found the motor boat below the island and had discovered the body on April 19th floating in the river, he immediately replied, "The hell. Jesus Christ. Drowned, huh?" This colloquy occurred in that regard:

"Q. They found his body. A. They did?

"Q. Yes. A. Where?

"Q. Over there by Light 11. A. *The hell. Jesus Christ. Drowned, huh?*

"Q. No. Shot with a shotgun. A. Shot? God! Whew! My God, how did that happen?

"Q. Can't you tell us? A. No. Hell, we were both rumdum, crazy rumdum. I don't know how the hell it happened."

To the succeeding inquiry, "Do you remember that?" the defendant replied, "No, I don't remember."

When Mr. Hamel left the island on Tuesday, April 16th, he took the defendant with him, having persuaded him that he should go to the hospital for treatment. The defendant entered the county hospital on the last mentioned date, where he remained until April 22nd, when he left that institution. He was arrested for the murder that same day.

When the body was discovered, the logchain and two heavy weights were found attached to it with baling wire. The chain and the weights were hanging down beneath the body which was floating in water about three feet in depth. Crowell and others recognized the logchain and door weights, which had been taken from the warehouse on the island, as belonging to him. The officers, Crowell, Hamel and others, then visited the island and made a critical examination. They found defendant's shotgun, and a box of cartridges in his room in the cabin. They also found that the chain and weights were gone from the warehouse. They discovered the point near the pathway where the surface or the soil had been recently removed, and at a little distance therefrom the two-inch fragment of the skull which was picked up was afterward found to exactly fit the aperture in the dead man's skull. They also found the empty cartridges near that pathway, and observed that a piece of canvas had been either cut or torn from the awning hanging from the cottage porch.

Roger Green, a member of the California Criminal Identification and Investigation Division, examined the gun, the cartridges, the shot contained therein and the baling wire. He testified that the small shot which had been extracted from the body of the deceased were exactly the same size, type and make as those contained in the loaded shells found in defendant's cabin. He called them number 7½ chilled or hardened shot, and said that the shells contained 345 shot to the load. He examined the caps in the discharged shells and in the loaded ones and experimented by firing from defendant's gun one of the loaded shells, and testified that the shells found near the pathway were fired from that very gun. The firing pin of the gun had a slight distinguishing mark found in the cap of the empty shell. The firing pin also contacted the cap slightly off center. He also said the piece of baling wire had been recently cut by an ax, a hatchet or some sharp instrument from another piece of the same wire, for it had a fresh, smooth surface at one end. The evidence showed that Crowell had on the island a quantity of similar size and type of wire.

A post mortem examination disclosed the fact that Leland Martin died as a result of the gunshot wounds previously mentioned, and that he had been dead five or six days when the body was recovered.

From the foregoing facts and other relevant evidence which the record contains, there can be no doubt that the defendant deliberately shot and killed the deceased with his single barrel twenty-gauge shotgun, and that he shrewdly planned and carried out the loading of the body with heavy weights and the dumping of the body into the river, for the purpose of concealing his crime. The disposition of the body and the removal of the surface dirt and other evidence of the homicide may have been accomplished the night of April 11th, or the defendant may have completed that job the following day, for no person visited the island on Friday the 12th.

[1-5] We are of the opinion the facts and circumstances of this case warranted the trial court in finding that the defendant was guilty of murder of the first degree. It is, of course, necessary that the facts and circumstances of a homicide case shall disclose substantial proof or reasonable inferences of malicious, deliberate and premeditated killing of the victim, before he may be found guilty of first degree murder. But it is not necessary that there shall be "express evidence of a deliberate purpose to take the life of another. It is sufficient if the facts and circumstances surrounding the commission of the offense reasonably warrant an inference to that effect." The question of the degree of the crime is one exclusively for the determination of the trial judge or jury, and his or its conclusion in that regard will not be disturbed when there is any substantial evidence to support it. People v. Smith, 15 Cal.2d 640, 648, 104 P.2d 510. To support a judgment of murder of the first degree it is not necessary to show personal enmity on the part of the defendant toward deceased. People v. Cornett, 61 Cal.App.2d 98, 106, 141 P.2d 916; People v. Fleming, 218 Cal. 300, 309, 23 P.2d 28; People v. Sainz, 162 Cal. 242, 121 P. 922; 13 Cal.Jur. 591, sec. 11. Upon a trial for murder, the commission of the homicide by the defendant having been established, the burden rests upon the accused person, in the absence of evidence adduced by the prosecution tending to show that the killing was justifiable or excusable, or that it amounts only to manslaughter, to prove the circumstances in mitigation or excuse. Sec. 1105, Penal Code; People v. Spinelli, 14 Cal.2d 137, 142, 92 P.2d 1017; People v. Cornett, supra. In the Spinelli case, supra, quoting with approval from People v. Johnson, 203 Cal. 153, 263 P. 524, it is said [14 Cal.2d 137, 92 P.2d 1019]:

"'The ruthless disposition of the body of the deceased, following the killing, certainly is some evidence as to an abandoned or malignant heart upon the part of the slayer. However this may be, section 1105, Penal Code, provides that: "The commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable". The defendant offered no proof to meet the burden which the law casts upon him, and, as there was no claim of justification or excuse offered for the killing of decedent or pretense that the proof tended to show that the crime committed only amounted to manslaughter, the crime was murder of the first degree.'"

In the present case, while the defendant did positively deny that he killed Martin, it may reasonably be said he claimed that if he did kill him he was excusable for the homicide because he was so intoxicated that he did not know what he was doing, and that he had no recollection whatever of that homicide. We shall discuss that feature of the defense later.

[6] With relation to the elements of deliberation, premeditation and malice, there are proved circumstances in this case which clearly indicate that those elements are adequately supported. In the extrajudicial statements which the defendant made he repeatedly said that they were quarreling about the defendant leaving Martin at Paradise Point and driving away without him. The defendant kept his gun in his cabin. The homicide took place outside that house

near the walk. The defendant had to either follow Martin out of the cabin to the scene of the homicide, or he had to procure the gun and go out there to meet him. The gun was a single barreled shotgun. The deceased was shot twice, once in the stomach and again in the head. Before the second shot was fired the defendant was required to extract the discharged cartridge, and reload the gun. When he left the cabin with his gun, he must have thoughtfully taken the precaution to carry with him additional loaded cartridges. We think those circumstances sufficiently supply the necessary proof of premeditation, deliberation and malice, to support the determination of the trial judge that he was guilty of murder of the first degree.

[7] When it appears that the deceased was deliberately shot twice, or killed with a deadly weapon without sufficient provocation, under circumstances indicating that the act was performed by the defendant with an abandoned and malignant heart, as it does in the present case, malice may be presumed. Sec. 188, Penal Code; People v. Cook, 15 Cal.2d 507, 514, 102 P.2d 752; People v. Larrios, 220 Cal. 236, 252, 30 P. 2d 404; 13 Cal.Jur. 683, sec. 72.

[8] The question of the intoxication of the defendant was competent for the court to consider under all the circumstances of the case in determining the motive or intent with which the homicide was committed, whether he was incapable of premeditating or deliberating the performance of the act, or to understand the nature of his extrajudicial statements, and to ascertain the degree of the crime. Sec. 22, Penal Code; People v. Keyes, 178 Cal. 794, 797, 175 P. 6; People v. Sainz, 162 Cal. 242, 121 P. 922; People v. Allen, 166 Cal. 723, 729, 137 P. 1148; People v. Flores, 15 Cal. App.2d 58, 67, 58 P.2d 1311; People v. Boggs, 12 Cal.2d 27, 37, 82 P.2d 368; People v. Montezuma, 117 Cal.App. 125, 3 P. 2d 370, 4 P.2d 285; 13 Cal.Jur. 622, sec. 31. While there is evidence in the present case of the intoxication of the defendant before and after the commission of the homicide, there is ample proof that he was not so drunk that he was incapable of planning and executing the crime, and of shrewdly disposing of the body. He was seen, on the evening of the homicide, driving his automobile back to the levy from which he crossed to the island. He said that he returned and went to bed in his cabin. He deliberately took the gun and cartridges from his room and went out to kill the deceased. After firing the first shot into the body of his victim, he reloaded the gun and shot him again. He procured and attached the chain and weights to the body and dumped it into the river. He took the canvas from the awning to remove the body. He removed the surface soil which evidently contained the blood and brains of his victim. He set the motor boat afloat and suggested that the deceased was drowned. He made several statements to various persons at different times which indicated that he understood their inquiries perfectly and answered intelligently. That furnishes ample evidence to support the court's determination that he was able to understand the nature of his act, and that he was capable of premeditating, deliberating and executing the crime, and of concealing the body of his victim.

[9, 10] The court did not err in refusing to strike out the evidence of Clarence Crawford, the deputy sheriff, with relation to a voluntary statement made by the defendant on April 22nd, after his discharge from the hospital, and after his arrest, while they were on the way to the county jail. Crawford testified from notes of the conversation which he made immediately after it occurred. The witness said:

"On this particular instance I asked Bernie why he did a thing like that, referring to the date in question in the shooting, and he stated that 'I don't know why I did it. I guess I must have been crazy. * * * We were arguing and I remember Lee [Martin] come at me. I can't remember anything after that.' "

The defendant's attorney moved to strike the statement from the record on the ground that it was merely "an * * * accusatory statement," rendered incompetent under People v. Lapara, 181 Cal. 66, at page 71, 183 P. 545, 547. The motion was properly denied. That statement was not a confession of guilt. But it was an admission that he shot the deceased, and that he remembered "we were arguing."

He did excuse the act by saying, "I guess I must have been crazy." The admission was competent as evidence tending to show who killed the deceased, and that some controversy existed between them before the commission of the homicide. In the Lapara case a similar question was held to be incompetent because the defendant in that case promptly and definitely denied the killing. His answer was, "I did not kill him." The court properly said in that case, "But if he promptly and fully deny the charge, *the accusatory statements, standing alone,* are not in any sense competent evidence of the defendant's guilt." (Italics added.) At the trial of this case the defendant did afterward declare that he did not kill Martin, and he then claimed that he had no recollection whatever of the homicide. Even if the motion to strike out the preceding statement had been granted, it would have been competent to subsequently offer it to impeach the defendant by showing that he previously made that statement which is in conflict with his testimony at the trial. We think the ruling was correct.

[11, 12] Objections to defendant's offer in evidence of hospital records of his case while he was an inmate of that institution on three previous occasions, in February, June and August, 1945, seven months before the homicide, were sustained on the ground that they were incompetent, irrelevant, and too remote. The records showed that he had been treated at the hospital for a liver complaint and dysentery. They were offered as an exception to the rule of hearsay evidence, as proof of his physical inability to commit the homicide or to dispose of the body. The witness, Doctor Carl Meehan, acting superintendent of the hospital, had never examined or treated the patient. He had no personal knowledge of his ailments or physical condition. He had no part in making the hospital records in question. The objections were properly sustained. The evidence of entries in the hospital records was incompetent, irrelevant and too remote. People v. Boggess, 194 Cal. 212, 235, 228 P. 448. The question of the competency, relevancy or admissibility of evidence on the ground of being too remote, is ordinarily subject to the sound discretion of the trial judge. People v. Arrangoiz, 24 Cal. App.2d 116, 118, 74 P.2d 789. Even though a hospital record may be competent under proper circumstances, it may still be irrelevant because it is too remote. We may not say, as a proposition of law, that the court abused its discretion in excluding the said records under the circumstances of this case. It does not appear that the defendant was prejudiced by that ruling.

[13–15] The defendant subsequently offered in evidence the hospital chart of his case upon his last entry in that institution, from April 16th to April 22nd, when he left the hospital, to show that he was "suffering from delirium tremens" during that period of time. That offer was made as proof of his contention that he was incapable of premeditating or committing homicide or of disposing of the body on April 11th, or of making the binding extrajudicial admissions against interest which were testified to at the trial. It was stipulated at the trial that the record contains the entry, "Final diagnosis, delirium tremens," under date of April 16, 1946. That stipulated fact was accepted in evidence. Upon that stipulation the record was excluded. It was not contended the record contained any other entry bearing upon the issue with respect to defendant's ability to commit the homicide or his responsibility for the admissions against interest. We may assume the last mentioned hospital record was admissible and competent evidence, as an exception to the rule with regard to hearsay evidence (Sec. 1953f, C.C.P.; Loper v. Morrison, 23 Cal. 2d 600, 608, 145 P.2d 1; McDowd v. Pig'n Whistle Corp., 26 Cal.2d 696, 700, 160 P. 2d 797; 32 C.J.S., Evidence, § 728, page 633), provided the proper foundation for its reception was established, which is doubtful, but immaterial. Regarding the preliminary foundation which must be proved to entitle hospital records to be admissible in evidence, it is said in 32 C.J.S., § 728, at page 634, that:

"* * * There must be compliance with statutes under which they are sought to be introduced; it must appear that entries were made in the ordinary course of business *by persons whose duty it is to* *make them; they must be made contemporaneously with the facts to which they relate* or within such time thereafter as to be part of the transaction; must refer to matters which the persons making the entries have the duty to record; and *must be duly authenticated.* * * * *They must have been made by a person having knowledge of the facts set forth or one competent to predicate a medical and scientific opinion on the facts.*" (Italics added)

Some of the elements referred to in the preceding quotation, necessary to lay the foundation for the introduction of the last mentioned record, appear to be absent in the present case. It was not authenticated. But, as we have said, that may be immaterial since the essential fact sought to be elicited was stipulated. The defendant was not prejudiced by the court sustaining the objection to the record itself, since it was stipulated that it showed that the condition of the defendant, while an inmate of the hospital from April 16 to April 22, 1946, included the entry that it was diagnosed as "delirium tremens". This case was tried by the judge sitting without a jury, and the facts were all before the court. The court did not err in restricting the cross-examination of Doctor Meehan regarding the defendant's condition while he was an inmate of the hospital on that occasion. He stated that he had not seen the patient and that he had no personal knowledge of his mental or physical condition.

[16] Delirium tremens is accompanied by temporary aberration of the mind from brain disorder caused by protracted and excessive use of alcoholic liquor. It is accompanied by hallucinations, violent actions, feeble pulse, shattered nerves, trembling of the muscles, particularly of the hands, arms and tongue, so that the victim is unable to articulate or talk coherently. In ordinary cases the symptoms abate in from three to six days. 7 Encyclopedia Britannica, 14th Ed., p. 167. The homicide which is involved in this case was committed five days before the defendant went to the hospital. In the meantime several men saw and talked with the defendant and they testified to those conversations. Apparently he was then able to talk rationally and coherently. While each of them said that he appeared to have been drinking, no witness suggested that he was suffering from delirium tremens. Nor do the related conversations indicate that he was so intoxicated that he did not fully understand and intelligently answer questions. In fact the circumstances of the homicide and the manner of disposing of the body strongly indicate careful planning and complete knowledge of the entire transaction on the part of the defendant. It was the province of the judge to determine from all the facts and circumstances, including the conversations and the stipulated entries in the hospital record, whether the defendant was so incapacitated from intoxication or delirium tremens that he was not responsible for his acts, conduct or admissions against interest. Those issues were determined adversely to the defendant. Those conclusions are adequately supported by competent and convincing evidence.

[17-20] The court did not err in permitting the cross-examination of the defendant, to test his recollection of the homicide, and his memory of the extrajudicial statements made by him. He denied killing the deceased, and declared that he did not remember what statements he had previously made regarding the homicide. The defendant's admissions against interest, previously made in two extrajudicial statements taken by a court reporter and transcribed, were competent for impeachment purpose. Portions of those statements were read to the defendant at the trial by the district attorney who conducted the original inquiry. The officer testified that he personally recalled each question and answer and said they were correctly transcribed, and that the defendant so stated. Before reading them in court the foundation required by Section 2052 of the Code of Civil Procedure was first laid by relating the times, places and parties present. The statements were not handed to the defendant to read. The attorney was not asked to do so. It was not contended they were inaccurately read to the witness. It was not necessary to hand the statements to the defendant. They were not signed by him. The witness declared that he did not remember making

any such statements. When a witness testifies that he does not remember his previous statements, it is competent to prove them for the purpose of impeachment. People v. Vatek, 71 Cal.App. 453, 474, 236 P. 163; Ehat v. Scheidt, 17 Cal.App. 430, 436, 120 P. 49; 27 Cal.Jur. 164, sec. 137. It has been said the language of Section 2052 that, "If the statements be in writing, they must be shown to the witness before any question is put to him concerning them," applies only to written statements signed by the witness, and not to unsigned memorandums or statements made by other parties. People v. Talman, 26 Cal.App. 348, 351, 146 P. 1063; People v. Young, 70 Cal. App.2d 28, 35, 160 P.2d 132. The defendant was not prejudiced by failure to hand him the statements from which the officer read.

For the reasons previously assigned, the defendant's motions for dismissal of the action and for a new trial were properly denied.

We are of the opinion there was no miscarriage of justice in this action.

The judgment and the order denying a new trial are affirmed.

ADAMS, P. J., and SCHOTTKY, Justice pro tem., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

WEST KEY NUMBER SYSTEM

79 Cal.App.2d 658

PEOPLE v. CRAVENS.

Cr. 2426.

District Court of Appeal, First District,
Division 2, California.

May 13, 1947.

Rehearing Denied May 28, 1947.

1. Embezzlement 🔑1
False pretenses 🔑1
Larceny 🔑1

The consolidation by statute of the crimes of larceny, embezzlement, and obtaining money or property by false pretenses, into the single crime of grand theft, has not changed the elements of the several offenses. Pen. Code, § 484.

2. Embezzlement 🔑11(1)
False pretenses 🔑12
Larceny 🔑12

In crimes of "larceny" and "embezzlement" the property must be wrongfully taken from the victim without his consent, but the gist of the crime of obtaining money or property by "false pretenses" is that victim transferred title to wrongdoer under influence of false pretenses. Pen. Code, § 484.

See Words and Phrases, Permanent Edition, for all other definitions of "Embezzlement', "False Pretenses" and "Larceny".

3. Embezzlement 🔑10
False pretenses 🔑20
Larceny 🔑13

Where victim opened joint bank account and voluntarily placed title in common to her money in defendant charged with grand theft, and voluntarily placed it in his power to withdraw the funds therefrom as owner, he could not be guilty of "embezzlement" or "larceny", and the theft, if any, must have been the obtaining of money by "false pretenses". Pen. Code, § 484.

4. False pretenses 🔑49(1)

In prosecution for grand theft, on ground that defendant was guilty of obtaining money by false pretenses because he induced victim to deposit money in a joint partnership account from which defendant allegedly drew $3,720 for his own personal use, evidence was insufficient to sustain conviction, where there was no substantial proof of any particular withdrawal by defendant, since defendant may have been guilty only of a series of petty thefts of less than $200. Pen. Code, § 484.

5. False pretenses 🔑7(5)

In prosecution for grand theft on ground that defendant was guilty of obtaining money by false pretenses, evidence that defendant represented that he knew how to manufacture an adhesive bandage which was merchantable, that he had manufactured a similar bandage successfully on previous occasions, and that he had sold his interests in prior businesses for certain sums, was evidence of present or past facts as distinguished from mere promises. Pen. Code, § 484.

6. False pretenses ⚷7(5)

In prosecution for grand theft on ground that defendant is guilty of obtaining money by false pretenses, it is sufficient to prove any single false representation on which the victim relied, and the fact that false promises are likewise made is not important. Pen. Code, § 484.

7. False pretenses ⚷49(3)

In prosecution for grand theft on ground that defendant was guilty of obtaining money by false pretenses, evidence was sufficient to establish that defendant obtained the money by means of false statements and representations. Pen. Code, § 484.

8. False pretenses ⚷7(5)

Where victim, who was induced by defendant's false statements and representations, paid defendant $2,000 for a one-half interest in bandage business, title to the money immediately vested in defendant with victim's consent, and the crime of obtaining money by false pretenses was thereupon completed, even if jury found that defendant had promised to use all or some part of the money in the business. Pen.Code, § 484.

9. False pretenses ⚷49(5)

In prosecution for grand theft on ground that defendant was guilty of obtaining money by false pretenses from one who paid defendant $2,000 for a half interest in bandage business, evidence sustained finding that defendant's false representations of fact were material inducing causes of victim's investment. Pen. Code, § 484.

10. Criminal law ⚷829(3)

In prosecution for grand theft on ground that defendant was guilty of obtaining money by false pretenses, refusal to give defendant's requested instruction that the false pretenses must be something more than a promise relating to a future event or possibility, and that mere puffing of value or exaggeration cannot be made the basis of a verdict of guilty, was not prejudicial error in view of instruction given on same subject. Pen. Code, § 484.

11. False pretenses ⚷52

In prosecution for grand theft on ground that defendant was guilty of obtaining money by false pretenses, defendant's requested instruction that, if jury had a reasonable doubt as to whether money in question was taken or received from complaining witness under claim of right on his part, jury was to resolve doubt in defendant's favor and find him not guilty, was properly refused, since it was erroneous and confusing and would have amounted to a directed verdict for defendant. Pen. Code, § 484.

12. Criminal law ⚷829(3)

In prosecution for grand theft on ground that defendant was guilty of obtaining money by false pretenses, defendant's requested instruction that if complaining witnesses merely made a bad business deal, or believed they had made a bad bargain, and that they would therefore lose their money, defendant was not guilty, was properly refused, where jury was fully instructed on false pretenses and was told that the false pretenses must have been the inducing cause influencing complaining witness to part with title to money. Pen. Code, § 484.

13. Criminal law ⚷1173(2)

In prosecution for grand theft on ground that defendant was guilty of obtaining money by false pretenses, wherein evidence was introduced that, between time victim paid $500 and balance of $1,500 to defendant for interest in business, defendant continued to advertise that same interest for sale, refusal of defendant's requested instruction that defendant was within his rights in so advertising if he feared that victim was not going to complete the contract was not prejudicial error, since jury could have assumed that fact, and since it is not prejudicial error to refuse to instruct on a truism or matter within common knowledge. Penal Code, § 484.

◆

Appeal from Superior Court, City and County of San Francisco; Melvyn I. Cronin, Judge.

William C. Cravens was convicted on two counts of grand theft, and he appeals.

Judgment of conviction on one count affirmed, and judgment on other count reversed, and cause remanded on that count for a new trial.

Nathan C. Coghlan, of San Francisco, for appellant.

Fred N. Howser, Atty. Gen., and Carl W. Wynkoop, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Appellant was convicted by a jury on two counts charging him with grand theft. The two counts related to two separate transactions with two different persons and for clarity will be separately discussed.

The Virginia Reame Transaction.

The second count of the information charges the theft from Mrs. Reame of $3,720 on or about November 11, 1944. The evidence shows that Mrs. Reame first met appellant in San Francisco early in January, 1944. She became acquainted with him through correspondence, having obtained his name and former address from her sister who had gotten them from a "Matrimonial Newspaper" and had had some correspondence with him. On the second meeting appellant told Mrs. Reame that "the first time he looked at me he said, 'this is the girl I want to marry.'" On the third or fourth meeting appellant showed Mrs. Reame a specimen of adhesive gauze and said that he had manufactured it, and that it was a terrible good seller. He told her that he knew everything there was to know about the manufacture of adhesive gauze and that he had started the American Bandage Corporation of Chicago and she understood that he had made $25,000 from that corporation; and he then started the Cra-Tex business in Omaha, Nebraska, manufacturing the same type of bandage and sold his interest in that company for $8,000. The parties rented a building in San Francisco, into a part of which Mrs. Reame moved as her residence and they agreed to go into the business of manufacturing an adhesive gauze bandage as partners, using the remaining portion of the building as their place of business. Mrs. Reame gave appellant smaller sums of money from time to time and on April 4, 1944, she deposited $2,300 in a bank account subject to withdrawal by herself, her son and the appellant. Later additional smaller sums of Mrs. Reame's money were from time to time deposited in this account. Mrs. Reame drew a few checks on this account but the bulk of the money was drawn out by checks signed by appellant. The money was used partly for Mrs. Reame's living expenses and furnishing her living quarters, largely in the purchase of materials for the partnership business and other partnership expenses, and to an amount and in a manner not definitely established for appellant's personal use. Appellant did not succeed in manufacturing a satisfactory gauze bandage and made very few sales in such small amounts that by the end of 1944 the partnership funds were exhausted. Mrs. Reame testified that she invested her money in the partnership in reliance upon appellant's statement that he knew the correct way to manufacture an adhesive bandage.

The witness Stone testified that he, one Burket and appellant organized the American Bandage Co. in Chicago in 1936; that appellant represented to them that he had a secret formula for manufacturing an adhesive bandage and could manufacture a merchantable bandage; that appellant put no money in the business and in three months time did not succeed in producing a merchantable bandage; and that, his stock having been placed in escrow to be delivered to him only upon his manufacturing a merchantable adhesive bandage, they discharged him at the end of three months and forfeited his stock in the company. He further testified that the American Bandage Co. afterwards manufactured a merchantable adhesive bandage but not according to appellant's formula, and that following appellant's formula it would be impossible to manufacture a merchantable bandage. On cross-examination of appellant evidence was adduced which would support the inference that the Cra-Tex Co., afterwards formed in Omaha to manufacture an adhesive bandage following appellant's formula, had been a financial failure.

[1] Since the amendment of section 484 of the Penal Code in 1927 the former crimes of larceny, embezzlement and obtaining money or property by false pretenses have been consolidated into the single crime of grand theft. People v. Myers, 206 Cal. 480, 275 P. 219; People v. Selk, 46 Cal.App.2d 140, 115 P.2d 607; 10 Cal. Jur. 10 Yr. Supp., Theft, sec. 1, p. 617. However the elements of the several offenses have not been thereby changed. People v. Myers, supra, 206 Cal. 480, 275 P. 219; People v. Selk, supra, 46 Cal.App.2d 140, 115 P.2d 607; 10 Cal.Jur. 10 Yr. Supp., Theft, sec. 2, p. 618.

[2] In the crimes of larceny and embezzlement the property must be wrongfully taken from the victim without his consent to the transfer of title to the wrongdoer (15 Cal.Jur., Larceny, sec. 8, p. 899; 10 Cal.Jur., Embezzlement, sec. 14, p. 251), whereas the gist of the crime of obtaining money or property by false pretenses is that the victim transferred the title to the property to the wrongdoer under the influence of the false pretenses (12 Cal. Jur., False Pretenses, sec. 10, p. 457, sec. 13, pp. 460, 461).

[3] Since by opening the joint bank account Mrs. Reame voluntarily placed a title in common to her money in appellant and voluntarily placed it in his power to withdraw the funds therefrom as owner he could not be guilty of embezzlement or larceny. People v. Foss, 7 Cal.2d 669, 670, 62 P.2d 372; People v. Hotz, 85 Cal.App. 450, 452, 259 P. 506; cases collected in the notes in 17 A.L.R. 982 and 31 L.R.A.,N.S., 822; 29 C.J.S, Embezzlement, § 16, p. 693; 36 C.J., Larceny, sec. 153d, p. 782. The theft, if one was committed, must therefore have been obtaining money from Mrs. Reame by false pretenses.

In the few cases which we have found on the precise subject it has been held that the procuring of money to be contributed to the capital of a partnership of which the victim is a member cannot constitute the crime of obtaining money by false pretenses because the victim as partner retains an interest in the fund. State v. Smalley, Mo.Sup., 252 S.W. 443; State v. Woerth, Mo.Sup., 256 S.W. 456; Reg. v. Watson, 7 Cox Cr.Cas. 364. We are not satisfied that proof that the wrongdoer afterwards converted the partnership property to his own use while the victim was still subject to the influence of his false pretenses would not constitute the crime of obtaining money or property by false pretenses. That it would is suggested by the court in State v. Smalley, supra, wherein the court in reversing the judgment of conviction remanded the case for a new trial on the theory that the state might prove that "the partnership was used as an artifice or a part of a scheme to defraud and not as a going concern acting in good faith." 252 S.W. at pages 445, 446. We are moved to this conclusion by the consideration that any confidence man could safely operate through the medium of forming a partnership with his victim and then appropriating the assets of the partnership were the rule otherwise. That the wrongdoer gets the property in two steps rather than one where a partnership with his victim is formed should not absolve him of the crime of obtaining money or property by false pretenses where the false pretenses continue to operate up to the moment of his wrongful appropriation of the partnership assets contributed by his victim.

[4] The difficulty of the prosecution's case on this count lies in the fact that the crime (or crimes), if any, was not complete until the withdrawal and appropriation of the money by appellant. So long as the money remained in the bank account it was subject to Mrs. Reame's power of withdrawal and she was deprived of neither title nor possession. As to those amounts withdrawn from the account for payment of partnership obligations she still retained her partnership interest in the proceeds. No completed crime could occur until appellant withdrew money from the account and appropriated it to his own use. No substantial proof appears in the record of any particular withdrawal and appropriation by appellant. It is not clear that, if guilty of any crime with regard to Mrs. Reame's money, appellant may not have been guilty only of a series of petty thefts, assuming that no single withdrawal and appropriation amounted to $200. People v.

Stanford, 16 Cal.2d 247, 251, 105 P.2d 969; People v. Rabe, 202 Cal. 409, 413, 261 P. 303; People v. Miles, 37 Cal.App.2d 373, 378, 379, 99 P.2d 551. The case was tried on the theory that a single crime was committed and there was no clear proof of any single identified withdrawal and appropriation. For this reason we are convinced that the judgment of conviction on this count (Count 2 of the information) must be reversed.

[5] In the event of a new trial on this count we notice appellant's claim that all of the representations proved were promissory. It may be conceded that a false promise cannot be the basis of a conviction of the crime of false pretenses and that the false representation must be of a present or past fact. People v. Jackson, 24 Cal. App.2d 182, 204, 74 P.2d 1085; People v. Downing, 14 Cal.App.2d 392, 395, 58 P.2d 657; People v. Reese, 136 Cal.App. 657, 663 et seq., 29 P.2d 450; People v. Walker, 76 Cal.App. 192, 205, 244 P. 94. The theory has been advanced in two recent decisions that, as in civil actions for fraud, the making of a promise with no intention of performing it or no bona fide belief in its possibility of performance, is a false representation of a present fact, i. e. of the state of the promisor's mind. People v. Ames, 61 Cal.App.2d 522, 531, 532, 143 P.2d 92; People v. Gordon, 71 Cal.App.2d 606, 624, 163 P.2d 110. We need not rely on this latter doctrine in the case before us for the reason that the representations by appellant that he knew how to manufacture an adhesive bandage which was merchantable, that he had manufactured a similar bandage successfully for the American Bandage Co., and that he had sold his interest in that company for $25,000, that he had successfully operated the Cra-Tex Co. in Omaha and had sold his interest in that company for $8,000, were all representations of present or past facts which the jury could have found negatived by the proof.

[6] It is sufficient to prove any single false representation on which the victim relied (12 Cal.Jur., False Pretenses, sec. 19, pp. 469, 470; People v. White, 85 Cal. App. 241, 247, 259 P. 76; People v. Fraser, 81 Cal.App. 281, 253 P. 340), and the fact that false promises were likewise made is not important if there were also false representations of present or past fact which materially contributed to the victim's parting with his property or money. People v. Bowman, 24 Cal.App. 781, 794, 142 P. 495; People v. Ames, supra, 61 Cal.App.2d 522, 532, 143 P.2d 92; People v. Gordon, supra, 71 Cal.App.2d 606, 625, 163 P.2d 110.

The John N. Blair Transaction.

The first count of the information charges the theft from John N. Blair of $2,000 on or about January 13, 1945. By the end of 1944 Mrs. Reame's money was practically exhausted. Appellant had assembled some crude machinery constructed of second-hand material for the manufacture of an adhesive bandage but had not been able to make it work satisfactorily. He had had some correspondence with the United States Army and had submitted samples of adhesive gauze of his manufacture. He received a letter from a contracting officer of the army dated August 2, 1944, advising him that the samples submitted were not satisfactory and specifically:

"a. Edges of some bandages are ragged. b. On some of the bandages there are large lumps of pitch-like material adhering to the gauze. c. The individual sections which go to make up the rolls in some instances became detached during unrolling of the bandages. d. Adhesive mass has not been uniformly applied. It is much heavier on some areas than others. Where the adhesive mass is light the adhesive quality appears poor and not equal to that noted on samples of this item tested recently which were manufactured by Nu-Hesive, Inc. (the equal of which is required by specifications). e. Measures approximately 2½" wide. Workmanship should be first class; there should be no lumps present as shown in 'b' above; the sections of the bandage should be neatly attached at the ends by means of the self-adherent quality of the bandage itself; adhesive mass should be uniformly applied; bandage should measure the exact required width. In view of the above, this office does not feel justified to allow you to submit any bids on the furnishing of this type of bandage. If you find that you can improve your bandage to meet the requirements, this office will be pleased to examine such improved bandages."

Mrs. Reame was dissatisfied and was insisting that appellant either produce a merchantable bandage or give her back her money. Against this background appellant ran a business opportunity advertisement in a San Francisco newspaper in January of 1945 which read "something like 'the greatest opportunity on Pacific Coast for a very little money invested.'" Mr. Blair answered this advertisement and met appellant at his place of business on January 12, 1945. At that time appellant told Blair that his business was "medical supply of bandage * * * the kind that nobody else in this Pacific Coast could make, in fact nobody in this country could make but him * * * something like the bandage he created back East, called the American Bandage Corporation." At that time appellant told Blair that it would take $2,000 "to put it over."

On January 13 Blair returned and appellant showed him the chemicals that he was using and represented that he was "the only person that knew how to manufacture that chemical together for the bandages." He further told Blair that he knew every detail of the manufacture of this type of bandage and how to make it; that he had orders, one order for $5,000 and one for $2,500, just as quick as he could get it turned out. He told Blair about an army contract which he hoped to get and also told him that nobody else owned an interest in the business. On the first or second meeting appellant showed Blair a small roll of bandage and told Blair that he had made it. He said: "This is the kind of bandage that I am going to make—that we are going to make and supply to the Army, as soon as we get started." He particularly called Blair's attention to the fact that the gauze was cut on the bias. The sample shown Blair was exactly the same as a roll of bandage that Blair later bought in a drugstore and exhibited at the trial, manufactured by Johnson & Johnson. Blair never saw any gauze of that type manufactured in appellant's place of business, "it couldn't be done."

Blair was shown the crude machinery assembled by appellant. He knew that it was worthless but he is a machinist and he didn't worry about that. He told appellant that he could fix the machinery. What Blair was interested in was appellant's ability to make the bandage. On January 13, 1945, Blair paid appellant $500 and received a bill of sale requiring him to pay $1,500 more on or before March 15, 1945. Blair was going to a hospital and after his return he paid appellant the $1,500 by a check which he had received from a brother in Idaho. Blair made an effort to construct new machinery but every time he did so it would be torn down and appellant would say that he had changed the idea. "I just had an idea about a different way of making it." This and appellant's demands for more money discouraged Blair and after a short time he quit the business.

[7] That many of the representations made to Blair were not promissory, but of present or past fact, is clear. We single out the following: The fact that appellant was making or knew how to make a type of bandage that nobody else knew how to make, something like the bandage he created back east called the American Bandage Corporation. That these statements were false the jury could find from the evidence that appellant had not been able to produce a successful bandage for American Bandage Co., and the further fact that many merchantable adhesive gauze bandages were already on the market while appellant himself had not succeeded in manufacturing one of merchantable character. The representation that he was the only person who knew how to manufacture the chemical for the bandage. This was contradicted by the evidence that the chemicals could be purchased ready-prepared from certain manufacturers and that appellant purchased them in that fashion. The exhibition to Blair of a roll of bandage cut on the bias and appellant's statement that he had made it. The evidence shows that the army required its guaze to be cut on the bias and that appellant had made many attempts to cut the guaze on the bias and had not succeeded.

[8] Since Blair paid his $2,000 for a one-half interest in the business the title

to the money immediately vested in appellant with Blair's consent and the crime of obtaining money by false pretenses was thereupon completed. This would be so even if the jury found that appellant had promised to use all or some part of this money in the business. Commonwealth v. Brown, 167 Mass. 144, 45 N.E. 1.

[9] The jury could properly find that the false representations of fact were material inducing causes of Blair's investment. Blair testified that appellant "had a way of talking that he could make me believe anything." "I was interested in the gauze that he could make for the Army" and for the general market. The combination of false representations of fact with promises based thereon is a common form of deception, the purpose and effect of the false statements of fact being to lend credibility to the promises. We have cited cases above to the effect that such combination is immaterial if the false representations of fact are material inducements to the victim's parting with his money or property.

Appellant proposed the following instruction which the court refused to give:

"You are instructed that such a false pretense as is involved in a case where it is claimed that property or money was obtained by false pretenses, must be something more than a promise relating to a future event or possibility.

"The mere puffing of the value of what one may have to sell or an exaggeration as to what one may be able to do with a given article, or even a promise to do certain things, however impossible, is not a false pretense in contemplation of law, and cannot be made the basis for a verdict of guilty in such a case."

The court did give the following instructions:

"The pretense must be concerning a past or present fact. Mere promises, trade 'puffing,' matters of opinion or prediction are not sufficient."

"You are instructed, if it be claimed that this defendant was guilty on either count of the information of perpetrating a fraud, it is the law by which you are to be guided in this connection that a representation as to what property will be worth at a future date is a mere opinion which does not constitute, in any case, a basis for complaint of fraud."

"You are instructed that if you have a reasonable doubt as to whether the defendant in this case intentionally misrepresented anything relating to the past in connection with the business of making medicated gauze bandages, or intentionally deceived the complaining witnesses as to the present status of the said business, if you have a reasonable doubt as to those questions, you must find him not guilty."

[10] From these instructions the jury must have understood that they could not find the appellant guilty of obtaining money by false pretenses unless they found that he had made one or more false representations of present or past fact. No prejudice appears from the failure to give the specific instruction proposed by appellant.

[11] Appellant's proposed instruction "that if you have a reasonable doubt as to whether the sums of money in question were taken or received from the complaining witnesses under a claim or right on his part, you are to resolve the doubt in the defendant's favor, and, accordingly, find him not guilty" was properly refused. It was erroneous and confusing. It would have amounted to directing a verdict for defendant since there was no doubt that he received the money under *a claim* of right. The very question presented to the jury was whether his claim of right was honest or based on false pretenses.

[12] The refusal of the following proposed instruction was not error:

"You are instructed that if after calmly reviewing the evidence you find that you have a reasonable doubt as to whether or not the complaining witnesses in the transactions which occurred between them and the defendant merely made a bad business deal, or believed that they had made a bad bargain, and that they believed they would for that reason lose their money, you cannot find a verdict of guilty under either count in the information against this defendant."

The jury was fully instructed on false pretenses and that they could only bring in a verdict of guilty based on false pretenses if they found that false pretenses were made by the defendant, with intent to defraud, and that the false pretenses must be the inducing cause influencing the complaining witness to part with title to his money. Under these instructions the jury could not have convicted if they had a reasonable doubt whether the complaining witness *merely* made a bad business deal.

[13] Evidence was introduced that between the time that Blair paid the first $500 and the balance of $1,500 appellant continued to advertise a one-half interest in his business for sale. Appellant explained that he did this in the belief that Blair might not pay the balance and only with the intention of selling to some other person who might become interested if Blair withdrew from the transaction and received his $500 back. The court refused to give a proposed instruction that "defendant was entirely within his rights, if he believed or feared that Blair did not intend to complete his contract, but that he would abandon it, in calling to the attention of the public, by advertisement in the newspapers, the fact that he desired to sell a one-half interest in his business." The jury must be assumed to be composed of persons of ordinary intelligence and to have known, without instruction, that if the appellant advertised in good faith only for the purpose of hedging against Blair's possible withdrawal from the transaction he was acting within his rights. It is not prejudicial error to refuse to instruct on a truism or matter within the common knowledge of any person of ordinary intelligence. People v. Roche, 68 Cal.App.2d 665, 668, 157 P.2d 440; People v. Leddy, 95 Cal.App. 659, 680, 273 P. 110; People v. Edwards, 72 Cal.App. 102, 121, 236 P. 944; People v. Scott, 24 Cal.App. 440, 449, 141 P. 945; 8 Cal.Jur. 631.

The judgment of conviction on count one is affirmed. The judgment on count two is reversed and the cause remanded on that count for a new trial.

NOURSE, P. J., and GOODELL, J. concur.

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79 Cal.App.2d 619

HUNT v. UNITED ARTISTS STUDIO, Inc., et al.

Civ. 15659.

District Court of Appeal, Second District, Division 2, California.

May 12, 1947.

1. Dismissal and nonsuit ⇨45, 60(1)

Statute providing for dismissal of action unless action is brought to trial within five years after plaintiff filed action except where parties have stipulated in writing that time may be extended, etc., is mandatory and leaves but slight latitude for the exercise of discretion. Code Civ.Proc. § 583.

2. Dismissal and nonsuit ⇨45
Frauds, statute of ⇨121
Limitation of actions ⇨5(1)

Statutes enacted for purpose of limiting time within which action may be commenced, of limiting period actions may pend without trial, and requiring certain kinds of contracts to be in writing, may not be enlarged or restricted, except where the party who invokes them has been guilty of such conduct as would cause injustice to his adversary should an order of dismissal be granted. Code Civ.Proc. § 583.

3. Stipulations ⇨14(11)

Stipulation authorizing a continuance of the trial of action to such time as "suits the court" was exhausted by order fixing day of trial, and stipulation could not supplement subsequent oral agreements or consents to further continuances so as to avoid mandatory effect of statute limiting the time action may pend without a trial. Code Civ. Proc. § 583.

4. Stipulations ⇨14(11)

One stipulation extending statutory period action may pend without trial does not operate as a waiver for all future time. Code Civ.Proc. § 583.

5. Stipulations ⇨14(11)

Acts of defendant in orally acquiescing in continuances and settings of action for trial did not have effect of a written stipulation extending in express terms the time of trial to a date beyond statutory five-year period. Code Civ.Proc. § 583.

6. Dismissal and nonsuit 🔑60(3)

Neither absence nor death of defendant could interrupt running of five-year period of statute limiting time action may pend without trial. Code Civ.Proc. § 583.

7. Dismissal and nonsuit 🔑71

Where plaintiff opposed defendant's motion to dismiss action because it was not brought to trial within statutory five-year period on ground of defendant's absence from state, record did not establish defendant's absence from state within the five-year period. Code Civ.Proc. § 583.

8. Dismissal and nonsuit 🔑60(3)

Where case had been set for trial on May 9, 1945, at which time case had been filed exactly six years, but case was continued to November 21 and plaintiff's attorney was suspended in July, 1945, and when the November day arrived her new counsel's substitution was filed and case was stricken from calendar, the suspension of plaintiff's original attorney did not render it futile or impracticable to bring case to trial prior to expiration of statutory five-year period and dismissal of action could not be denied because of suspension of plaintiff's attorney. Code Civ.Proc. § 583.

9. Dismissal and nonsuit 🔑60(3)

Dismissal of cause under statute limiting period action may pend without trial is not to be denied because plaintiff's attorney is deceased or suspended. Code Civ.Proc. § 583.

10. Attorney and client 🔑75(1)
Dismissal and nonsuit 🔑60(3)

The lapse of five-year period under statute limiting time action may pend without trial is not a "proceeding" within statute regarding substitution of new counsel on death or suspension of original counsel. Code Civ.Proc. §§ 286, 583.

See Words and Phrases, Permanent Edition, for all other definitions of "Proceeding".

11. Dismissal and nonsuit 🔑60(6)
Stipulations 🔑6

Defendant's notice of motion that when action came on for trial defendant would move for trial without jury was designed to invoke arbitration of court on matter of dispensing with a jury concerning which parties were in disagreement, and, where plaintiff failed to agree in writing to defendant's wishes, there was no stipulation to extend the statutory period an action may pend without trial. Code Civ.Proc. § 583.

12. Dismissal and nonsuit 🔑60(1)

The appearances of defendant's counsel at times notice for setting of case beyond expiration of five years fixed by statute limiting period an action may pend without trial did not forfeit defendant's right to a dismissal for plaintiff's failure to bring action to trial within the statutory period. Code Civ.Proc. § 583.

13. Dismissal and nonsuit 🔑60(1)

Motion of defendant for dismissal of action for plaintiff's failure to bring action to trial within statutory five-year period was not addressed to discretion of court, and, in absence of a written stipulation or its equivalent, court was powerless to deny motion. Code Civ.Proc. § 583.

14. Dismissal and nonsuit 🔑81(6)

Motion to vacate order dismissing action for plaintiff's failure to bring action to trial within statutory period was supererogatory, since entire issue was determined by court's order dismissing action. Code Civ.Proc. § 583.

15. Appeal and error 🔑113(4)

An appeal does not lie from an order denying motion to vacate order dismissing action for plaintiff's failure to bring action to trial within statutory period. Code Civ. Proc. § 583.

16. Dismissal and nonsuit 🔑81(6)

Trial court having once made order dismissing action for plaintiff's failure to bring action to trial within statutory period had no power to vacate or modify order for mere judicial error. Code Civ.Proc. §§ 473, 583.

◆

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by Elsie Hunt against United Artists Studio, Inc., and others for damages or account of alleged plagiarism. From adverse orders, plaintiff appeals.

Affirmed.

P. E. Cavaney, of Los Angeles, for appellant.

Mitchell, Silberberg & Knupp and Leonard A. Kaufman, all of Los Angeles, for respondents.

MOORE, Presiding Justice.

The question for decision is whether the trial court abused its discretion in dismissing the action pursuant to section 583, Code of Civil Procedure,* after its pendency for six years and nine months by reason of settings and continuances of the cause with the respondent's consent, both before and after the expiration of the five-year period, and finally in permitting the case to go off calendar.

Appellant filed her action for damages on account of alleged plagiarism May 10, 1939. Respondent filed his notice of motion for an order dismissing the action January 29, 1946. The order of dismissal was entered 25 days later. The chronology of filings and orders shows 63 in number, 42 of which bear date prior to the filing of the answer two and a half years after the suit had been commenced. Of those 42 eight were stipulations. After the action was finally at issue its trial was set for August 17, 1944. Thereafter it was successively continued to January 3, March 21, April 4, May 9, and finally to November 21, 1945. On the latter date the case went off calendar and appellant's present counsel was substituted for Attorney Taylor.

[1, 2] The sole basis of the appeal is that the participations of respondent in the setting for and continuances of the trial are tantamount to a stipulation to extend the five-year term. Such contention is not supported in law. The mandatory provision of section 583 leaves but slight latitude for the exercise of discretion. Statutes enacted for the purpose of limiting the time within which actions may be commenced, of limiting the period actions may pend without a trial, and of requiring certain kinds of contracts to be in writing are laws designed to maintain the repose of society and the tranquility of the state. They bespeak the attitude of the sovereign power and may not be enlarged or restricted except where the party who invokes them has been guilty of such conduct as would cause injustice to this adversary should an order of dismissal be granted. Many situations are reported in each of which estoppel was vainly pleaded by the plaintiff against the motion for a dismissal where the parties had stipulated for a trial date after the five-year period. Smith v. Bear Valley, etc. Co., 26 Cal.2d 590, 160 P.2d 1; Miller & Lux v. Superior Court, 192 Cal. 333, 219 P. 1006; Larkin v. Superior Court, 171 Cal. 719, 154 P. 841, Ann.Cas.1917D, 670; City of Los Angeles v. Superior Court, 185 Cal. 405, 197 P. 79; Sedarovich v. Paul, 16 Cal.App.2d 452, 454, 60 P.2d 871; Rosenfelt v. Scholtz, 17 Cal.App.2d 443, 444, 62 P.2d 381. In those cases the stipulation did not effect a waiver of the defendants to a dismissal, but on the contrary it was held that unless after the five-year period has expired the parties stipulate in writing for a further extension of the period it is mandatory upon the court to dismiss the action, after due notice to the plaintiff. Smith v. Bear Valley etc. Co., supra.

[3-5] The only stipulation filed for a continuance of the trial of the present action was that filed on August 17, 1944.

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* "Dismissal of actions * * * Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have stipulated in writing that the time may be extended, and except where it be shown that the defendant has been absent from the State or concealed therein and his whereabouts unknown to plaintiff and not discoverable to said plaintiff upon due diligence, in which event said period of absence or concealment shall not be a part of said five-year period. When, however, such defendant has, or has had, an attorney of record for a sufficient time to enable the action to have been tried if the plaintiff had acted with due diligence, such period of absence or concealment shall be a part of said five-year period. * * *"

That document authorized a continuance to "such time as suits the court." The order fixing January 3, 1945, as the day of trial exhausted the force and function of that stipulation. Consequently such stipulation may not supplement subsequent oral agreements or consents to further continuances so as to avoid the mandatory effect of the statute. Mercantile Investment Company v. Superior Court, 218 Cal. 770, 773, 25 P.2d 12. Nor does one stipulation extending the statutory period operate as a waiver for all future time. Miller & Lux, Inc., v. Superior Court, supra, 192 Cal. at page 337, 219 P. 1006. Subsequent to such written stipulation there were four other continuances within the following 15 months prior to November 21, 1945, when the case was dropped from the calendar. But neither one nor all of the acts of respondent in orally acquiescing in such settings for trial had the effect of a written stipulation extending in express terms the time of trial to a date beyond the five-year period. The only means whereby the defendant is bound by a postponement of the date of trial to a time beyond the statutory period is by his written stipulation expressly extending the time beyond such period or by his express waiver by writing or in open court of his right to a dismissal under section 583, Code Civil Procedure. Inasmuch as there was no stipulation extant on January 29, 1946, granting appellant further time to toy with her lawsuit and the court, respondent was strictly within his rights to move for a dismissal.

[6, 7] Appellant asserts that it was impracticable to bring her action to trial prior to the expiration of the five-year period for two reasons, namely, (1) the absence of respondent from the state and (2) she was without counsel, he having been suspended. The statute makes no provision for the denial of the motion on either account. But disposing of the two grounds in their order, respondent's absence from the state was never established by appellant. The only reference in any document to his absence is the declaration in his counsel's affidavit filed March 20, 1945, in support of his motion for a non-jury trial that respondent was then in London for an indefinite period. This was ten months prior to the filing of his motion to dismiss. But if he had been in Europe even in January, 1946, it would have had no effect upon the trial. The court had already on November 21, 1945, granted a non-jury trial primarily because of the long delays in bringing the case to trial and of the necessity for respondent to give his deposition so that his presence would not be necessary to a just determination of the action. If he was absent it was after the five-year period and his deposition had been filed, rendering his presence unnecessary. Furthermore, neither his absence nor even his death could interrupt the running of the five-year period. Smith v. Bear Valley, supra, 26 Cal.2d at page 602, 160 P.2d 1. In support of her argument appellant cites the following authorities: California Employment Stabilization Commission v. Guernewood Park Resort & Tavern et al., 70 Cal.App.2d 245, 160 P.2d 581; Ojeda v. Municipal Court, 73 Cal.App.2d 226, 166 P.2d 49; Carmichael v. Superior Court, 55 Cal.App.2d 406, 130 P.2d 725; Christin v. Superior Court, 9 Cal.2d 526, 71 P.2d 205, 112 A.L.R. 1153; Pacific Greyhound Lines v. Superior Court, 28 Cal.2d 61, 168 P.2d 665. They do not support her contention. The California Employment Stabilization Commission case is not applicable, the motion having been filed before the five-year period. In Ojeda v. Municipal Court the motion was denied because the defendant had been absent from the state for most of the five years. In the Carmichael case the defendants had not been served with summons. In the Christin case it was not possible to bring the action to trial while the order changing venue was on appeal. In Pacific Greyhound v. Superior Court the plaintiff in the original action was entitled to a stay of proceedings under the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A.Appendix, § 501 et seq.

It is thus seen that not one of the authorities cited applied to a situation where the defendant had been served more than five years prior to his departure from California and had an attorney of record at all times. The last amendment (1945) to the statute provides that the period of defendant's absence shall be a part of the five-year period when he has had an attorney of record "for sufficient time to enable the action to have been tried if the plaintiff had acted with diligence."

[8-10] The suspension of appellant's attorney did not render it "futile or impracticable" to bring the case to trial prior to the expiration of the five-year period. That attorney was suspended in July, 1945. The case had been set for trial on May 9 of that year. At that time the case had been filed exactly six years. The attorney had not been suspended on the latter date when the cause was continued to November 21, another delay of six months and 12 days. When the November day arrived her new counsel's substitution was filed and the case was stricken from the calendar. From the record nothing indicates that the suspension of original counsel interfered with the prosecution of the action. It occurred after the case had been pending over six years, and during the suspension appellant deposited jury fees with the clerk. Also, during such suspension respondent did not require appellant to appoint other counsel, as he might have done (Code Civil Proc., sec. 286), but waited over two months after Mr. Cavaney had been substituted before serving notice of motion for dismissal. Dismissal of a cause under section 583 is not to be denied because the plaintiff's attorney is deceased or suspended. The lapse of the five-year period is not a "proceeding" contemplated by section 286, supra. Larkin v. Superior Court, 171 Cal. 719, 154 P. 841, Ann.Cas.1917D, 670.

[11] There is no stipulation for extending the five-year period in defendant's notice of motion that when the "action comes on for trial towit on the 4th day of April, 1945," defendant would move for trial without jury. Such notice contained no agreement for extension of the five years nor is it even an offer to stipulate. Obviously it was designed to invoke the arbitration of the court upon the matter of dispensing with a jury concerning which the parties were in disagreement. Appellant having failed to agree in writing to respondent's wishes, there was no stipulation to extend the statutory period. Miller & Lux v. Superior Court, 192 Cal. 333, 340, 219 P. 1006. The notice contained nothing to indicate respondent's consent to extend the five-year period. He was signifying his intention to move the court for an order bearing upon the conduct of future proceedings. Had there been a stipulation, presumptively such motion would not have been made.

[12] Appellant contends that respondent's conduct and actions constituted a waiver, and argues that the court impliedly found such to be true by its orders setting the trial dates beyond the five-year period. The appearances of respondent's counsel at the times noticed for the setting of the case beyond the expiration of the five years did not operate to forfeit respondent's right to a dismissal for appellant's failure to bring the cause to trial within the statutory period. Mercantile Investment Company v. Superior Court, supra; Miller & Lux v. Superior Court, supra; City of Los Angeles v. Superior Court of Tuolumne County, 185 Cal. 405, 409, 197 P. 79. In Ravn v. Planz, 37 Cal.App. 735, 174 P. 690, the trial had been continued to a day beyond the statutory period on the motion of defendant and without plaintiff's consent. However, when the plaintiff appeared with his witnesses on the date fixed for the trial he discovered that it was mandatory upon the court to yield to defendant's motion for a dismissal because five years had passed since the *filing of the answer,* as the statute then provided. Such dismissal would have been avoided had the court on the day of the continuance sworn a witness and thereby commenced the trial.

Appellant's authorities cited in support of her claim that the acts and conduct of respondent constituted a waiver of his rights under section 583 are Larkin v. Superior Court, 171 Cal. 719, 154 P. 841, Ann.Cas.1917D, 670; Koehler v. Peckham, 11 Cal.App.2d 481, 54 P.2d 500; Rio Vista Mining Company v. Superior Court, 187 Cal. 1, 200 P. 616; Govea v. Superior Court, 26 Cal.App.2d 27, 78 P.2d 433; Bayle-Lacoste & Company v. Superior Court, 46 Cal.App. 2d 636, 116 P.2d 458; Christin v. Superior Court, 9 Cal.2d 526, 71 P.2d 205, 112 A.L.R. 1153; First National Bank of San Diego v. Nason, 115 Cal. 626, 47 P. 595; California Employment Stabilization Commis-

sion v. Guernewood Park Resort & Tavern et al., 70 Cal.App.2d 245, 160 P.2d 581. A scrutiny of such authorities reveals no such holding. In the Larkin case the superior court was ordered to dismiss the action notwithstanding continuances and death of the former administrator. In the Rio Vista and Koehler cases continuances were by written stipulation to days beyond the five-year period. The Govea decision held that a stipulation in open court is tantamount to the filing of a written stipulation as contemplated by section 583. Bayle-Lacoste v. Superior Court deals with a party who had not been served with summons but who after five years filed his answer and cross action whereby he waived objection to the jurisdiction and to the right of dismissal. First National Bank v. Nason and California, etc., Commission v. Guernewood both appealed to the court's discretion. In Smith v. Bear Valley the parties had extended the period by written stipulation. On the contrary, the law is that unless a stipulation is on file for an extension beyond the expiration of the five years the action must be dismissed. Smith v. Bear Valley, supra.

[13] It is thus demonstrated that the motion of respondent was not addressed to the discretion of the court, and that in the absence of a written stipulation or its equivalent the court was powerless to deny the motion.

[14-16] Finally, appellant complains that the court refused to vacate its order of dismissal of the action upon appellant's motion, and has appealed from the order refusing to vacate the order of dismissal. There are two answers to such appeal: (1) It is supererogatory since the entire issue was determined by the court's order dismissing the action, and the disposition of the appeal therefrom is the primary purpose of this opinion; (2) appeal does not lie from such an order. Driscoll v. Shipp, 21 Cal.App.2d 369, 370, 69 P.2d 429; 2 Cal.Jur. 164. If a new proceeding could be initiated to settle the very same issues as those resolved by a prior order the time for appeal would never end. The trial court having once made its decision has no power to vacate or modify it for mere judicial error. Stevens v. Superior Court, 7 Cal.2d 110, 59 P.2d 988. It has no jurisdiction to vacate an order of dismissal except upon the grounds specified in section 473, Code of Civil Procedure.

Orders affirmed.

McCOMB and WILSON, JJ., concur.

WEST KEY NUMBER SYSTEM

79 Cal.App.2d Supp. 906

PEOPLE v. PERRY.

No. Cr. A 2249.

Appellate Department, Superior Court,
County of Los Angeles, California.
May 7, 1947.

1. Obstructing justice 🔑14

In prosecution for obstructing public officers in discharge of their duty, prosecution had burden of proving all elements of offense including the one that officers were then discharging or attempting to discharge some official duty. Pen.Code, § 148.

2. Arrest 🔑63(1)

Police officers of city of Los Angeles were "peace officers" within statute providing for arrest by peace officers without a warrant under certain conditions. Pen. Code, § 7, subd. 8; §§ 817, 836.

See Words and Phrases, Permanent Edition, for all other definitions of "Peace Officer".

3. Arrest 🔑63(3)

An officer may make arrest for misdemeanor without a warrant only if offense is committed or attempted in officer's presence. Pen.Code, § 836.

4. Arrest 🔑63(4)

Unless the rule is modified by statute, an officer cannot arrest without a warrant for misdemeanor not committed in his presence and view, and mere belief or suspicion that a misdemeanor is being or has been committed is insufficient to warrant arrest without warrant, nor may arrest without warrant be made on belief founded on information received from third person that a misdemeanor is being committed.

5. Obstructing justice ⚷14

In prosecution for obstructing public officers in discharge of their duty in arresting a member of a picket line for alleged disturbance of the peace, no presumption was available to supply lack of proof that arrest of picket was lawful. Pen.Code, §§ 148, 415.

6. Obstructing justice ⚷7

If arrest is unlawful, the person being arrested or others acting in his behalf may resist the arrest, using no more than reasonable force for that purpose. Pen.Code, §§ 148, 236, 692–694.

7. Obstructing justice ⚷16

Evidence did not sustain conviction of obstructing police officers in discharge of their duty in arresting a picket for disturbing the peace on ground of failure to show that picket was disturbing the peace so that officers were not discharging any official duty. Pen.Code, §§ 148, 415.

◆

Appeal from Municipal Court of City of Los Angeles; Leo Aggeler, Judge.

Robert A. Perry was convicted in the municipal court of resisting, delaying, and obstructing named public officers in the discharge and attempt to discharge a duty, and he appeals.

Reversed and remanded for new trial.

Maynard J. Omerberg, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Donald M. Redwine, Asst. City Atty., and Spencer L. Halverson, Deputy City Atty., all of Los Angeles, for respondent.

SHAW, Presiding Judge.

The defendant appeals from a judgment of conviction and from an order denying his motion for a new trial. The charge against him is that he did "resist, delay and obstruct" two named public officers "in the discharge and the attempt to discharge a duty of his office, towit: the arrest of" one Overhold (who spells his name Overholt, and will hereinafter be referred to by that spelling) for a violation of section 415 of the Penal Code.

The complaint designates section 148, Penal Code, as the legal foundation of the charge. This section declares that "Every person who willfully resists, delays, or obstructs any public officer, in the discharge or attempt to discharge any duty of his office, when no other punishment is prescribed, is punishable" in such manner as to make the offense a misdemeanor. Manifestly this section requires, in order to constitute the offense, four elements: (1) Wilfulness, (2) resistance, delay or obstruction of (3) a public officer, and (4) some official duty which the officer is then discharging or attempting to discharge. Defendant does not claim that the evidence is insufficient to show the existence of the first three of these elements, but contends that there is no proof of the fourth.

[1, 2] On all elements of the offense, including the fourth, the prosecution had the burden of proof. (People v. Rabalete (1938), 28 Cal.App.2d 480, 487, 82 P.2d 707; McGuire v. State (1923), 19 Ala.App. 138, 95 So. 565, 567; Harris v. City of Tuscaloosa (1926), 21 Ala.App. 392, 108 So. 768, 769; State v. Winter (1913), 24 Idaho 749, 139 P. 739, 740.) The conviction cannot be upheld unless it appears that the arrest of Overholt—the only official duty charged—was lawful; for if it was unlawful, manifestly no official duty was being discharged in making it. Section 836, Penal Code, provides for arrests without a warrant, and reads as follows: "A peace-officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person: 1. For a public offense committed or attempted in his presence. 2. When a person arrested has committed a felony, although not in his presence. 3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it. 4. On a charge made, upon a reasonable cause, of the commission of felony by the party arrested. 5. At night, when there is reasonable cause to believe that he has committed a felony." Section 415, Penal Code, for alleged violation of which the officers were making the arrest which defendant resisted, declares

violation of its provisions to be a misdemeanor. Being police officers of the City of Los Angeles, these officers were peace-officers (Penal Code, sec. 7, subd. 8, sec. 817).

Respondent contends on this point that "an arrest is lawful if there is reasonable cause therefor," citing Murphy v. Murray (1925), 74 Cal.App. 726, 729, 241 P. 938; Gisske v. Sanders (1908), 9 Cal.App. 13, 16, 98 P. 43; Michel v. Smith (1922), 188 Cal. 199, 205, 206, 205 P. 113; People v. Cupp (1926), 77 Cal.App. 472, 475, 476, 246 P. 1085. In the Cupp case the misdemeanor involved was treated as though committed in the presence of an officer, and no statement of the right to arrest on reasonable cause was made. In all the other cases here cited, it appears from the opinions that the court was discussing arrests for felonies, as to which Penal Code section 836 above quoted does set up the rule of reasonable cause in the cases therein specified.

[3] But as to misdemeanors, section 836 contains no authorization for an arrest, without a warrant, on reasonable or probable cause, all its provisions of that sort being expressly limited to arrests for felonies. Under it the power and duty of an officer to make an arrest for a misdemeanor without a warrant are limited to a case where the offense is committed or attempted in the officer's presence. This rule has been several times declared by the courts. Thus, in Boyes v. Evans, (1936), 14 Cal.App.2d 472, 479, 58 P.2d 922, the court said: "Ordinarily an officer has no legal right to attempt to make an arrest for a misdemeanor on suspicion or even on mere information of another person without first procuring a warrant therefor." Where two persons were arrested without a warrant and neither had committed or been suspected of committing any felony, the Supreme Court said, "The only justification which could be alleged for the action of the officers was that the defendants had committed a misdemeanor in their presence." (People v. Craig (1907), 152 Cal. 42, 45, 91 P. 997.) Similar declarations were made in Ferguson v. Superior Court (1915), 26 Cal.App. 554, 557, 147 P. 603; Dorris v. McKamy (1919), 40 Cal.App. 267, 273, 180 P. 645; In re Milstead (1919), 44 Cal.App. 239, 242, 243, 186 P. 170; People v. Gilman (1920), 47 Cal.App. 118, 121, 122, 190 P. 205; People v. Matthews (1899), 6 Cal.Unrep. 341, 343, 58 P. 371.

[4] Were we to regard section 836, Penal Code, as permissive but not mandatory in its delimitation of the authority to make arrests, leaving the common law in force in all cases not covered by it (Political Code 4468), we find nothing in the common law to extend such authority beyond that specified in section 836. In 6 C.J.S., Arrest, § 6, pp. 593, 594, 595, the rule is stated as follows: "Unless the rule is modified by statute, an officer does not have the power to arrest without a warrant for a misdemeanor not committed in his presence and view. * * * It is a general rule, subject to statutory variations, that a misdemeanor must have been actually committed to justify an arrest without a warrant, and the mere belief or suspicion that a misdemeanor is being, or has been, committed is insufficient to warrant an arrest without a warrant; nor may an arrest without a warrant be made on a belief, founded on information received from a third person, that a misdemeanor is being committed." In Carroll v. United States (1925), 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543, 39 A.L.R. 790, 802, the court stated this as the common law rule: "The usual rule is, a police officer may arrest without warrant one believed by the officer, upon reasonable cause, to have been guilty of a felony, and that he may only arrest without a warrant one guilty of a misdemeanor if committed in his presence."

But the California cases already cited on the authority of an officer to make an arrest for a misdemeanor plainly imply that an officer has no such authority beyond that conferred by section 836, Penal Code, and we are satisfied that such is the law. That section is clearly intended to make complete provision for the cases in which a peace officer may make an arrest. Dealing with statutes like section 836, the courts of other states have also held that the statute is a limitation on the authority to make arrests. In Adair v. Williams (1922), 24 Ariz. 422, 210 P. 853, 26 A.L.R. 278, 282, on a statute identical with that of California, the court held that a peace officer has authority to make an arrest for a misdemeanor without a warrant "only when the offense is committed or attempted in the presence of the officer," and that an instruction was erroneous which advised the jury that an officer might justify an arrest on his "reasonable belief" that the person arrested was then committing a misdemeanor. In Stearns v. Titus (1908), 193 N. Y. 272, 85 N.E. 1077, 1078, under a similar statute, the court said: "The offense defined by section 10 of the Penal Code is made a misdemeanor. To justify an arrest without a warrant for the commission of that offense, the crime must be actually committed or attempt be made to commit it in the presence of the officer. Reasonable suspicion or probable cause to believe its commission is not sufficient." In State v. Bradshaw (1916), 53 Mont. 96, 161 P. 710, 711, on a statute like ours, the court held that an officer had the right to arrest without a warrant only in the cases provided for by law, and said that to justify such an arrest "It is not sufficient that the officer believed that the defendant was engaged in a violation of the law, though such belief may have been entertained in the utmost good faith." On a statute like ours so far as the right to arrest without a warrant is concerned, the court, in State v. Small (1918), 184 Iowa 882, 884, 169 N.W. 116, held that the defendant charged with resisting an arresting officer had committed no offense, and said: "An offense, then, must have been committed in the presence of the policeman, in order to have justified him in making the arrest. It is not enough that he may have so thought, or have had reasonable ground so to believe; the offense must actually have been attempted or committed in his presence, to have justified the arrest." McGuire v. State, supra (1923), 19 Ala.App. 138, 95 So. 565, 567, holds that where defendant is charged with resisting an arrest without a warrant, the state must show that he had committed an offense in the officer's presence. Similar declarations as to the authority of an officer to make an arrest for a misdemeanor without a warrant were made in Robinson v. State (1925), 197 Ind. 144, 149 N.E. 891, 892; Hilla v. Jensen (1921), 149 Minn. 58, 182 N.W. 902, 903; Bowman v. Commonwealth (1925), 211 Ky. 118, 276 S.W. 1057, 1058; Mitchell v. Hughes (1918), 104 Wash. 231, 176 P. 26, 28; and State v. Dunivan (1925), 217 Mo.App. 548, 269 S.W. 415, 417.

Section 415 of the Penal Code, for violation of which the arrest here was allegedly made, reads as follows: "Every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person, by loud or unusual noise, or by tumultuous or offensive conduct, or threatening, traducing, quarreling, challenging to fight, or fighting, or who, on the public streets of any unincorporated town, or upon the public highways in such unincorporated town, run any horse-race, either for a wager or for amusement, or fire any gun or pistol in such unincorporated town, or use any vulgar, profane, or indecent language within the presence or hearing of women or children, in a loud and boisterous manner, is guilty of a misdemeanor, and upon conviction by any court of competent jurisdiction shall be punished by fine not exceeding two hundred dollars, or by imprisonment in the county jail for not more than ninety days, or by both fine and imprisonment, or either, at the discretion of the court." On examining the evidence, we can find nothing to show that Overholt had committed a violation of this section, or indeed any other offense, in the presence of the arresting officers or at all. In the prosecution's evidence, we find only this testimony of one of those officers: "I arrested Overholt for disturbing the peace." While this is the usual designation of the offense denounced by section 415, there is nothing in this bare statement to show that such an offense had been committed, and no witness of the prosecution gave any information whatever as to the conduct of Overholt prior to his arrest. Overholt himself was a witness, and stated that prior to the time in question he had been engaged, with a large number of other persons, in picketing a place of business, that he had left the picket line for 45 minutes or so, standing with others across the street from it, that just before his arrest he recrossed the street and "blended into" the picket line, and that then some sort of disturbance, the cause of which he did not know, broke out at the head of the line about thirty feet away, which caused a stoppage of the line. Respondent designates as showing a disturbance of the peace participated in by Overholt, this particular part of his testimony:

"A. As I was walking up here, that disturbance at the head of the line occurred and everybody started shoving backward. You know how a crowd is, there is nothing you can do, so you are pretty well carried by the movement of the crowd. I found myself down in between these two cars, I believe it was those two cars, and these police officers were pushing the line back this way. (Indicating) I don't know what the disturbance was at the head of the line, but the action was to either to keep the line moving back this way—I still didn't know what the disturbance was, but, anyhow, there was a tussle and a melee and I found myself down in between the two cars, and Officer Berger put the arm on me, you might say, and said, 'Come along with me.'" In addition to Overholt's testimony, respondent relies on that of police officers that there was "a considerable riot" and "a lot of trouble" going on, but examination of their testimony shows that they were referring to a time after Overholt's arrest.

All of this does not show anything done by Overholt personally which would constitute a disturbance of the peace, or any other offense. However, we understand respondent's position to be that as a member of a combination or conspiracy to picket the place in question he was responsible for the acts of other pickets, either under the law of conspiracy or by the operation of section 31, Penal Code, which makes one who aids and abets in the commission of a crime a principal therein. This might be so, if the proper foundation for the application of these principles of law appeared. But we find nothing to indicate that there was any conspiracy to engage in any acts of violence or a disturbance of the peace. As far as appears, the picketing had, up to the time of Overholt's arrest, been entirely quiet and peaceful. The disturbance at the head of the line, to which he referred, broke out just prior to his arrest, and if it constituted a disturbance of the peace, which does not clearly appear, there is nothing to show that he aided or abetted it or even anticipated it. For all that appears, the disturbance may have been a "tussle" between some of the pickets about private or personal matters entirely unrelated to the picketing. There is nothing to show Overholt's responsibility for the "trouble" or "riot" that occurred after his arrest; but if there were, those events could not be used to furnish justification for the antecedent arrest.

Respondent also invokes, in justification of the arrest, the presumptions declared in section 1963, C.C.P., that official duty has been regularly performed, that the law has been obeyed and that a person is innocent of crime, seeking to apply them to the conduct of the officers in making the arrest. In this connection, we note that by sections 236 and 237, Penal Code, false imprisonment, defined as "the unlawful violation of the personal liberty of another," which includes an unlawful arrest (35 C.J.S., False Imprisonment, § 13, p. 514; People v. Agnew (1940), 16 Cal.2d 655, 659, 107 P.2d 601) is made a crime. An unlawful arrest is also penalized, in some cases, by section 146, Penal Code. Respondent cites, in support of its argument, In re Milstead, supra (1919), 44 Cal.App. 239, 243, 186 P. 170, and People v. Drevoir (1919), 42 Cal.App. 124, 129, 183 P. 370. The statements there made on which respondent relies are mere assumptions made for the purpose of deciding other points, and are manifestly not intended as affirmances of the propositions assumed, but are as to them obiter dicta at best.

But in People v. McGrew (1888), 77 Cal. 570, 20 P. 92, where the defendant was prosecuted under section 236, Penal Code, for false imprisonment, it was held that "the imprisonment being proven, the law presumes it unlawful until the contrary is shown. It is for the defendant to justify it by proving that it was lawful" and an instruction so declaring was approved. Nothing was said about the presumptions invoked by the respondent in the case at bar. In People v. Agnew, supra (1940), 16 Cal.2d 655, 662, 107 P.2d 601, where the defendant was prosecuted under section 236, Penal Code, for false imprisonment arising out of an arrest made without a warrant, the question arose again, and the court held "that the common law presumption of unlawfulness in unlawful imprisonment cases still exists in this state" and that it is not excluded from consideration in a criminal case by the presumption of innocence, and approved the rule stated in People v. McGrew, supra, with this qualification: that the defendant, in showing a justification for the arrest, is not bound to go further than to produce evidence which raises a reasonable doubt of his guilt, and the jury should be so instructed. This qualification, however, goes only to the quantum of proof necessary to overcome the presumption of unlawfulness. It can have no effect on a case where, as here, there is nothing sufficient for that purpose.

[5] Here, had the arresting officers themselves been prosecuted for making an unlawful arrest in violation of section 236, Penal Code, and had the evidence tending to show lawfulness of the arrest gone no further than that before us in the present record, a conviction would be sufficiently supported to stand on appeal, in view of the rule declared in People v. McGrew, supra, and People v. Agnew, supra. Is the situation changed because, instead of such a prosecution, we have a charge of resisting the same arrest as unlawful? We cannot see that it is. Since there is, as held in those cases, a general presumption that imprisonment (which includes an arrest) is unlawful, it is applicable here. And here it is aided as well as opposed, by the presumption of innocence. Whatever presumptions may come to the aid of the arresting officers, this defendant also is entitled to align the presumption of innocence in his favor. The right of personal liberty is protected by both state and national constitutions, and is not to be infringed lightly or without good cause. Our legislature has manifested its solicitude for such liberty by enacting section 236 of the Penal Code, penalizing unlawful violations of it. It would not be consistent with this constitutional and legislative attitude to put upon one whose guilt depends on the lawfulness of the restraint of his or another's liberty, the burden of showing the unlawfulness of that restraint. We conclude, therefore, that no presumption is available to supply the lack of proof that the arrest of Overholt was lawful.

[6, 7] Unless that arrest was lawful, then, as already stated, the officers were under no duty to make it, and resistance to their action in the matter was not a violation of section 148, Penal Code (46 Cor.Jur. 874). Moreover, if an arrest is unlawful, either the person being arrested or others acting in his behalf may resist the arrest, using no more than reasonable force for that purpose. This is the effect of sections 692, 693 and 694 of the Penal Code, which provide that lawful resistance to the commission of a public offense may be made by the party about to be injured or by any other person in his aid or defense, either of whom may make sufficient resistance to prevent the offense. These sections apply here because the arrest, if unlawful, is a violation of section 236, Penal Code, and therefore a public offense. This right of resistance was conceded in People v. Craig, supra (1907), 152 Cal. 42, 45, 50, 91 P. 997, where it was held that the arrest was lawful and resistance to it was not justified, but the court said, "Since the right of a person to resist an unlawful attempt to subject him to arrest cannot be denied * * *," and further, "The right of one person to aid another in defending against a threatened injury is defined by our statute (Penal Code, sec. 694), and does not differ substantially from the right as it existed under the common law. He cannot interfere except in aid of a lawful resistance by the person threatened." In People v. Dallen (1913), 21 Cal.App. 770, 775, 132 P. 1064, the court said: "There can be no doubt that a person has the right to 'resist an unlawful attempt to subject him to arrest' (People v. Craig, 152 Cal. 43, 45, 91 P. 997), but held that in so doing such person cannot take the life of the arresting person, unless he is resisting also threatened danger to his life or limb and may reasonably do so for that purpose. In People v. Bradley (1913), 23 Cal.App. 44, 46, 136 P. 955, the court conceded that an unlawful arrest "might have been rightfully resisted with the same degree of force employed in making the arrest," and this concession was quoted with apparent approval in People v. Gilman, supra (1920), 47 Cal.App. 118, 123, 190 P. 205.

Similar decisions may be found elsewhere. Thus in Ryan v. City of Chicago (1906), 124 Ill.App. 188, 190, where the appellant was charged criminally with resisting an officer who arrested him without a warrant, the court held the arrest illegal because no act done in the presence of the officer was a crime, and held further that "The arrest being unlawful, appellant had a right to meet force with force, if in so doing he used such force only as was reasonably necessary to repel the assault upon his person." In State v. Bradshaw, supra, (1916), 53 Mont. 96, 161 P. 710, 711, the defendant was charged with resisting an officer seeking to arrest him without a warrant, and the court held that if the arrest is not lawful "the person sought to be arrested may use such force as may be necessary to prevent the arrest, or to effect his escape after arrest." In State v. Small, supra (1918), 184 Iowa 882, 885, 169 N.W. 116, it was held that where the arrest without a warrant is unlawful because no offense has been committed, "the party arrested may resist with such force as appears to him, acting as an ordinarily prudent man, to be reasonably necessary. The law jealously guards the liberty of the citizen, and a public officer has no right, because of being clothed with the habiliments of office, to interfere therewith, save as provided." The court further held an instruction erroneous which said the defendant owed the duty to submit to the officer, if he knew of his official character at the time, saying, "He owed no such duty unless, at the time, he was engaged in the commission of a public offense."

In the analogous case of an escape or a rescue from custody, a like rule has been declared. In People v. Ah Teung (1891), 92 Cal. 421, 424, 28 P. 577, 15 L.R.A. 190, the defendant was charged with assisting a prisoner to escape from jail, and the court after holding that the imprisonment was unauthorized and illegal, stated respondent's argument that "the offense of assisting a prisoner to escape from jail is made out when it is shown that a defendant has assisted a person unlawfully confined therein to free himself from the restraint of a prison" and that "the purpose of the law is to throw a protection around jails, by making it unlawful for friends of those confined therein to proceed in any other manner than by the writ of habeas corpus, or other legal process, for the enlargement of such persons." Regarding this argument the court said: "We cannot accept this view. An escape is classed as a crime against public justice, and the law, in declaring it to be an offense, proceeds upon the theory that the citizen should yield obedience to the law; that when one has been, by its authority or command, confined in a prison, that it is his duty to submit to such confinement until delivered by due course of law, no matter whether he was committed to await a future trial, or as a punishment after judgment of conviction, or for any other purpose authorized by law. But when the imprisonment is unlawful, and is itself a crime, the reason which makes flight from prison an offense does not exist. In such a case the right to liberty is absolute and he who regains it is not guilty of the technical offense of escape. And this view seems to be the one which is adopted by the courts, without dissent from any." People v. Clark (1924), 69 Cal.App. 520, 522, 231 P. 590, was the same in its essential facts as People v. Ah Teung, supra, and the court quoted and followed the rule we have above quoted from that case.

The order and judgment appealed from are reversed, and the cause is remanded for a new trial.

BISHOP and STEPHENS, JJ., concur.

30 Cal.2d 157

BEBBINGTON v. CALIFORNIA WESTERN STATES LIFE INS. CO.

S. F. 17368.

Supreme Court of California, in Bank.
May 23, 1947.
As Modified on Denial of Rehearing
June 19, 1947.

1. Insurance 🔑646(6)

In action on a life policy, burden of proof was on insurer to establish defense under aircraft rider, that because of insured's death while flying in a United States Army plane, its liability was limited to the reserve of the policy.

2. Evidence 🔑318(1, 2), 351

In action on life policy with defense of non-liability because insured met his death in a flying accident which was excluded by a rider to the policy, newspaper clippings, letters of condolence, and telegrams informing insured's mother of his death, were hearsay statements and were inadmissible under the Uniform Business Records as Evidence Act. Code Civ.Proc. §§ 1953e–1953h.

3. Evidence 🔑320

In action on life policy with defense of non-liability because insured allegedly met his death in a flying accident which was excluded from coverage by a rider to the policy, a "Friend's Statement" made on form furnished by insurer was inadmissible to prove the insurer's defense where the statement was made by one who had no knowledge of the accident other than that afforded by other documents and statements of insured's mother.

4. Evidence 🔑318(7)

In action on a life policy with defense of non-liability because insured while in the army allegedly met his death in a flying accident which was excluded from coverage by a rider to the policy, a certified statement of a Major General to the effect that Army records showed that insured died from injuries sustained in an aircraft accident, while on authorized flight in a military plane, was inadmissible as hearsay.

5. Evidence 🔑215(1)

In action on life policy, documents which constituted hearsay evidence, were not admissible as admissions by beneficiary because they had been sent by beneficiary to insurer with proof of death form given by beneficiary in accordance with requirement of policy, since where a policy requires the submission of proofs of death, a beneficiary is not to be held because of her compliance with the requirements, to have accepted as her own the recitals or declarations contained in the data submitted.

6. Insurance 🔑665(5)

In action on a life policy, insurer's evidence was insufficient to establish that insured who was killed while flying in an army airplane, was not a passenger in a licensed aircraft within exception to aircraft rider limiting recovery to policy reserve.

Appeal from Superior Court, Santa Clara County; M. G. Del Mutolo, Judge.

Action by Edith R. Bebbington against the California Western States Life Insurance Company, a corporation, to recover on a life policy. From a judgment in favor of the plaintiff, the defendant appeals.

Judgment affirmed.

Prior opinion, see 171 P.2d 495.

Campbell, Hayes & Custer, Edwin J. Owens and Austen D. Warburton, all of San Jose, for appellant.

James F. Boccardo and Edwin H. Williams, both of San Jose, for respondent.

CARTER, Justice.

Plaintiff brought this action to recover as beneficiary of a $2,000 life insurance policy which had been issued by defendant to her now deceased son. Trial had before a jury resulted in verdict in her favor and judgment was entered awarding her the full amount of the policy. Defendant has appealed from the judgment.

One issue is determinative of the appeal. Attached to the policy was a rider providing that in the event of the death of the insured as a result of airplane travel other than as a farepaying passenger in licensed aircraft flying a regular scheduled passenger flight, the liability of defendant should be limited to the reserve of the policy. Defendant, by answer, asserted that the proofs of death submitted by plaintiff showed that the assured died in an airplane accident while flying a United States Army plane, thus making operative in defendant's favor the limitation of liability contained in the exclusion clause of the rider.

[1] The burden of proof was on defendant to establish this defense and show the circumstances which brought the death within the exclusion clause. (Mah See v. North American Accident Ins. Co., 190 Cal. 421, 425, 213 P. 42, 26 A.L.R. 123; Rossini v. Saint Paul Fire etc. Co., 182 Cal. 415, 188 P. 564; Postler v. Travelers' Ins. Co., 173 Cal. 1, 158 P. 1022; Witherow v. United American Ins. Co., 101 Cal.App. 334, 336, 281 P. 668; Mattson v. Maryland Casualty Co., 100 Cal.App. 96, 98, 279 P. 1045.) Failure of proof on this issue requires affirmance of the judgment for plaintiff. Defendant was able to show that the deceased was killed in an airplane crash, but failed to show that he was not riding as a passenger in a licensed passenger aircraft at the time.

Defendant offered in evidence a form filled out by plaintiff as proof of death, stating that her son had been killed in an "airplane crash" near Orlando, Florida, together with certain documents which plaintiff had submitted at defendant's request, that is, a telegram from one "McNeil Coapbr" informing her of the death "as a result of an aircraft accident near Orlando"; a letter of condolence from an Army Captain saying that decedent was a "valuable member of this squadron and was engaged in training pilots and their crews for combat at the time of his death"; a Florida death certificate giving as cause of death "accident * * * in a wooded area * * * while at work * * * plane crash"; an Employer's or Friend's Statement filled out by one Woods on a form furnished by defendant, stating that the deceased had been an aviation pilot in the Army and giving as the cause of death "aircraft accident while on an X mission, accident caused by interceptor plane"; and newspaper clippings telling of the airplane collision.

[2] Objection was made to the admission of these documents on the ground that they were hearsay. The court received in evidence the proof of death (Defendant's Exhibit A), but excluded the other documents (Defendant's Exhibits B to F for Identification). The ruling that these several documents were hearsay statements and, as such, were inadmissible, was correct. Obviously the newspaper clippings, letter, and telegram were written hearsay. Upon no theory could they be brought within the liberalizing provisions contained in sections 1953e–1953h of the Code of Civil Procedure, particularly section 1953f, which provides that "A record of an act, condition or event, shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission." None of the requirements of this section were met.

[3] Neither was the so-called "Friend's Statement" admissible to prove the affirmative defense. It was made by a resident of Hayward who had no knowledge other than that afforded by the other documents and the statements of the mother. In answer to the question "What was the cause of death * * * State fully all that you know or have heard * * *", it merely said, "Aircraft accident while on an X mission. Accident caused by an interceptor plane." There was no offer to show the meaning of "X mission".

The death certificate, even if admissible (see 159 A.L.R. note p. 191), to show the cause of death, that is, bodily injuries received in plane crash (and that fact is not disputed), was valueless to prove any fact relevant to the affirmative defense that the aircraft was not a regularly scheduled passenger plane. Other than as indicating the cause of death its recitals were extraneous hearsay statements of prior events.

[4] Another document was offered and excluded as hearsay, but by inadvertence

it was not copied into the transcript. It was later made a part of the record by the granting of a petition to augment when the cause was before the District Court of Appeal. It consists of a certified statement of a Major General, dated March 15, 1945, to the effect that Army records show that the deceased died from injuries "sustained in an aircraft accident, while on authorized flight in a military plane." The certificate was not in proper form to bring it within an exception to the hearsay rule in that it was not a certified copy of a record but merely an officer's statement of what the record showed. A later certificate, dated April 27, 1945, was in a more acceptable form and it might have been admissible (See, Loper v. Morrison, 23 Cal.2d 600, 607 et seq., 145 P.2d 1; Gunter v. Claggett, 65 Cal.App.2d 636, 643, 151 P.2d 271; Armit v. Loveland, 3 Cir., 115 F.2d 308; Wigmore on Evidence, 3d Ed., sec. 1675a, pp. 726–728); however, this certificate was not executed or presented to the trial court until after the entry of the judgment herein on April 20, 1945, and it never became part of the present record. It is mentioned here because it was erroneously transmitted to the clerk of the District Court of Appeal by the clerk of the trial court and this led to a confusion of the two certificates when the cause was heard in the District Court of Appeal.

[5] It cannot be said that the trial court should have received the excluded documents as admissions because they had been sent to defendant with the proof of death form given by plaintiff. Where a policy requires the submission of proofs of death, a plaintiff is not to be held, because of her compliance with the requirements, to have accepted as her own the recitals or declarations contained in the data submitted (Mar Shee v. Maryland Assurance Corp., 190 Cal. 1, 6, 210 P. 269; Justice v. Inter-Ocean Casualty Co., 108 Cal.App. 267, 291 P. 436). Here the defendant required the furnishing of proofs of death, and in addition the Oakland manager asked plaintiff to send him the telegram and newspaper clippings.

When plaintiff's deposition was taken she was asked the question: "And at the time he was not riding in a commercial plane with a licensed pilot, was he?" to which she replied, "No, he was not", but she also testified in answer to the question, "Now you don't know how your son died? A. No. I wasn't there." She was asked, "When you sent in your proof of loss did you have any first hand information of the manner in which your son's death came about?", and answered, "No. Only the clipping in the paper and the death certificate." Also in response to the question, "It is your understanding that he died in an aviation accident?", she said "As far as I know." This testimony made it evident, and the fact stands uncontradicted, that plaintiff had no information concerning the death other than the hearsay statements contained in the excluded documents.

[6] Moreover, it will be noted that even if the excluded documents had been admitted in evidence, there is no statement in any of them to the effect that the son was not a passenger in a licensed plane at the time of his death. In short, defendant simply failed to prove the essential fact which would make operative the exclusion clause of the rider.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, and SCHAUER, JJ., concur.

30 Cal.2d 124

McCLELLAND v. BOARD OF SUPERVISORS et al.

L. A. 19924.

Supreme Court of California, in Bank.
May 21, 1947.
Rehearing Denied June 19, 1947.

1. Taxation ⚷49

Constitutional requirement that all property in the state be taxed in proportion to its value is mandatory. Const. art. 13, § 1.

2. Taxation ⚷40(8)

A taxpayer is entitled to have his property assessed on same basis of valuation as that applied to other property of like character and similarly situated. Const. art. 13, § 1.

3. Taxation ⚷40(8)

The authorized County Board of Equalization has duty of determining property value for assessment purposes upon such basis as is used in regard to other property, so as to make all the assessments as equal and fair as is practicable.

4. Taxation ⚷490

A County Board of Equalization's determination of assessment value is conclusive, unless board has proceeded arbitrarily or unless there is something equivalent to fraud.

5. Taxation ⚷493(4)

Where it is contended that fraud or its equivalent results from arbitrary action of County Board of Equalization in declining to equalize assessed valuations of property, proceedings before the board are subject to review. Code Civ.Proc. § 1074.

6. Taxation ⚷493(8)

Arguments as to the weight of the evidence, including various elements of property value for assessment purposes, were for County Board of Equalization, and factual decision of the Board upon the evidence before it could not, in view of substantial conflicts therein, be disturbed by the Supreme Court. Revenue and Taxation Code, §§ 1601–1615.

7. Taxation ⚷485(2)

In proceedings on applications to County Board of Equalization for reduction of assessment valuations of multiple dwelling properties, Board's rejections of building slips which applicants asserted would demonstrate that assessor contemplated increased valuations of single family residences for the following year was not arbitrary or fraudulent. Revenue and Taxation Code, §§ 1601–1615.

8. Taxation ⚷493(8)

In certiorari proceedings to review denial by County Board of Equalization of applications by owners of multiple dwelling properties for reduction of assessment valuations on ground that alleged general substantial increases in 1946 assessed valuations of multiple dwelling properties and failure to make such increases against either one family dwellings or against vacant lots constituted an arbitrary discrimination against owners of multiple dwellings, evidence was insufficient to establish fraud or arbitrary action which would justify disturbing board's determination. Revenue and Taxation Code, §§ 1601–1615; Code Civ.Proc. § 1075; Const. art. 13, § 1.

Certiorari by Hazel E. McClelland on behalf of herself and all other taxpayers of the County of Los Angeles, State of California, of the same class and similarly situated, against the Board of Supervisors, in its capacity as the Board of Equalization of the County of Los Angeles, State of California, consisting of William A. Smith and others, to review assessment valuations of various properties.

Proceedings and order reviewed affirmed.

John W. Preston and John W. Preston, Jr., both of Los Angeles, for petitioners.

Harold W. Kennedy, County Counsel, and A. Curtis Smith, Deputy County Counsel, both of Los Angeles, for respondents.

SCHAUER, Justice.

Petitioner is the owner of a 44-unit apartment house located in the city of Los Angeles. In July, 1946, the board of supervisors of Los Angeles County, sitting as a board of equalization, after a hearing denied applications made to it by petitioner and by approximately 700 other owners of multiple-dwelling properties in that county for the reduction of the assessment valuations of their various properties. (See Revenue & Taxation Code, §§ 1601–1615.) Thereafter petitioner, "on behalf of herself and all other taxpayers of the county of Los Angeles * * * of the same class and similarly situated," instituted this certiorari proceeding. It was contended before the board and petitioner contends here that by reason of a 1946 increase in the assessment valuations of multiple-dwelling improvements the tax assessments against such properties were unfair, unjust and excessive, and resulted in unequal and illegally discriminatory tax burdens as compared with the assessments upon other real property in the county. It is urged that upon the established facts the board exceeded its jurisdiction when it denied the applications for equalization. The relief asked of the board, and in ultimate effect through the process of this court, is that the 1946 assessed valuations be reduced to those of 1945.

In support of her position petitioner alleges that in the year 1940 the assessor of Los Angeles County made a general revaluation of all real property improvements in the county and entered such valuations in the 1940 county assessment-roll; that "no general changes in the assessable valuations of said real property improvements were thereafter made" until the taxable year 1946; that in 1946 the assessor "undertook a piecemeal revaluation of buildings but applied it only to certain real properties * * *, to wit: multiple dwelling improvements * * * hotels and in a limited way to special type loft and office buildings; but * * * made no changes in the assessable values of single-family dwelling properties, or, generally speaking, in commercial and industrial property improvements or in vacant lands generally, in said County"; that for the year 1946 the assessed valuation of the improvements on petitioner's property was increased from $40,000 to $54,000 and that of the land remained at the previous figure of $2,450; that as of the taxable year 1946 "the market or selling price of all real property and improvements situated in said County had risen to higher levels in comparison with the market or selling price of said real property and improvements for * * * 1940 to 1945"; that "any prior enhancement in the value of improved property, due to the higher costs of labor and materials, to scarcity or legal restrictions upon the purchase or use of building materials, was general and uniform as to all types of building construction taxable in the said County"; that, therefore, "it was the duty of the Assessor * * * either to increase, readjust and equalize all valuations of real property and improvements in said County for the taxable year 1946–47, or, after taking into consideration the economic effects of controlled and uncontrolled rents, to allow all assessable property values to remain at uniform levels corresponding to the said 1940 revaluation of improvements." It is further alleged that "the method and scheme adopted and followed by said assessor in assessing" multiple-dwelling properties for 1946 were illegal in that:

1. The assessor arbitrarily allocated all alleged increases in the values of multiple-dwelling properties "to the improvements on the respective properties, and no part * * * was allocated to the lands underlying said improvements. That the assessor's said action was taken * * * by him in * * * an effort to obviate the necessity for increasing the value of the land underlying single-family dwellings and vacant lots adjacent thereto" in the county.

2. "That in furtherance of said purpose said assessor refrained designedly from increasing the assessable value of the lands * * * underlying single unit dwellings and vacant lots intermingled with such * * * dwellings, except in a very few areas where * * * special local conditions * * * made it appear incumbent * * * to allocate some increase to [such] * * * lands."

3. That for the taxable year 1946, "there were in the County * * * more than 650,000 single-family dwellings, approximately 180,000 of which were occupied by rent-paying tenants, which brought said dwellings in direct competition with the [multiple-dwelling] properties represented herein by petitioner. But said assessor, acting arbitrarily * * * refrained from making any increase in the value for tax purposes of the * * * [single-unit dwell-

ing] improvements. * * * That the * * * single unit dwellings are as a rule located in the same block or in the immediate vicinity of the properties represented herein by petitioner."

4. That the block in which petitioner's real property is situated contains a total of eighteen lots; that of such lots one is vacant, two are improved with apartment houses (one of which is petitioner's property here involved), one is improved with a home for children, one with a finance office, two with dwellings used for churches, and the remainder with one-family dwellings; that no increases in the assessed valuations of any of the eighteen lots were made in 1946; that increases in the valuations of improvements upon such lots were made in the following three instances only: the two apartment house improvements were increased 35% and 37%, respectively, over 1945; and the home for children was increased approximately 12½% over 1945.

Petitioner alleges further that on July 29, 1946—the final day of the hearing before the board—an offer was made to prove that the assessor "had been for some time and was then * * * entering upon the map books of his office increases in assessment valuations of single-family dwelling properties for the year 1947 ranging from 21% to 83%," but that the board refused the offer of proof.

Respondents (the board of supervisors and the assessor of Los Angeles County) deny the occurrence of a general increase in either market value or selling price of real property during the taxable years 1940 through 1946, and allege "that some property had decreased in price and value, some property, including the property of petitioners, had increased both in price and value and that a substantial part of the said property, including most single family dwelling improvements, had increased in price but had not increased in value due to the fact that such increase in price represented a bonus or premium paid by purchasers for shelter and that as of the [taxable year 1946] * * * there was no substantial evidence that such increases in prices represented any increase in market value and any increases placed on such property * * * would have been speculative." They further allege that in determining values both the assessor and the board considered, among other factors, those of costs of labor and materials, the economic effects of controlled and uncontrolled rents, and the scarcity of and legal restrictions upon the purchase and use of building materials, but take the position that such factors do not in themselves establish value or have a general or uniform effect upon value and that the assessor was under no duty to either increase and readjust all valuations of real property or else to allow all such valuations to remain at the 1945 levels. Respondents allege also that rather than undertaking a piecemeal revaluation of buildings in 1946, the assessor redetermined the value of all property, including improvements, in the county; that he decreased the assessed values of some properties, increased others, and made no changes in others; that substantial increases were made in the valuations of lands in "many * * * large areas in the county and that such changes were made in all * * * instances where in the opinion of the Assessor land values had increased regardless of whether such land was vacant, occupied by single family dwelling units, multiple dwelling units or other types of improvements"; that the increases made were not arbitrary or made in an effort to avoid increasing the valuations of land underlying single family dwellings or vacant lots but on the contrary "all increases in improvement values were allocated to improvement assessments and all increases in land values were allocated to land assessments." Respondents deny that the assessor arbitrarily refrained from making any incresae in valuations of one-family dwelling improvements and "allege that after considering all of the factors relating to value" the assessor determined that "there had been no established increase in value of such * * * dwellings."

It thus appears that, as indicated above, the chief contention of petitioner is that the alleged action of the assessor in making general substantial increases in the 1946 assessed valuations of multiple-dwelling properties and in failing to make such increases, except in a few isolated instances, against either one-family dwellings or against vacant lots, constituted an arbitrary and unlawful discrimination against the owners of multiple dwellings and brought about an unequal tax burden upon them.

[1-4] The provision of section 1, Article XIII, of the California constitution that "All property in the State * * * shall be taxed in proportion to its value," is mandatory. (San Pedro etc. R. R. Co. v. City of Los Angeles (1919), 180 Cal. 18, 21, 179 P. 393.) As declared in Birch v. County of Orange (1921), 186 Cal. 736, 741, 200 P. 647, 649, "the taxpayer is entitled to * * * the exercise of good faith and fair consideration on the part of the taxing power in assessing his property, at the same rate and on the same basis of valuation as that applied to other property of like character and similarly situated. Inequality of taxation is produced as surely by inequality of valuation as by inequality of the rate of tax." (See also Los Angeles Gas & Elec. Co. v. County of Los Angeles (1912), 162 Cal. 164, 168, 121 P. 384, 9 A. L.R. 1277; Southern Pac. Land Co. v. San Diego County (1920), 183 Cal. 543, 546, 191 P. 931; Mahoney v. City of San Diego (1926), 198 Cal. 388, 398, 245 P. 189.) However, "it is well settled in this state that to the authorized county board of equalization has been confided the duty of determining 'the value of the property under consideration for assessment purposes upon such basis as is used in regard to other property, so as to make all the assessments as equal and fair as is practicable'; that in discharging this duty, 'the board is exercising judicial functions, and its decision as to the value of the property and the fairness of the assessment, so far as amount is concerned, constitutes an independent and conclusive judgment of the tribunal created by law for the determination of that question,' adjudicating necessarily that 'the property is assessed at the same value proportionately as all the other property in the county'; that such adjudication 'cannot be avoided, unless the board has proceeded "arbitrarily and in willful disregard of the law intended for their guidance and control, with the evident purpose of imposing unequal burdens upon certain of the taxpayers" * * * or unless there be something equivalent to fraud in the action of the board'; and that 'Mere errors in honest judgment as to the value of the property will not obviate the binding effect of the conclusion of the board.' [Citations.]" (Universal Consol. Oil Co. v. Byram (1944), 25 Cal.2d 353, 356, 357, 153 P.2d 746, 748.)

[5] Where, as here, it is substantially contended that fraud or "something equivalent to fraud" results from arbitrary action of the board in declining to equalize the assessed valuations of property, the proceedings before the board are subject to review. As observed in LaPrade v. Department of Water and Power (1945), 27 Cal.2d 47, 53, 162 P.2d 13, 17, "Where a local * * * tribunal exercises quasi judicial powers its action may be reviewed by either mandamus or certiorari. [Citations.] And in such a review the chief issues are whether the person affected has been accorded a hearing, and if so, whether there is any evidence to support [the board's] * * * determination. [Citations.] In the review proceedings the court should confine itself to the showing made before the * * * tribunal with regard to the sufficiency of the evidence. [Citations.]" (See also Garvin v. Chambers (1924), 195 Cal. 212, 220–222, 232 P. 696; Swars v. Council of the City of Vallejo (1944), 64 Cal.App.2d 858, 864, 149 P.2d 397. Instances in which the courts of this state have reviewed by certiorari the actions of local boards of equalization may be found in Huntley v. Board of Trustees (1913), 165 Cal. 298, 131 P. 859, and Birch v. Board of Supervisors (1923), 191 Cal. 235, 215 P.2d 903. The cases are not altogether uniform as to the scope of such review. (See discussion and cases cited and reviewed in concurring opinion in Sipper v. Urban (1943), 22 Cal.2d 138, 148–153, 137 P.2d 425.) The California rule has often been declared to be the traditional view that the review "cannot be extended further than to determine whether the inferior tribunal * * * has exceeded its jurisdiction." (See Code Civ.Proc. § 1074; 4 Cal.Jur. 1105, 1106, and cases there cited.) But in the application of the general rule to various factual situations diffi-

culty has appeared in defining "jurisdiction" as the word is used in the rule and in distinguishing between the excess of jurisdiction which is vulnerable on certiorari, and mere errors in exercising jurisdiction which are held not cognizable in such proceeding. (See Fortenbury v. Superior Court (1940), 16 Cal.2d 405, 408, 106 P.2d 411; Abelleira v. District Court of Appeal (1941), 17 Cal.2d 280, 291, 109 P.2d 942, 132 A.L.R. 715; Redlands etc. Sch. Dist. v. Superior Court (1942), 20 Cal.2d 348, 360–365, 125 P.2d 490.) However we are satisfied that, as hereinafter appears more fully, upon any view as to the scope of this proceeding petitioner has not established that the evidence before the board of equalization was insufficient to support its determination as to the correctness and legality of the disputed assessments; nor, upon any view of the scope of certiorari, is the showing here sufficient to authorize annulment of the board's order for any vice in its own procedure.

Inasmuch as no claim is made that petitioner and other owners of multiple dwellings were not accorded a hearing by the board in this case, we turn to consideration of the sufficiency of the evidence to support the board's determination that the property of petitioner and those whom she represents should be assessed at the valuations placed thereon by the assessor for the taxable year in question. For this purpose a transcript of the applications and exhibits filed with the board as well as a reporter's transcript of the oral hearing has been filed in this court.

From the record it appears that applications to the board which were considered at such hearing were divided into six groups. Group A, involving approximately 21,530 dwelling units, represented "those multiple dwelling owners whose improvements have been increased only and the land remained as before. Group B are those that have the same class except that some of their real estate has been increased to a slight extent. Group C represents the multiple units known as hotels. Group D represents office buildings. * * * Group E are wholesale and retail mercantile properties, and Group F are protests protesting the increased assessment of land only."

James O. Stevenson, agent for certain of the applicants for reductions by the board, testified that he was then the Director of the Los Angeles Bureau of Municipal Research, "one of the purposes of which is to appraise real and personal property and to study all phases of taxation and tax equalization, principally within the County of Los Angeles"; that as the result of studies made by himself and the Bureau and alleged information from the assessor and the latter's building department the witness had concluded that prior to 1946 the assessor had applied the "straight line" method of depreciation to all improvements in the county in fixing the assessed valuations but in 1946 had altered the method of assessing multiple-dwelling improvements by adopting a higher replacement cost and by changing from the "straight line" to the "reducing balance" or "declining balance" depreciation method; that the change, coupled with "hypothetical unit cost factors" used by the assessor, resulted in 1946 assessed valuations of multiple-dwelling properties of from 20% to 100% higher than those of 1940 through 1945; that the change was not applied to the approximately 650,000 single-dwelling improvements in the county and consequently those properties were not increased in valuation as were multiple dwellings; that only 14.2% of dwelling properties in the county are of multiple type and the remainder are one-family dwellings; that of the one-family dwellings 43% were in April, 1940, rented in competition with multiple dwellings; that in 1946 the assessor continued to apply the "straight line" depreciation method to all industrial and commercial buildings and "that the assessed valuation thereof * * * has not been changed to and including the year 1946, except as to hotels, Class 'A' office buildings, lofts, stores and theaters and other minor exceptions incidental to additions, alterations or reclassifications."

The witness stated further that although the multiple-dwelling improvements of the 467 Group A petitioners had been raised in valuation, no increase was made of the land underlying such improvements, although "it is generally known that improved building sites are scarce and that prices therefor have advanced fully as much as the cost or value of buildings and improvements"; that in some of the 232 Group B properties both land and improvements had been raised, "thereby increasing the total assessments of such property * * * a greater amount than the property of petitioners in Group A was increased"; that the valuations placed on the improvements of the Group C petitioners (26 hotel owners) had also in 1946 been increased from 60% to over 200% as a result of changing the assessment method; that "as to some of the said hotel properties, the real estate assessment has been increased also, pursuant to some local scheme"; that many of such hotels are located in downtown Los Angeles or in other commercial districts and are of a type of construction similar to that of office buildings in the same vicinities, but were assigned increases in valuations far greater than the increases of office buildings; that the office, loft, and theatre buildings of the 24 Group D petitioners were also increased in valuation approximately 25% as the result of change in assessment method; that the land under such buildings was also increased in valuation in 1946 "by another method which affected the properties * * * unequally"; that both the improvements and the land of the 12 Group E petitioners (owners of properties used for retail or wholesale merchandising) were increased in valuation in 1946, although most improvements "of a similar nature or in similar and competitive use" were not raised; that the 10 Group F petitioners "are protesting the increased assessment of land * * * The reasons for such increased assessment are applicable, if applicable at all, to all land in the County"; that the witness "saw no evidence" that, as suggested by petitioner, the assessor had assigned to land those valuations that "belong to improvements" or vice-versa.

The witness also made statements of the effect upon property values of such factors as frozen rentals, increased costs of operation, higher selling prices, alleged shift of population distribution, comparative volumes of business, and other factors entering into business competition. He submitted charts of seven complete blocks of one-family dwellings in the county in which no assessed valuation increases were made in 1946; of two such blocks in which most of the land had been increased but none of the improvements; one block in which all land had been increased but only one of the approximately 5 houses; 3 blocks of both multiple and one-family dwellings in which all the multiple-dwelling improvements had been increased from one-third to one-half over the 1945 valuations, but no other increases had been made. Other charts set forth the 1945 and 1946 assessed valuations and the percentage of increase in 1946 of 24 specified apartment building improvements, of 16 named hotel improvements, and of 20 office building improvements; still others purported to state the relationship between assessed valuations and sales prices (as indicated by internal revenue stamps on deeds) of properties in various districts throughout the county. Depreciation tables submitted by the applicants demonstrated that over a period of years property depreciated by the "straight line" method would show a balance of taxable value much lower than that of property depreciated at the same percentage rate by the "reducing balance" method.

On cross-examination the witness Stevenson admitted that he had no personal knowledge of the current assessment methods of the assessor and that his information was based upon alleged statements by the assessor and the head of the latter's building department and upon studies of various statistical reports and of copies of "building slips" or working records of the assessor's office secured by the witness prior to the closing of such records to public inspection in 1941 (Revenue & Taxation Code, § 408); that his "checking" of 1946 assessments covered "most" of the county but did not include various residential districts such as Glendale, Tujunga, Montrose, Pomona, Sunland, Pasadena, or

Temple City; that all property in San Fernando Valley had been increased in assessed valuation; that "sales prices do not always indicate market value," and "I consider the valuation of prices being paid for single family residences as being artificial"; that such situation is "a result of * * * a kind of bonus for occupancy or space because of the peculiar conditions which exist at the present time"; that current sales prices of single-family residence properties "exceeds sound value by as much as 100%."

Other witnesses appearing on behalf of the applicants gave to the board their views on the relationship between frozen rental income and the 1946 assessed valuations. A resume of their testimonies would serve no useful purpose here.

In support of the valuations for tax purposes assigned to the properties of the various petitioners for 1946, Mr. J. W. Hartman, assistant assessor of Los Angeles County, stated that there are in the county in excess of 1,238,000 parcels of land to be taxed, with "a million structures of every type and character," and 800,000 "assessments of personalty"; that certain of the assessor's staff ("with a permanent personnel in excess of 412, and a recurrent personnel in excess of 1,000") secure and evalue "information relative to structures and the application of the same in valuation," and others of the staff "concern themselves primarily with information which leads to the determination of land values of both improved and unimproved properties"; that in valuing improvements the assessor keeps "certain basic records," referred to as "building slips"; that the slips do not "show all factors * * * used in computing the value of the property" but "only a detailed description of the property, its geographical location, its estimated probable cost, area, the arithmetical calculations of the appraiser, the year it was constructed and other recorded information"; that in determining assessed valuations the assessor and his staff consider also "the site, surrounding territory, the type and class of structures adjacent and nearby," selling prices, commodity indexes, "capitalized income, expressions of market value by informed people * * * and a host of other data"; that after a final joint survey by the assessor's land and building departments the property "is considered as a whole," is equalized with other properties and the total fair value is determined; that half of such value is used for assessment purposes. Mr. Hartman stated further that in 1946 the valuation of land underlying single-family residences had been increased in many instances but that of the improvements had remained at the 1945 figure because in the opinion of the assessor "there was not sufficient evidence as of the first Monday of March, 1946, to justify such an increase. The Assessor was of the opinion that the sales prices of single family residences were not reflective of market value but * * * contained * * * a bonus for occupancy" which in many instances meant that "you have to deduct *60% of the sales price* to get down to market value." (Italics added.)

"With respect * * * however * * * [to] multiple units * * * for rental purposes, this was not capital buying shelter but rather * * * capital soundly seeking safe investment at the highest rate of interest available with safety. The very volume of these transactions has been indicative of the soundness of the investment and the trend of market value with respect to these properties. In the consideration of these properties with respect to all other properties where increases were made, the Assessor in each instance took into consideration every evidence which he could discover affecting the determination of the value of the properties.

"With respect to single family residences, the Assessor came to the conclusion that the bonus for occupancy, while it constituted a part of the sales price, did not represent market value and so the Assessor did not attempt to reflect such bonus * * * in the assessed valuation * * * [But] in the purchase of income properties capital was seeking the highest possible return with the least * * * risk, and such sales * * *, in the opinion of the Assessor, did not contain any bonus for occupancy but represented * * * and constituted an index for the determination of market value." The witness also stated that in 1946 all properties in the county were assessed by the same methods as theretofore used and were equalized one with the other; that no single depreciation method or "set formula" was used, but rather "all types of depreciation known"; that if sales data alone were taken as evidence of apartment house values "we would have at least *twice the assessed value* [italics added] we have now"; that in his opinion not over 15% to 20% of the single-family dwellings in the county were occupied by tenants rather than by owners. In answer to the question, "Mr. Hartman, isn't it a fact that you have a plan for revaluation of practically all properties in Los Angeles County, and have had it on hand for some time?" the witness stated, "We have plans all the time for valuation of properties. We are never without them." He further declared that he had neither stated nor heard the assessor state an intention to increase generally the assessed valuations of single residences or of office buildings in 1947.

Mr. John R. Quinn, assessor of Los Angeles County, corroborated much of Mr. Hartman's testimony and in addition testified that he had at no time stated either "publicly or otherwise to Mr. Stevenson," the applicants' agent and witness, that in 1946 he was "going to use a particular mathematical scheme or formula to arrive at the assessed valuations" of the applicants' properties which would differ from that used for all properties, or that any increases whatever would be made "by the application of a precise mathematical formula" or that any property was to be "singled out for raising."

Mr. Potter, head of the assessor's building division, said that he had at no time stated to Mr. Stevenson that the properties involved at the hearing were "going to be increased this year by any invariable mathematical formula" or that the assessor "proposed to single out for a raise this year any particular class or group of property"; that in making 1946 assessments he had followed the method explained by Mr. Hartman; that every year "we have a representative visit every piece of property in the County," including the 650,000 single-family dwellings.

Upon the demand of petitioners and after waivers by them of any "confidential information" appearing, the building slips or working records of the assessor's office on certain of the hotel and other commercial properties involved in the hearing were produced before the board. Photostatic copies of various of such slips are in the record.

From the testimony quoted it is apparent that the statements of the assessing officers as to methods employed and factors entering into determination of assessed valuations of property throughout the county, including that of the applicants seeking reductions from the board, support the board's order refusing the applications.

Petitioner sets forth in one of her briefs an "analysis" of the 1946 building slips produced by the assessor which petitioner asserts demonstrate that the assessor "depreciated the replacement value [of the properties described in such slips] * * * by a reducing balance method to arrive at assessment value." She argues also the effect had upon relative values of multiple dwelling and of single-family properties by higher sales prices, frozen rentals and increased maintenance and operating costs, higher production costs, and lower purchasing power of the dollar. In this connection she emphasizes particularly that sales prices of both single-unit and multiple-unit dwellings had shown marked increases during the years between 1940 and 1946 but that the assessor had made general increases in assessed valuations for 1946 of multiple dwellings only. However, as recited hereinabove, the witness Hartman testified that as to single-dwellings "you had to deduct 60% of the sales price to get down to the market value" and that as to apartment house properties "we would have at least twice the assessed value we have now" if sales data alone were taken as evidence of value. It thus appears that the board could properly find that the assessor fixed the market value in each of the two types of improvement at approximately 50 per cent of their sales price value and that there was no arbitrary inequality between them in this respect.

[6] Arguments as to the weight of the evidence, including the various elements of

value, were addressed to the board and by it determined adversely to petitioner and the other applicants, and the factual decision of the board upon the evidence before it cannot, in view of the substantial conflicts shown, be disturbed by this court (Universal Consol. Oil Co. v. Byram (1944), supra, 25 Cal.2d 353, 356, 357, 153 P.2d 746) or held to be beyond the board's jurisdiction in any sense of the word.

[7] It does not appear that the board's refusal to consider or permit the introduction of building slips which the applicants asserted would demonstrate that the assessor contemplated increasing the assessed valuations of single-family residences for the taxable year 1947 entitle the applicants to the relief sought here. As recited above, the witness Hartman testified that the slips were simply working records of the assessor's office, that in determining assessed valuations various elements not indicated on the slips were considered by the assessor's staff, and, in addition, that "We have plans all the time for valuation of properties. We are never without them." Such refusal to receive or consider the working records of the assessor's staff for the contemplated 1947 assessment does not appear to have been arbitrary or to have deprived petitioner of the fair hearing to which she was entitled. In the light of the very substance claimed for them, as well as of the other evidence, such working slips apparently would cast no light upon relative values for the taxable year 1946, or upon the ultimate actual valuations which might be reached by the assessor for 1947; nor would they, in view of the detailed explanation given by the assessor and his staff of the methods of appraisement employed and the multiple factors entering into their estimates of values, tend to demonstrate either actual fraud or "something equivalent to fraud" on the part of the assessing authorities. (See Universal Consol. Oil Co. v. Byram (1944) supra, 25 Cal.2d 353, 356, 357, 153 P.2d 746, and authorities there cited.)

[8] Unquestionably the record of proceedings before the board reflects substantial evidence which tends to support the claims of petitioner and of those whom she represents, but by reason of the material and extensive conflicts which we have reviewed we feel bound to conclude that the right to the annulling action of certiorari has not been established.

For the reasons above stated the proceedings and order reviewed are affirmed. (Code of Civ. Proc. § 1075.)

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concur.

* * *

29 Cal.2d 834

FIELDS v. SANDERS et al.

L. A. 19864.

Supreme Court of California, in Bank.

March 25, 1947.

1. Master and servant 🔑332(2)

Ordinarily, whether an employee was acting within scope of employment at time of assault by him is for the jury.

2. Appeal and error 🔑1078(1)

Where argument on appeal was directed entirely to the trial court's disposition of the issue of scope of employment in relation to the doctrine of respondeat superior, as it affected liability for damages for assault and battery, only evidence relevant to that contested point needed to be reviewed by the Supreme Court.

3. Master and servant 🔑332(4)

In action by motorist against truck driver and his employer to recover damages for assault by driver in course of altercation following alleged collision, an instruction that an employer as principal is liable for injuries to third persons resulting from the unlawful acts of employees acting within general scope of employment, and that conduct of the driver in the case should be regarded as conduct of his employer, was proper under the facts. Civ. Code, § 2338.

4. Master and servant 🔑305, 306

Under statute making a principal responsible to third persons for wrongful acts committed by his agent in transacting business of the agency, responsibility of the principal results from acts so committed even though they are contrary to the principal's explicit instructions or otherwise unauthorized or are malicious or wilfull. Civ. Code, § 2338.

5. Master and servant 🔑302(1)

In considering whether an agent's unauthorized wrongful act is attributable to his principal, court cannot look to the nature of the act alone to determine whether it was committed in transaction of principal's business, but must consider as well the activity of agent on behalf of principal in connection with which act was committed, and inquiry is, not whether act itself was authorized, but whether it was committed in the course of a series of acts of the agent authorized by the principal. Civ. Code, § 2338.

6. Master and servant 🔑302(1)

Where an agent, for however brief a period, has ceased to serve his principal, the agent alone is responsible for his acts during the period of such cessation, but fact that questioned act was unauthorized or, if wrongful, that it was not committed to further principal's interests, will not show such a departure from the principal's service as would absolve principal if an act was committed while agent was still occupying himself with principal's business within the scope of his employment. Civ.Code, § 2338.

7. Master and servant 🔑332(2)

In action by motorist against truck driver and his employer to recover damages for assault by driver in the course of an altercation following an alleged collision, where entire episode embracing successive moves by driver after alleged collision to avoid obstructing traffic, and assault on motorist, was an unbroken series of continuous acts, trial court properly determined as a matter of law that assault was in scope of driver's employment, although evidence of collision and of details of battery was conflicting. Civ.Code, § 2338; Vehicle Code §§ 482(b), 582.

8. Master and servant 🔑302(3)

Oil company could not avoid liability under doctrine of respondeat superior for assault by driver on motorist following alleged collision, on the ground that driver's employment did not contemplate that he should enter into relations with third persons in course of which he might become annoyed, lose his temper, and commit an assault. Civ.Code, § 2338.

9. Master and servant 🔑302(3)

Oil company could not avoid liability under doctrine of respondeat superior for assault by its driver on motorist following alleged collision, on ground that driver during course of successive moves after the alleged collision, to avoid obstructing traffic, had time to disengage himself and allow his temper to cool, in view of evidence that entire episode was an unbroken series of continuous and connected acts, and in view of driver's own testimony that at no time had he lost his temper.

10. Master and servant 🔑302(3)

Oil company could not avoid liability under doctrine of respondeat superior for assault by its driver on motorist following alleged collision on ground that company could not expect that wrench would be used by driver as a club to beat motorist.

11. Master and servant 🔑306

The fact that jury impliedly found malice on part of oil truck driver as the basis of its award of punitive damages against him alone would not relieve oil company from liability under doctrine of respondeat superior for assault by truck driver on motorist following alleged collision. Civ.Code, § 2338.

12. Trial 🔑142

Where the evidence clearly discloses, and is susceptible of but the single conclusion, that employee's wrongful act was committed in and as a part of employer's business, the court should so decide as a matter of law.

13. Master and servant 🔑332(2)

In action by motorist against truck driver and his employer to recover damages for assault by driver in the course of altercation following an alleged collision, the issue of scope of employment was properly withdrawn from the jury. Civ.Code, § 2338.

14. Appeal and error ⚿1078(1)

Where no argument was presented in support of appeal, it would be deemed abandoned.

◆

Appeal from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Action by Ray W. Fields against Fred Sanders and others to recover damages for assault allegedly committed on plaintiff by the named defendant. Judgment for plaintiff, and defendants appeal.

Affirmed.

Prior opinion 170 P.2d 690.

Sidney A. Moss, of Los Angeles, for appellants.

Shibley, Wanzer & Litwin and Charles S. Litwin, all of Long Beach, for respondent.

SPENCE, Justice.

In this action for damages for assault and battery, jury verdicts were returned in favor of plaintiff as follows: (1) Compensatory damages in the sum of $3,000 against various members of the Krieger family doing business as Krieger Oil Company and its employee, Fred Sanders; and (2) exemplary damages in the sum of $350 against Fred Sanders alone. The members of the Krieger Oil Company have appealed from the $3,000 judgment entered upon the first verdict and Sanders has appealed from the $350 judgment entered upon the second verdict against him.

[1] The sole point presented by the briefs is whether Sanders, admittedly the employee of the Krieger Oil Company, was acting within the scope of his employment at the time of the commission of the assault hereinafter related. The trial court decided the question as a matter of law in instructing the jury that Sanders' conduct was to be deemed that of his employer. While ordinarily such question is one of fact for the determination of the jury, the record in this case sustains the propriety of the trial court's view that the point at issue was one for its decision.

[2] The assault was committed in the course of an altercation between plaintiff, Ray W. Fields, and the employee, Fred Sanders, immediately following an alleged collision between their respective vehicles on the highway in the early morning of September 19, 1944. Plaintiff's complaint contained two causes of action, the first relating to property damage and the second relating to general damages for malicious assault and battery. However, the court granted a nonsuit as to the first cause of action because of plaintiff's failure to offer proof in support thereof, and only the second cause of action proceeded to judgment. With the argument on this appeal directed entirely to the court's disposition of the issue of the scope of employment in relation to the doctrine of respondeat superior, only the evidence relevant to that contested point need be reviewed here.

At about 1:50 a. m. of the date mentioned Sanders drove a truck, with a tank trailer attached, belonging to the Krieger Oil Company, from the refinery yard at Clearwater. He had been instructed to proceed to Camp Kearney near San Diego with a load of oil, and he started on this mission by driving in a southerly direction on Lakewood Boulevard. This boulevard connects with Highway 101 near the easterly boundary of the city of Long Beach, where a traffic circle is located. At the same time that Sanders was proceeding south on Lakewood Boulevard, plaintiff, accompanied by his wife, was driving his Dodge automobile in the same direction.

According to plaintiff's testimony, the following events occurred on the road: Just as his car entered the traffic circle, a truck started to pass him. When he was on the west side, next to the curb, he noticed that the truck was crowding him and finally struck his car and knocked it over the curb. Momentarily he stopped, then got back on the road and continued until he overtook the truck, honked his car's horn, and asked the driver, Sanders, to stop. Sanders did so, pulling over to the side of the road, and Fields parked his car a few feet in the rear of the truck. Thereupon Fields left his car, went to the right side of the truck and addressed Sanders in the following language: "My God, what are you trying to do, kill a man? You ran me off the road, run me over the curb and struck my car. * * *" Sanders denied that he had done so and Fields then said: "* * * let us go back and see what damage is done." Sanders rejoined: "I didn't strike your car." Fields replied: "* * * we will talk that matter over but first let me get your number and your company and your driver's license, so if I want to file a complaint I can * * * all I want is your number, the name of your company and your license. * * *" Thinking Sanders was going to drive away, Fields turned to the left to get Sanders' number and "Just then the door flew open and he jumped out with a flashlight and struck at me, and missed me, and when he did that, I told him if he wanted to play like that all right, if he wanted to fight, lay the flashlight down and fight like a man anyway." Fields stated that Sanders then jumped back into the truck, slammed the door and raced his motor. "I thought he was leaving, and I started back to the back to get his number again, and just then the door flew open and he jumped out with this large instrument and he struck me just as I turned, and hit me on the top of the head, and I sure went down on my knees—I went down part way. As I raised up he struck me again in the back of the head, knocking me to my knees, and I don't remember any more—I mean, I was knocked unconscious."

Plaintiff's wife corroborated, in the main, her husband's account of the events and of the injuries which he received and stated that he recovered consciousness on the way to the hospital. She stated that after her husband parked the car and walked over to Sanders' truck, she "got out to see what damage had been done"; that she saw the men "were arguing about something there"; and that she was "about 18 or 20 feet" from her husband "at the time he was being struck by" Sanders. She said that a light in the traffic circle enabled her to see Sanders as he hit her husband and she described the "large instrument" that he used as a wrench approximately two and one-half feet long.

In the phases of his testimony which are material to this discussion, defendant Sanders did not differ in any essential particular from plaintiff and his wife in relating the sequence of events on the road. He stated, however, that he "stopped three times in all" in the course of his altercation with plaintiff: the first time was shortly after entering the traffic circle, when Fields drove his car "up on the side on the right" and "hollered to" Sanders "what do you mean, trying to run a man over the curb, you think you are awful smart driving a big truck"; the second time was after Fields had "pulled up * * * 60 or 70 feet into the middle of the circle and stopped and got out and came over and got on my running board on the right-hand side and he reached over to get ahold of me and drug me out of the truck, and cussed me * * *"; and the third time was after he told Fields that "traffic [was] blocked" so he pulled his truck and trailer a short distance out of the circle, when Fields "stepped up on the running board again and * * * kept cussing. * * *" With respect to this last encounter, Sanders stated that while Fields "was standing there, he made a pass at me in the truck, so I just kicked the door open, right-hand door,—he was on the right, I just kicked the door open and he fell off on the ground. When he got up I was out. He made a swing at me and so I hit him, and he went down on his knees, and he got up and made another swing at me and I hit him again, and he went down then. * * *" Sanders added that Fields was not "unconscious" when he got in his truck and "pulled away to keep from having any trouble"; that Fields then "was standing up still wanting me to lay the wrench down and fight [but] I told him I couldn't fight." Sanders testified that Fields did not strike him at any time but he was frightened because he "was an old man" and Fields made "passes" at him. Sanders further stated that he at no time made a "pass" at Fields with a flashlight, saying he had none in his possession that night.

[3] In this state of the record the court properly charged the jury as follows: "You are instructed that an employer, as principal, is liable for injuries to third persons resulting from the negligence, torts and wrongful and unlawful acts of their employees while acting within the general

scope of their employment. In the case before us the conduct of Fred Sanders shall be deemed by you to have been the conduct of Krieger Oil Company of California."

[4-6] Under the provisions of section 2338 of the Civil Code, a principal is liable for the "wrongful acts" of his agent committed "in and as a part of" the principal's business. Apt illustration of this concept of liability, premised upon the doctrine of respondeat superior, is the case of Hiroshima v. Pacific Gas & Elec. Co., 18 Cal. App.2d 24, 63 P.2d 340, where it was held that the company's employee, whose duties were to collect power bills, was acting within the scope of his employment when he struck a customer in the course of an argument as to whether the customer had received a notice that his electric service would be discontinued if he did not pay his bill. In so deciding, the court said at page 28 of 18 Cal.App.2d, at page 342 of 63 P. 2d: "It is not necessary that the assault should have been made 'as a means, or for the purpose of performing the work he [the employee] was employed to do.'" Similarly, in Stansell v. Safeway Stores, Inc., 44 Cal.App.2d 822, 113 P.2d 264, defendant's store manager was held to be acting within the scope of his employment when he quarreled with a customer over a grocery order and, following an exchange of opprobrious names, ran after and injured her. Likewise, in Andrews v. Seidner, 49 Cal.App.2d 427, 121 P.2d 863, 864, where a cafe patron was struck by the bartender as the result of a quarrel precipitated by the latter's effort to collect for drinks that had been served, the cafe owner was held liable because "the assault was committed in and as a part of business which the employee was authorized to transact for his employer." A succinct statement of the governing considerations in such situation under the settled authorities is found at page 430 of 49 Cal.App.2d, at page 864 of 121 P.2d: "Responsibility of the principal results from acts so committed even though they be contrary to the principal's explicit instructions or otherwise unauthorized, or malicious or wilful. In considering whether an unauthorized wrongful act of an agent is attributable to his principal, we cannot look to the nature of such act alone to see whether it was committed in and as a part of the transaction of the principal's business, but we must consider as well the activity of the agent on behalf of the principal in connection with which the act was committed. The inquiry is not whether the wrongful act itself was authorized but whether it was committed in the course of a series of acts of the agent which were authorized by the principal. Of course, where the agent, for however brief a space of time, has ceased to serve his principal, he alone is responsible for his acts during the period of such cessation. But the fact that the questioned act was unauthorized or, if wrongful, that it was not committed in order to further the interests of the principal, will not show such a departure from the service of the principal as will absolve the latter if the act was committed while the agent was still occupying himself with the principal's business within the scope of his employment. Support for these statements, with full citation and discussion of authorities will be found in Johnson v. Monson, 1920, 183 Cal. 149, 190 P. 635; Ruppe v. City of Los Angeles, 1921, 186 Cal. 400, 199 P. 496; Hiroshima v. Pacific Gas & Elec. Co., 1936, 18 Cal. App.2d 24, 63 P.2d 340; Stansell v. Safeway Stores, Inc., 1941, 44 Cal.App.2d 822, 113 P.2d 264."

[7] In the light of these observations, the facts in this case determinative of the Krieger Oil Company's liability, under the doctrine of respondeat superior, for the assault committed by Sanders upon Fields stand undisputed. Admittedly, the employee Sanders was engaged in his employer's business while operating the truck along the highway to his appointed destination. In the course of such travel the collision with plaintiff's car allegedly occurred, with the result that the drivers of the respective vehicles were required by law to stop and each furnish the other with certain information and identification data. Vehicle Code, ch. 4, § 482(b). Not only did the quarrel leading to plaintiff's injury arise solely over Sanders' performance of his duties as the driver of the truck, but obviously Sanders' entire association with

plaintiff arose out of his use of the public highway on his employer's business. Sander's successive moving of the truck because it was obstructing traffic on the road was required under the law (Vehicle Code, ch. 13, § 582), but the argument continued unabated and Sanders, in the final phase of the controversy, struck plaintiff with the wrench. The entire episode—embracing Sanders' "three stops" on the road and the assault on plaintiff—was an unbroken series of continuous and connected acts; and immediately thereafter Sanders got into his truck and proceeded down the highway on his oil delivery mission.

True, there are conflicts in the evidence as above recited but they have no significant bearing upon the single issue in question. Thus, the parties are in dispute as to these matters: (1) Whether in operating the truck, Sanders did actually collide with plaintiff's car in attempting to pass it on the highway; (2) whether in arguing and remonstrating with Sanders about his conduct, plaintiff precipitated the affray by making "passes" at Sanders and threatening to beat him—although Sanders admitted that plaintiff did not strike him at any time; (3) whether on the occasion of the second stop on the highway while the quarrel was continuing, Sanders struck at plaintiff with a flashlight; and (4) whether on the occasion of the third stop in the final phase of the altercation and following Sanders' successive hitting of plaintiff with the wrench, plaintiff was rendered "unconscious" by the blows or "was standing up still wanting [Sanders] to lay the wrench down and fight" as Sanders got in his truck and left the scene of action. Manifestly, these variances did not affect the sequence of events nor change the nature of the quarrel which arose in, from, and as a part of Sanders' performance of his duties as a truck driver on the public highway. Any personal element entering in the verbal bout between plaintiff and Sanders, and assuming plaintiff's provocative conduct in "cussing" and making ineffective "passes" at Sanders, does not alter the fact that Sanders' entire course of action was inextricably intertwined with his service to his employer: his stopping of the truck as required by law after the alleged collision with plaintiff's car; his obligation to exchange identification data with plaintiff; his successive moves of the truck to avoid obstructing traffic on the highway; and his continued denial of having struck plaintiff's car in attempting to protect his employer from liability in the matter. The culmination of the quarrel upon Sanders' perpetration of the assault and the infliction of injuries upon plaintiff indicates not a departure from the line and scope of his employment but rather an additional act committed "in and as a part of" his employer's business.

[8] There is no force to the claim that Sanders' employment did not contemplate that he should enter into relations with third persons in the course of which he might become annoyed, lose his temper and commit an assault in "an altercation concerning the right of way or concerning some similar rule involving the reciprocal conduct of motorists on the highway." Sanders' truck-driving assignment obviously would bring him into contact with other drivers of vehicles lawfully using the public highways at the same time, would envisage his compliance with highway rules and regulations in the performance of his duties in the furtherance of his employer's business interests, and would embrace any conduct inseparably connected therewith. This point was considered recently by this court in the case of Carr v. Wm. C. Crowell Co., 28 Cal.2d 652, 171 P.2d 5, where it was held that the undisputed facts established that the assault in question was the outgrowth of the employment. There in the course of a dispute over the laying of a hardwood floor, the employee of a building contractor threw a hammer at another workman, striking and injuring him. In commenting upon the "employer's responsibility for the tortious conduct of his employee" as a risk of the business, this court stated at page 656 of 28 Cal.2d, at page 7 of 171 P.2d: "* * * defendant's enterprise required an association of employees with third parties, attended by the risk that someone might be injured. 'The risks of such associations and conditions were risks of the employment.' Cardozo, J., in Leon-

bruno v. Champlain Silk Mills, 229 N.Y. 470, 472, 128 N.E. 711, 13 A.L.R. 522. Such associations 'include the faults and derelictions of human beings as well as their virtues and obediences * * *. They involve risks of injury and these risks are inherent in the working environment.' (Citing authorities.)"

[9] It is further argued that while proceeding with the removal of the truck incident to his "three stops" on the highway, Sanders "had plenty of time to disengage himself from the quarrel and to allow his temper to cool," so that it could be inferred that only personal motives and reactions motivated his continued battling with plaintiff. The record clearly negatives this line of argument. Apparently, Sanders at no time was acting in response to a loss of temper, for on cross-examination he testified that "at no time that evening" was he "angry at Mr. Fields"; that he "was very calm during the time all these things took place"; and that he "didn't get excited." And whether or not Sanders had opportunity to "disengage himself" from the quarrel is immaterial, for he didn't take advantage of it according to the undisputed facts showing that the altercation, engendered by Sanders' employment, continued unchanged in character throughout its rapidly succeeding stages and culminated in plaintiff's injury; and then only did Sanders "pull away" from the scene of action to proceed down the highway.

[10, 11] Nor is it of any consequence that "the employer here could not expect that the wrench would be used [by Sanders] as a club" to beat plaintiff. Neither could the employer in the recent case of Carr v. Wm. C. Crowell Co., supra, 28 Cal. 2d 652, 171 P.2d 5, be deemed to have expected that a hammer, furnished as a working tool to his carpenter, would be hurled at another employee in the course of a dispute, striking and injuring him. Yet such circumstances of use of the instrument did not relieve the employer from responsibility for the wrongful act of his employee. As was there said at page 654 of 28 Cal.2d, at page 7 of 171 P.2d: "It is sufficient * * * if the injury resulted from a dispute arising out of the employment." The same observation renders it immaterial that the jury impliedly found malice on the part of Sanders as the basis of its award of punitive damages against him alone. Deevy v. Tassi, 21 Cal.2d 109, 125, 130 P.2d 389.

[12, 13] "With respect to questions of fact the court reserves the power of deciding whether an issue should be presented to the jury: if reasonable men could not differ as to whether the evidence does or does not establish the existence of a fact, the court will not submit the issue to the jury." Mosley v. Arden Farms Co., 26 Cal.2d 213, 223, 157 P.2d 372, 377, 158 A.L.R. 872, concurring opinion. In line with this settled principle courts have held as a matter of law that an employee at the time of the tortious conduct in question was not acting within the scope of his employment when the evidence clearly showed a complete abandonment thereof. Gordoy v. Flaherty, 9 Cal. 2d 716, 72 P.2d 538; Peccolo v. City of Los Angeles, 8 Cal.2d 532, 66 P.2d 651; Kish v. California State Automobile Ass'n, 190 Cal. 246, 212 P. 27; Martinelli v. Stabnau, 11 Cal.App.2d 38, 52 P.2d 956; Humphrey v. Safeway Stores, Inc., 4 Cal.App.2d 589, 41 P.2d 208; Gousse v. Lowe, 41 Cal.App. 715, 183 P. 295. Similarly, as indicated by the foregoing authorities, where the evidence clearly discloses, and is susceptible of but the single conclusion, that the employee's wrongful act was committed "in and as a part of" the employer's business, the court should so decide as a matter of law. We are of the opinion that the present case falls within this latter category, and that the issue of the scope of employment was therefore properly withdrawn from the jury in the course of the court's instructions.

[14] Turning to the appeal of defendant Sanders from the judgment against him alone for exemplary damages in the sum of $350, no argument has been presented in support of that appeal and it must be deemed to be abandoned. No appeal was taken by defendant Sanders from the judgment entered jointly against him and the members of the Krieger Oil Company for compensatory damages in the sum of $3,000, and that judgment has long since become final as to him.

The judgments from which the appeals were taken are, and each of them is, affirmed.

GIBSON, C. J., and SHENK, CARTER, and TRAYNOR, JJ., concurred.

EDMONDS and SCHAUER, JJ., concurred in the judgment.

30 Cal.2d 138

SPAULDING et al. v. YOVINO-YOUNG et al.

S. F. 17280.

Supreme Court of California, in Bank.

May 21, 1947.

1. Landlord and tenant 🔑92(1)

A provision in lease granting lessee option to purchase is not an essential covenant of the lease, nor is it a term or condition of the demise.

2. Landlord and tenant 🔑92(1)

In absence of a provision in lease making exercise of option to purchase contained therein personal to lessee, such option may be separated from the lease and transferred by lessee independent of leasehold interest.

3. Landlord and tenant 🔑92(1)

The general consideration of the lease, such as covenant to pay rent or to do other acts, supports an option to purchase contained therein as well as the right to occupy the premises.

4. Landlord and tenant 🔑115(3)

The continued occupancy of leased premises by former lessee after expiration of two-year lease under provision in lease that a holdover would constitute a month-to-month tenancy only on the same terms and conditions was no more than the law would imply in absence of such "holdover" clause. Civ.Code, § 1945.

5. Landlord and tenant 🔑92(3)

Where two-year lease at stipulated monthly rental provided that a holdover would constitute a month-to-month tenancy only on the same term and granted an option to purchase provided all rent was paid up to time of exercise of option, the "holdover" clause in lease could not be construed as permitting exercise of the option after fixed period specified in the lease. Civ. Code, § 1945; Code Civ.Proc. § 1161.

6. Appeal and error 🔑110

An order denying motion for a new trial was non-appealable.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Bryan J. Spaulding and Sally G. Spaulding against Joseph J. Yovino-Young and Mabel F. Yovino-Young for specific performance of an option to purchase contained in a written lease. From a judgment for defendants and from an order denying a motion for a new trial, the plaintiffs appeal.

Judgment affirmed, and appeal from the order dismissed.

Prior opinion, see 171 P.2d 82.

Charles A. Christen and Everett H. Roan, both of San Francisco, for appellants.

Rupert R. Ryan, Albert K. Whitton and Young, Ryan & Whitton, all of Oakland, for respondents.

SPENCE, Justice.

This is an action for specific performance of an option to purchase agreement contained in a written lease of certain real property. The trial court found that the option was not exercised within the time of its life and accordingly rendered judgment for defendants. From that judgment and an order denying a motion for a new trial, plaintiffs appeal.

The construction to be placed upon the several clauses of the lease definitive of the rights of the parties thereto is the sole issue in controversy. Plaintiffs contend that the "hold-over" provision, allowing their month-to-month tenancy of the premises after the expiration of the term of the lease, operated to extend their option to purchase the property for a correlated period. Defendants object to this interpretation upon the ground that it would give an unwarranted scope to the language employed by the parties to express their understanding, inconsistent with both practical and legal considerations. An analysis of the pertinent portions of the lease conforms with the trial court's views in line with defendants' position and its consequent decision in defendants' favor.

The facts are simple and not in dispute. Defendants, as lessors, and plaintiffs, as lessees, executed a two-year written lease covering certain residential property in Oakland for the period commencing March 7, 1941, and ending March 6, 1943. The total rent stipulated was $840.00, payable in monthly installments of $35.00 per month on the 7th day of each and every month. It was further provided: "Should the parties of the second part [plaintiffs herein] hold over the term herein created, such tenancy shall be from month to month only, and be on the same terms and conditions as herein stated." The lease, in addition to being in the conventional form for the demise of real property, also contained the following option for purchase of the premises by the lessees: "It is further understood and agreed as part of the consideration for this lease, Lessors hereby give to the Lessees the option to purchase the real property herein leased for the sum of Thirty-five Hundred and Fifty ($3550.00) Dollars, in lawful money of the United States, provided, however, that said Lessees shall have paid all of the rental due up to the time of the exercise of said option; upon the execution of the necessary documents in connection therewith and the consummation of said sale, this lease shall cease and determine; said purchase price may be payable in cash, or as follows: Cash payment of Three Hundred and Fifty ($350.00) Dollars, upon which will be credited the total amount of rental paid to the date said option is exercised, after deduction, however, from said rental paid of" certain enumerated items as insurance and taxes "expended by Lessors" and "it being understood that the required monthly payments on the balance shall not exceed Thirty-five ($35.00) Dollars per month, including interest at six (6%) per cent per annum on the monthly decreasing balances."

Plaintiffs made the monthly rental payments of $35.00 to a real estate agent who received a commission for procuring the lease, and who also was to receive a commission in the event of the sale of the property. After the expiration of the lease term on March 6, 1943, plaintiffs continued in possession and continued to pay the monthly rental under their "hold-over" arrangements with defendants. On October 7, 1943, plaintiffs first made known their election to exercise the option through the agent who had been collecting the rents and tendered to defendants the sum of $224.89, this amount apparently having been computed in accordance with provisions of the option. Defendants refused to accept this payment and rejected the tender upon the ground that the time within which the option could be exercised had lapsed with the expiration of the two-year period of the lease. Plaintiffs then brought this action for specific performance.

[1, 2] The propriety of defendants' position stems from the following considerations. Under the language of the lease, the privilege of "holding-over" possession of the property on a "month-to-month only" basis and the option given to purchase the property conferred separate and distinct rights and powers upon plaintiffs. The first stipulation had reference to a continuance of the tenancy; the second stipulation empowered the lessees to terminate the tenancy and to become the absolute owners of the property. The latter privilege, though commonly found in a lease (35 Corpus Juris. 1038, sec. 181), is not an essential covenant thereof, nor is it a term or condition of the demise. Thus, in the absence of a provision making the exercise of the option to purchase personal to the lessee (Prichard v. Kimball, 190 Cal. 757, 764, 214 P. 863), such option may be separated from the lease and transferred by the lessee independently of the leasehold interest. Mott v. Cline, 200 Cal. 434, 450, 253 P. 718.

[3, 4] It is uniformly held that the general consideration of the lease, such as the

covenant to pay rent or do other acts, supports the option to purchase as well as the right to occupy the premises. Gordon v. Dufresne, 205 Cal. 512, 514, 271 P. 1066; Cates v. McNeil, 169 Cal. 697, 703, 704, 147 P. 944; 35 Corpus Juris, 1038, 1039, sec. 182. But it does not follow that all such rights and obligations exist beyond the fixed term of the lease. Here the fixed term created by the lease was specified as two years, and the lessor-lessee relationship as such terminated at the expiration of that period. The continued occupancy of the property thereafter by plaintiffs was regulated by the "hold-over" provision of the lease, which provision contemplated a landlord-tenant relationship as distinguished from the lessor-lessee relationship as such. The provision in the "hold-over" clause that the month-to-month tenancy was to be "on the same terms and conditions" as stated in the lease does not avail plaintiffs, for continued occupancy of the property on that basis by the former lessees was no more than the law would imply in the absence of such "hold-over" clause. Civil Code, sec. 1945; Vucinich v. Gordon, 51 Cal.App.2d 434, 436, 124 P.2d 868. Upon the expiration of the two-year lease period, plaintiffs were no longer bound to hold the premises and pay rent for a definite term in exchange for the right of occupancy and the option to purchase the property, which option was expressly defined as "part of the consideration for this lease." Rest. Contracts, sec. 75; Bard v. Kent, 19 Cal.2d 449, 452, 122 P.2d 8, 139 A.L.R. 1032. In the absence of the continuance of such mutuality of obligation between the parties, there would be no legal basis for carrying over the option agreement into the indefinite month-to-month tenancy permitted under the "hold-over" clause, apparently inserted in the lease for plaintiffs' protection from an unlawful detainer action. (Code Civ.Proc., sec. 1161.) The express statement in the lease making the availability of the option dependent upon the condition that "Lessees shall have paid all of the rental due up to the time of the exercise of said option," when considered in conjunction with the express provision in the lease for the agreed "term of two years" at the total "rental of $840.00," serves to correlate the life of the option with the fixed term of the lease. In these circumstances, plaintiffs' rights as lessees during the fixed term must be distinguished from their subsequent rights as month-to-month tenants under the "hold-over" clause.

There seems to be a dearth of authority upon the precise matter at issue in this case. Upon the question of whether a renewal or extension of a lease operates to extend the time for exercising the option to purchase contained therein, the courts have reached a variety of conclusions. (See notes 37 A.L.R. 1245; 39 A.L.R. 1108.) However, that is not the question here where the lease contains no provision for its renewal or extension but only a "hold-over" clause in anticipation of the possible continued tenancy of the property beyond the prescribed term marking the limit of the lessor-lessee relationship. Plaintiffs cite as pertinent the early case of Abbott v. Seventy-Six Land & Water Co., 87 Cal. 323, 25 P. 693. There the original lease contained both an option to purchase and an option to renew the leasehold from year to year, not to exceed two years. In the exercise of the option for renewal, a new lease agreement was drawn for the additional term and, as stated in the opinion, it was mutually understood and agreed between lessor and lessee that the option to purchase was to persist but was not to be expressed in the new lease for the convenience of the lessor. On those facts, it was held that the option contained in the original lease would carry into the renewal lease and subsequent renewals made under the same circumstances. That factual situation is certainly not present in this case.

[5] Nor does plaintiffs' reference to the English case of Rider v. Ford, [1923] 1 Ch. 541, strengthen their position. There the lessee, several years after the expiration of the original term but while still in possession, sought to exercise an option to obtain a 97-year lease of the property. After stating that the lessee was then holding as a tenant from year to year and noting that the lessors had never called upon him to elect whether he would exercise the option, nor had he done anything to abandon

the same, the court concluded from the informal correspondence between the parties in expression of their agreement that it could not "read into it any limit in point of time except * * * that the option exists so long as the relationship of landlord and tenant continues, notwithstanding that the original term of seven years has run out." (Page 545.) Regardless of any significance which might attach to the character of that option as designed to continue "the relationship of landlord and tenant" rather than to destroy it upon the tenant's purchase of the freehold, the present case differs in these respects: the parties here have executed a formal document setting forth their understanding as to the demise of the property and the separate right of the option to purchase conferred on the lessees "as part of the consideration for this lease." As so stipulated, the option is not "unlimited in time" but must be regarded as available only during the effective period of the consideration for the lease—two years—in correlation with occupancy of the property under the lessor-lessee relationship. (Cf. In re Leeds & B. Breweries, [1920] 2 Ch. [Eng.] 548.) In the light of these observations the "hold-over" clause must reasonably be construed as operating to permit the former lessees to continue tenancy of the property "on the same terms and conditions" stated in the lease, but not to permit exercise of the option after the fixed period specified in the lease. While a lessor may be content for a fixed time to be restricted to a fixed price for the sale of his property, it is another matter altogether to conclude that an option to purchase is to continue for an indefinite period under authority of a "hold-over" tenancy unless clear words are used to express that purpose. Such is not the case here, where the words of the "hold-over" provision are appropriate to a continuance of the tenancy but not to a continuance of the option. Accordingly, plaintiffs' attempt to exercise the option to purchase agreement seven months after the expiration of the lease, and while "holding-over" the property, came too late, and the trial court correctly so concluded.

[6] The order denying plaintiffs' motion for a new trial being nonappealable, the appeal from said order is dismissed. The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.

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79 Cal.App.2d 820

PEOPLE v. ORONA.

Cr. 4094.

District Court of Appeal, Second District,
Division 1, California.
May 22, 1947.

1. Witnesses 🔑241

Leading questions may be properly asked when they are designed to lead witnesses more quickly to matters which are material.

2. Criminal law 🔑1170½(1)

Permitting witness to answer question "did the car come to a stop at that lot?", over defendant's objection that question was leading and suggestive, did not constitute prejudicial error.

3. Automobiles 🔑355(8, 10, 14)

Evidence supported conviction of assault by means of force likely to produce great bodily injury and of violation of section 503 by taking and driving automobile of another in his absence without his consent with intent to deprive owner of his title and possession thereto, and of violation of section 480 in that while driving the automobile defendant was involved in an accident resulting in injuries to another and failed to stop and render aid. Vehicle Code §§ 480, 503.

4. Criminal law 🔑665(4)

Denial of defendant's motion to exclude witnesses at the trial on ground that "I don't want them to be told what they are going to testify to here" was not an abuse of discretion, where it was brought out that all the witnesses had testified at the preliminary hearing.

Appeal from Superior Court, Los Angeles County; Elmer W. Heald, Judge.

Seferino Orona, Jr., was convicted of assault by means of force likely to produce great bodily injury and of violations of sections 480, 503 of the Vehicle Code, and he appeals from the judgment of conviction and order denying his motion for new trial.

Affirmed.

Jesse Bach Porter, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Frank Richards, Deputy Atty. Gen., W. E. Simpson, Dist. Atty. and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

YORK, Presiding Justice.

Defendant was charged in an information containing four counts with (1) the crime of assault by means of force likely to produce great bodily injury upon Joe C. Clemens, Jr., (2) the crime of grand theft in that he took an automobile belonging to said Joe C. Clemens, Jr., (3) the crime of violation of section 503 of the Vehicle Code by taking and driving the automobile of said Joe C. Clemens, Jr. in his absence and without his consent with intent to deprive the latter of his title and possession thereto, and (4) a violation of section 480 of the Vehicle Code, in that while driving an automobile he was involved in an accident resulting in injuries to William H. Fitch and failed to stop and render aid. The jury brought in its verdicts finding defendant guilty as charged in counts 1, 3 and 4, and found him not guilty of grand theft, as charged in count 2 of the information.

Defendant prosecutes this appeal from the judgment of conviction which was thereafter entered, and from an order denying his motion for a new trial.

It is here contended that the trial court erred (1) in overruling appellant's objection to leading questions of the prosecution; (2) in holding that the evidence was sufficient to sustain the verdict on any count; (3) in holding that the evidence was sufficient to sustain a conviction under section 503 of the Vehicle Code. Also, that the court abused its discretion in overruling appellant's motion to exclude the witnesses from the court room.

At the trial of the instant prosecution, Mr. Clemens testified that he met appellant for the first time at Chris' bar in the vicinity of Washington and Maple in the city of Los Angeles on June 18, 1946, where he also met Mrs. Shannon; that the witness was the owner of a 1940 Studebaker business coupe which he had parked near the bar; that about 10:00 p. m. the three persons left the bar, appellant having asked Mr. Clemens to take him home to pick up his brother's car because he had a date with Mrs. Shannon and wanted to take her out; that the three of them got in Clemens' automobile and Clemens drove to the place where appellant said he lived, but there was no car there; that appellant wanted to get something to eat, but Clemens stated he was out of gas whereupon appellant suggested that they go to the place where he was employed and he would fill the tank; that whereupon the witness Clemens drove out Washington Boulevard to the place mentioned by appellant where they backed the car "against a pick-up truck and took the gasoline out of the barrel * * * on the back of this pick-up truck"; that appellant then told the witness where to go and he drove "up on the top of a mesa near the river"; that the witness formerly had been a fireman for the Santa Fe Railway and when he heard an engine whistling across the river, he wanted to go and watch the engines come into the roundhouse; that turning the lights off and leaving the keys in the car, he got out and walked about 300 feet; that he was gone about 15 minutes and when he returned he found the car parked in the same place and observed Mrs. Shannon lying flat on the ground alongside of the automobile and appellant standing over her hitting her with his fist on the head and face; that the witness immediately shoved appellant over, picked up Mrs. Shannon and placed her in the front seat of the car, at which time he "had a little argument or tussle" with appellant and knew nothing more until he waked the next morning suffering from lacerations on both sides of his head, a broken jaw and broken ribs, and found himself in a colored man's shack; that he was taken to a hospital where he remained two weeks and later recovered his car from the police.

The witness Booker testified that on June 18, 1946, he was living east of the Los Angeles River and north of Washington Street in a one-room shack, close to the Sears-Roebuck plant; that he was in bed when Mr. Clemens rapped on the door and said "Here I am"; that Clemens was "all smashed up. His face was all cut up * * * his face was just a mat of blood", and he was scarcely able to get around; that the witness arose and helped put Clemens to bed; in the morning he gave Clemens a cup of coffee, but the latter "couldn't drink it"; that Clemens asked the witness to drive him home saying, "My car is parked over there"; that no car was parked near the shack; that the witness declined to call the police because he "did not want to be involved in anything like that", but told Clemens to go to the gravel pit in the neighborhood and have some one there "call up an ambulance for you."

Mrs. Shannon testified that on the night of June 18, 1946, she was at Chris' bar and saw Mr. Clemens and appellant there; that she knew neither one before that night; that she left the bar alone at 10:30 p. m., at which time one of the men offered her "a lift home"; that she got in the car, Mr. Clemens driving and appellant seated on her right-hand side; that she was not very well acquainted with Los Angeles and did not know where they went, but that they finally stopped at a vacant lot; that she "was forcibly taken from the car by the defendant * * * He knocked me down and tried to attack me. I don't remember anything except being hit with his fist"; that she was dazed but not unconscious; that she "never did see Mr. Clemens from the time the car stopped. I never saw him after the time the car stopped. I don't know where he was"; that she remembered being in the car after the beating; that appellant got in and drove the car away from the lot; that Mr. Clemens was not in the car; that the witness remembered an impact and crash but "didn't even know a car was hit"; that appellant was driving at the time of the crash and left the witness "sitting on the right-hand side of the car * * * He got out of the car behind the wheel in the driver's seat and left in front of the car, in front of the headlights. * * * I saw him cross in front of the car; I saw the defendant." That she got out of the car and walked around to get some air; that she was not acquainted in Los Angeles very much and didn't know where the accident occurred, but could identify the place if driving out there; that in the impact she was thrown against the windshield and was bleeding profusely, but did not know whether she "was cut by the windshield or by the defendant."

The witness Savedra testified that about 9:45 in the morning of June 19, 1946, he saw Mr. Clemens about 300 feet from Mr. Booker's shack; that Clemens was "cut up pretty bad * * * I saw blood all over his face"; and that he asked the witness to give him a ride to the nearest telephone, which the witness did.

Mr. William H. Fitch testified that some time before midnight of June 18, 1946, accompanied by his wife he was driving a Ford convertible coupe on Industrial Street; that he "came to Washington Boulevard and I stopped at the stop sign. There was no indication of any traffic on either Industrial or Washington Boulevard. I started, got across the street, or half way, or better than half way across the street, when I was struck. * * * The right-hand side of my car"; that he was thrown out of his car and suffered a slight concussion, a gash on his forehead, a broken rib and a broken nose; that he did not see what struck him; that he was taken to the emergency hospital 20 minutes or half an hour after the accident, during which period he was lying on the ground and no person offered to aid him in any way or identified himself as the driver of the car that hit the witness.

State Traffic Officer Russell testified that on June 18, 1946, at 11:15 p. m., he answered a call at Industrial and Washington Boulevard and found a wrecked Ford coupe blocking the street; that he made a search of the immediate vicinity to see what had collided with the Ford and discovered no other vehicle, but saw a hub cap (People's Exhibit No. 3) on the running board of the Ford; that about 1:00 a. m. of June 19th, he saw a Studebaker President coupe parked at the northeast corner of Grande Vista and Washington Streets which point is three or four miles from Industrial and Washington; that the glass in the windshield of the Studebaker was cracked; that he and his partner held up the hub cap, rim and headlight "to the parts that were missing, to see if they would fit and match the other hub caps", and he observed that they were similar to those left on the car; that he impounded the Studebaker at a State garage. On cross-examination using a map, the officer testified "When I found the Studebaker it was parked right here, and nobody was in it and I knew it was the car we wanted, so we started patrolling the neighborhood looking for the driver and in our patrol we went west on Olympic and met Mrs. Shannon on the north side of Olympic in the street; she, in fact, flagged us down. * * * between Lorena and Soto Streets; that the Los Angeles River is not very far from Soto Street."

State Traffic Officer Carl L. Thomas testified that he and officer Russell answered a call to Industrial and Washington Boulevard shortly after 11:00 p. m. on the night in question and observed a Model A Ford in the intersection, and over to the side Mr. Fitch was lying on his back; that within 10 feet of the point of impact he picked up a Studebaker President hub cap, a rim and headlight "along with a tire and wheel of the Model A that was knocked off"; that he later examined the Studebaker at the corner of Grande Vista and Washington and found the right front thereof damaged, "the headlight was knocked out on the right front, the rim was missing, the right hub cap off the Studebaker was missing, and the windshield on the right hand side of the car * * * was shattered. * * * there was blood inside the car on the seat and (on) the blanket on the right-hand side, but there was no damage to the steering wheel, or anything on the driver's side of the car at all." This witness further testified that they picked up Mrs. Shannon west of the place wnere the Studebaker was found, near Olympic at approximately 4:00 a. m.; that "she was hitch-hiking and we noticed her face was badly bleeding, so we picked her up."

Traffic Accident Investigator C. O. Roberts testified that he had a conversation with appellant on June 22, 1946, about 2:00 p. m. in the 77th Street Division of the Los Angeles Police Department, at which time he said: "Sam, you got yourself in a lot of trouble last night, didn't you? He said, 'Yes.' I said, 'You beat this man up, took his car and this girl, and then you had the hit and run accident, after which you abandoned the car,' He said, 'That is right,' I said 'Well, how did you get in here, Sammie?' He said, 'Well, after I abandoned the girl and the car, I was making my way home when I was picked up by two Los Angeles police officers and booked on a traffic warrant.'"

Appellant took the stand in his own defense and testified to meeting Mr. Clemens and Mrs. Shannon in Chris' bar on the night in question; that Mr. Clemens asked him if he knew where they could go to listen to Mexican music and get some Mexican food; that he said he did and the three of them left the bar; that Clemens needed some gas and appellant directed him to the place where he worked and they got the gas and Clemens drove on, finally stopping the car and said, "Let's park for a little while," and got out of the car telling appellant to stay in the car; that said witness (appellant) sat down and "didn't talk to this girl or anything. I just sat there for a little while"; that Clemens returned and the witness got out of the car and Clemens called Mrs. Shannon and she got out; that Clemens and Shannon were talking while the witness stood on the right side of the car and pretty soon Clemens came up to the witness and started pushing and they started fighting; that the witness lost consciousness; that when he came to the car was gone and no one was around, so he started walking back home; that he boarded a street car but was hungry and got off at 7th and Central to look for a restaurant; that he walked west on 7th Street and when he got to 7th and Kohler

Street two officers stopped him and took him in to "investigate" him and later booked him for a traffic violation.

It appears from the foregoing statement that there was sufficient evidence adduced at the trial herein from which the jury could find that appellant committed an assault upon Mr. Clemens and left him in the vacant lot near Mr. Booker's shack; that appellant then took possession of the Clemens car with Mrs. Shannon sitting therein and drove away, colliding with the Field car at the intersection of Industrial and Washington Boulevard; that appellant did not stop or render aid at the scene of the collision, but drove on to Grande Vista and Washington, where he abandoned the car and Mrs. Shannon, who was bleeding profusely from injuries she received in the crash with the Field car. The only evidence in rebuttal was the testimony of appellant.

Appellant sets forth in his opening brief seven questions asked of Mrs. Shannon by the prosecution, which he contends were leading and that the court's failure to sustain his objection thereto was prejudicial to his case. The basis of his objection is that it appears from the direct and cross-examination of Mrs. Shannon that she was in such a state of intoxication at the time covered by the questions that she was unable to perceive or be conscious of the events that took place.

[1, 2] When asked if she had been drinking, Mrs. Shannon answered: "I was drinking beer." There is no evidence in the record that she was intoxicated or unconscious, although she was dazed from the beating she received from appellant. She remembered that appellant drove the automobile away from the vacant lot after he attacked her and also he was driving the car at the time of the crash, after which he left the car. In view of the treatment Mrs. Shannon received at the hands of appellant, it may be that she did not remember every detail of what occurred on the night in question, but that does not indicate that she was either intoxicated or unconscious. Assuming that the questions were leading, it is proper to ask leading questions when they are designed to lead the witness more quickly to matters which are material to the issues. (Wharton's Criminal Evidence, 11th Ed. Vol. 3, pp. 2135-2149, Secs. 1269-1271.) Appellant, for example, objected to the question "Did the car come to a stop at that lot?", on the ground that it was leading and suggestive and that it took two pages of testimony at the preliminary hearing to ascertain where the car stopped. In overruling the objection and permitting the witness Shannon to answer, "Yes, it did, your Honor."—no prejudicial error was committed by the trial court.

[3] In connection with his second point that the evidence is insufficient to sustain the verdict on any count for the reason that (1) the testimony of the two principal witnesses is unreliable; (2) the prosecution introduced no evidence of how and by what means the assault was committed; and (3) "the location of the parties involved in reference to the abandoned car also supports the contention of the appellant that he was not the driver of the car at the time of the accident", suffice to say that the points urged involve questions of fact, and that an examination of the evidence adduced at the trial herein conclusively shows that the jury's verdict is amply supported by such evidence.

[4] Appellant urges that the court abused its discretion in denying his motion to exclude the witnesses at the trial. At the time such motion was made, it was brought out that all of the witnesses testified at the preliminary hearing, hence appellant's ground for the motion "I don't want them to be told what they are going to testify to here", was insufficient reason for the exclusion of the witnesses from the court room.

The record discloses amply sufficient evidence to support the judgment and no error sufficiently prejudicial to authorize a reversal.

For the reasons stated, the judgment and order appealed from are, and each of them is, affirmed.

DORAN and WHITE, JJ., concur.

CITY OF PASADENA v. CITY OF ALHAMBRA et al. *

Civ. 14752, 15241.

District Court of Appeal, Second District,
Division 3, California.

May 6, 1947.

Rehearing Denied June 5, 1947.

Hearing Granted June 30, 1947.

1. Judgments 🔑563(1)

Supreme Court's denial of ex parte application for writ of mandate without an opinion would be deemed simply to constitute a refusal by Supreme Court to exercise its original jurisdiction, and would not be regarded as res judicata of question whether action should have been dismissed pursuant to statute because not brought to trial within five years, even though petitions for writ of mandate directed attention of Supreme Court to such question. Code Civ.Proc. § 583.

2. Dismissal and nonsuit 🔑60(2)

A partial trial within prescribed five-year period removes case from operation of statute requiring dismissal of action not brought to trial within five years. Code Civ.Proc. § 583.

3. Dismissal and nonsuit 🔑60(2)

In action to quiet title to water rights and for injunctive relief, wherein Division of Water Resources was appointed as referee to investigate physical facts, hearings on referee's application for instructions as to scope of investigation and in regard to payment of its expenses did not constitute a "partial trial" of the cause, so as to preclude dismissal thereof under statute requiring dismissal of action not brought to trial within five years. Code Civ.Proc. § 583.

See Words and Phrases, Permanent Edition, for all other definitions of "Partial Trial".

4. Dismissal and nonsuit 🔑73

In action to quiet title to water rights for injunctive relief, wherein Division of Water Resources was appointed as referee with no time limit interposed for filing of its report, trial judge, in his consideration of motions to dismiss the action under statute requiring dismissal of an action not brought to trial in five years, was entitled to determine whether referee was proceeding with due diligence and was following instruction to report seasonably, to court, result of its investigation of physical facts involved in its assignment. Water Code, § 2019; Code Civ.Proc. § 583.

5. Dismissal and nonsuit 🔑60(3)

Despite mandatory language of statute requiring dismissal of action not brought to trial within five years, implied exceptions will be recognized where it is not possible to bring the cause to trial. Code Civ. Proc. § 583.

6. Dismissal and nonsuit 🔑60(1)

The purpose of statute requiring dismissal of action not brought to trial within five years as to prevent avoidable delay for too long a period, and it is not designed arbitrarily to close the proceeding at all events in five years. Code Civ.Proc. § 583.

7. Dismissal and nonsuit 🔑60(2)

In action to quiet title to water rights and for injunctive relief, wherein Division of Water Resources was appointed as referee to investigate physical facts with no time limit interposed for filing of its report, where trial judge believed that referee was taking all possible steps to expedite his investigation and report, trial judge, in passing on motion for dismissal of the action pursuant to statute requiring dismissal of action not brought to trial within five years, was justified in refusing to count time consumed by referee as part of the five year period specified by statute and as result thereof deny the motions. Water Code, § 2019; Code Civ.Proc. § 583.

8. Pleading 🔑370

In determining issues raised by the pleadings, the pleadings of all parties must be considered, and it is necessary to consider their specific allegations.

9. Waters and water courses 🔑152(5)

In action to quiet title to water rights and for injunctive relief, where plaintiff alleged that it possessed paramount right to use of a stated quantity of water and that each of defendants likewise asserted a right to use of such water and prayed that each defendant be required to set forth nature of its claimed right to use of such water, and defendants, in their respective answers, aside from the three who disclaimed, denied plaintiff's allegation of paramount right and alleged ownership of various rights to use of such water, each superior to that of the plaintiff, pleading raised issues inter se as to all of the parties, since determination of one claim necessarily would affect amount available for other claims. Water Code, § 100; Const. art. 14, § 3.

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* Subsequent opinion 207 P.2d 17.

10. Action ⇨6
Waters and water courses ⇨152(5)

In actions to quiet title to water rights, particularly where plaintiff also is seeking declaratory relief, rights of each defendant are in issue not only as against plaintiff but also as against all of its codefendants. Water Code, § 100; Const. art. 14, § 3.

11. Waters and water courses ⇨152(1)

In suit to quiet title to water rights, the basic purpose is to determine respective rights of all parties to use of water involved. Water Code, § 100; Const. art. 14, § 3.

12. Constitutional law ⇨309(1)

In action to quiet title to water rights and for injunctive relief, an inter se determination among all the parties after due notice and hearing thereon could not be attacked by one of defendants on ground that it constituted a denial of procedural due process because no service was had upon the defendants. Water Code, § 100; Const. art. 14, § 3.

13. Statutes ⇨225½

Under Water Code establishing reference procedure in actions involving water rights, compliance with general reference statute was not required in action involving water rights. Code Civ.Proc. §§ 638–645; Water Code, §§ 2000–2050.

14. Waters and water courses ⇨152(10)

Under Water Code, an action to quiet title to water rights could be referred to State Division of Water Resources as referee, as against defendant's contention that only a natural person could be appointed by court as a referee. Code Civ.Proc. §§ 638–645; Water Code, §§ 2000–2050.

15. Statutes ⇨225

In view of ambiguity presented by apparent conflict between word of two statutes, resort to judicial construction was necessary to ascertain legislative intent.

16. Evidence ⇨29, 30, 33, 43(1), 45, 46, 47, 48, 49

Under statute, District Court of Appeal may take judicial notice of public and private official acts of the legislative, executive, and judicial departments of state and of the state laws. Code Civ.Proc. § 1875, subd. 3.

17. Waters and water courses ⇨152(10)

The State Division of Water Resources was statutory successor of the Water Commission and was, therefore, in February, 1939, the proper referee to which action involving conflicting water rights should be referred under statute. Pol.Code, §§ 363c, 363e; Water Code, §§ 4, 22, 23, 1050.5, 2000–2050, 2001.

18. Constitutional law ⇨80(2)
Statutes ⇨76(3)
Waters and water courses ⇨128

The provision in Water Code authorizing court to make reference of action involving conflicting water rights to State Division of Water Resources, as referee, is not unconstitutional as violative of separation of powers provision in Constitution, or as a "local" or "special law", where a general law can be made applicable. Water Code, §§ 2000–2050; Const. art. 3, § 1; art. 4, § 25, subds. 3, 33.

See Words and Phrases, Permanent Edition, for all other definitions of "Local Law" and "Special Law".

19. Constitutional law ⇨311

In action to quiet title to water rights and for injunctive relief, wherein Divison of Water Resources was appointed as referee to investigate physical facts, defendant was not denied due process of law by admission of divisions' report pursuant to statute, where defendant was afforded full opportunity to be heard in opposition to divisions' report as evidence, and to introduce evidence contrary to facts appearing therein. Water Code, §§ 2000–2050.

20. Waters and water courses ⚷152(10)

The word "solely", as used in provision in Water Code authorizing court to make reference of action involving conflicting water rights to Division of Water Resources, as referee, does not preclude participation by parties in divisions investigation, but rather an investigation is no less the referee's own by reason by having accepted assistance of the parties, thereby possibly expediting the reference in reducing its costs. Water Code, §§ 2000–2050.

See Words and Phrases, Permanent Edition, for all other definitions of "Solely".

21. Waters and water courses ⚷99

"Ground water" is divided, when discussing water rights, into water flowing in defined subterranean streams and percolating water.

See Words and Phrases, Permanent Edition, for all other definitions of "Ground Water".

22. Waters and water courses ⚷99

In order for ground water to be considered a "subterranean stream", it must possess all attributes of a surface body of water except location upon the surface, and its channels or boundaries must be known and well defined.

See Words and Phrases, Permanent Edition, for all other definitions of "Subterranean Stream".

23. Waters and water courses ⚷100

The law of surface bodies of water applies to subterranean streams.

24. Waters and water courses ⚷99

"Percolating water" is ground water which is not part of subsurface flow of a surface body of water and which does not possess a well-defined channel or boundaries, although it may possess both movement and direction and be interdependent with surface bodies of water.

See Words and Phrases, Permanent Edition, for all other definitions of "Percolating Water".

25. Waters and water courses ⚷99

Ground water which may not be classed as a subterranean stream must be classed as percolating water.

26. Waters and water courses ⚷99

Since ground water is invisible, it is presumed to be percolating water and burden of proof is upon party asserting the contrary.

27. Waters and water courses ⚷99

Party seeking to have ground water classed as a subterranean stream instead of as percolating water has burden of locating boundaries of the subterranean body of water with considerable certainty.

28. Waters and water courses ⚷107(3)

Evidence supported finding that ground water in issue in action to quiet title to water rights and for injunctive relief was percolating water and not a subterranean stream.

29. Waters and water courses ⚷127

The existence of adverse use is fundamental to acquisition of prescriptive status in regard to water rights.

30. Waters and water courses ⚷127

"Adverse use" of water involves the invasion of the usufructuary right of another in a water supply common to both.

See Words and Phrases, Permanent Edition, for all other definitions of "Adverse Use".

31. Waters and water courses ⚷127

What constitutes an invasion of a water right depends upon nature of right involved.

32. Waters and water courses ⚷34, 100, 101, 127, 190

In California, aside from the special pueblo right, water rights are riparian, overlying, appropriative, or prescriptive.

33. Waters and water courses ⚷40

A "riparian right" is reciprocal in character as to other riparian rights in the same body of water, extends only to the water during its passage by the land to which the riparian right attaches, and embraces both present and prospective reasonable beneficial riparian use.

34. Waters and water courses ⚷40

The very nature of a riparian water right precludes its being fixed in amount.

35. Waters and water courses 🔑42, 47

A riparian right may be invaded either by an excessive upper riparian use interfering with its present exercise, or by any upper nonriparian use.

36. Waters and water courses 🔑47

The reason why an upper nonriparian use constitutes an invasion of a lower riparian right is that it, per se, infringes upon prospective aspect of the lower riparian right.

37. Waters and water courses 🔑100, 101

An "overlying right" is analogous in nature to a "riparian right", since both originate in the juxaposition of land and water, and hence it may be invaded in much the same manner as a riparian right.

> See Words and Phrases, Permanent Edition, for all other definitions of "Overlying Right" and "Riparian Right".

38. Waters and water courses 🔑101

The riparian concept of upper and lower use is not applied to percolating water.

39. Waters and water courses 🔑127

In contrast to riparian and overlying rights, appropriative and prescriptive rights are dependent for their existence upon reasonable beneficial exercise thereof, have no prospective aspect and are absolute in amount, and hence appropriative or prescriptive rights may be invaded only by interference by another resulting in actual diminution of the amount of water covered by such right.

40. Waters and water courses 🔑146

Where water company, which had appropriative rights in percolating water in an area in common with other parties, had never suffered any involuntary diminution in its ground water production and had always had more water available than its use required, the taking of ground water by the other parties was not adverse to company's appropriative rights.

41. Adverse possession 🔑31
Waters and water courses 🔑127

Forfeiture should not be permitted without notice thereof during prescriptive period to one suffering forfeiture, and such principle is recognized in water right law.

42. Waters and water courses 🔑40

The taking of water by a riparian owner is presumed to be in exercise of his riparian right.

43. Waters and water courses 🔑127

An upper riparian owner cannot gain a prescriptive title against a lower riparian owner unless there has been either actual notice to lower owner of such upper owner's adverse claim or the circumstances are such, as substantial interference with lower flow or a nonriparian use, as to bring home, to lower riparian owner, the adverse nature of the upper riparian owner's use.

44. Waters and water courses 🔑127

Ground-water rights of water company, to extent that company exports its water production to customers located outside of the overlying area, are "appropriative."

> See Words and Phrases, Permanent Edition, for all other definitions of "Appropriative Rights".

45. Waters and water courses 🔑152(11)

Where rights of water company to percolating water in area were prior to those of various other parties also owning rights in the water supply, distributing burden of overdraft equally among all parties, including water company, was improper, although trial court could restrict water company's production in accordance with exact priority of its water rights.

46. Waters and water courses 🔑127

The immunity of an established public use of water is not absolute, and the right to such use may be lost completely by prescription.

47. Waters and water courses 🔑152(2)

Where trial court would be required to take into consideration, in restricting water company's production of area ground water, the availability to water company in equitable and reciprocal terms of excess water of other parties also owning interests in the ground-water supply, irrespective of origin of such water, so that no interruption of water company's service to its customers should result from any restriction of its production, water company's defense of intervention of its public use was not apposite.

48. Waters and water courses ⇨100, 101, 143

Public policy as embodied in Constitution demands that ground-water supply be protected from eventual exhaustion by continued overdraft. Const. art. 14, § 3.

49. Waters and water courses ⇨100, 101

The water rights of landowners who have used water underlying their land upon their overlying land for purely private purposes are purely "overlying rights".

50. Waters and water courses ⇨100, 101, 190

Mutual water companies, to extent that they served only their own overlying stockholders, were only overlying users and their water rights were purely "overlying rights".

51. Waters and water courses ⇨127

All parties who devote and have devoted water produced by them from percolating waters in area to public use are to extent of such use making an "appropriative use".

See Words and Phrases, Permanent Edition, for all other definitions of "Appropriative Use".

52. Waters and water courses ⇨100, 101, 127, 190

Where water company having rights in common with others to percolating waters in area had devoted its entire production to public use, company's rights were "appropriative" in character, notwithstanding its claim to overlying rights in so much of its production as was used on land, the overlying rights to which it owned.

53. Waters and water courses ⇨100, 101, 127, 190

Fact that water devoted to a public use is taken from overlying land owned by taker does not affect "appropriative" character of the use.

54. Waters and water courses ⇨100, 101, 127, 190

Fact that water devoted to public use is used on overlying land is without effect upon "appropriative" character of the use.

55. Waters and water courses ⇨40, 100, 101, 127

The essential nature of a water right is determined by character of its exercise.

56. Waters and water courses ⇨100, 101, 127, 190

Where service rendered by water company having ground rights in common with others to percolating water in area to its overlying customers had been made on precisely same basis and by identical means as its service to its nonoverlying customers, company's rights with respect to its entire water production would be regarded as having been exclusively "appropriative".

57. Waters and water courses ⇨146

All appropriative rights, where prescriptive period has run, ripened into prescriptive rights as against the overlying rights.

58. Waters and water courses ⇨146

Where action involving conflicting water rights was determined to be inter se so far as defendants, including water company, were concerned, the inter se character of the action prevented running of prescriptive period of water company's appropriative right to increase in its water production made since filing of the action.

59. Waters and water courses ⇨140

An appropriative right is subordinate to existing rights, and hence water company's appropriative right to its increase in production made since action involving conflicting water rights had been filed were subordinate to all overlying rights.

60. Waters and water courses ⇨138, 140

The appropriative rights of parties in action involving conflicting water rights were not prescriptive between themselves, where record showed that their exercise was not mutually adverse, and hence respective priority of the water rights in time was their respective priority in right. Civ. Code, § 1414.

61. Waters and water courses ⇨42, 100, 101, 142, 143, 144, 144½, 190

Constitutional provision limiting one's right to use water to amount required for reasonable beneficial use, irrespective of the kind of right, means that an allocation may not be based upon an unreasonable method of obtaining or using water or upon an unreasonable use or waste thereof. Const. art. 14, § 3.

62. Waters and water courses 🔑42, 100, 101, 144, 190

Proof of long-continued use of a definite quantity of water under proper circumstances gives rise to presumption that use has been reasonably beneficial within constitutional limitation. Const. art. 14, § 3.

63. Waters and water courses 🔑42, 100, 101, 144, 190

Under constitutional provision limiting one's right to use water to amount required for reasonable beneficial use, irrespective of the kind of right, the use required is not the most efficient possible, but merely a reasonable one in keeping with general custom of the locality so long as the custom does not involve unnecessary waste. Const. art. 14, § 3.

64. Waters and water courses 🔑42, 100, 101, 144, 190

"Waste" of water, within constitutional provision limiting one's right to use water to amount required for reasonable beneficial use, irrespective of kind of right, occurs when water is used needlessly, prodigally, and without serving a purpose. Const. art. 14, § 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Waste".

65. Waters and water courses 🔑42, 100, 101, 144, 190

The fact that as a consequence of use of water in its storm drainage, sewerage, street cleaning, and fire fighting operations by plaintiff city, a certain amount of water escaped from area wherein plaintiff had water rights in common with others that would not have otherwise escaped, did not in itself establish "waste" on part of plaintiff as regards issue, whether allocation to plaintiff was proper. Const. art. 14, § 3.

66. Waters and water courses 🔑152(8)

Findings as to reasonable beneficial use by each of the parties in action involving conflicting water rights were supported by evidence, so that allocations made to the parties were unassailable on that ground. Const. art. 14, § 3.

67. Waters and water courses 🔑146

Prescriptive rights in percolating water could properly be measured by the highest continuous annual ground-water production of the party made within any five-year period preceding institution of suit involving conflicting water rights which was not thereafter forfeited by lessened continuous annual production during a subsequent five-year period.

68. Waters and water courses 🔑100, 101, 145

A water user is privileged to shift his points of extraction from an underground supply as he desires so long as he does not thereby injure other users thereof.

69. Waters and water courses 🔑151

The three-year forfeiture requirement of provision in Water Code has no application to appropriative rights in percolating water. Water Code, §§ 1200, 1241.

70. Stipulations 🔑14(1)
Waters and water courses 🔑137

Where stipulation of parties setting forth all elements of prescription except running of prescriptive period and adverse use plainly applied only to taking of water by the various parties themselves and did not cover taking by any of their predecessors in interest, there was no basis in record for including in any party's prescriptive amount any taking by a predecessor in interest, and, further, a successor in interest would stand in no better position than his predecessor as to latter's taking.

71. Waters and water courses 🔑152(11)

Any judgment in water rights litigation must conform to fundamental policy of state with regard to waters thereof as set forth in state constitution. Const. art. 14, § 3.

72. Waters and water courses 🔑127

Where one's water right has not been invaded, he is not estopped to assert it even against established public use.

73. Waters and water courses 🔑101, 190

The supplementation by city of its local water supply by use of water outside area wherein it was claiming rights to percolating waters in common with others was no ground for estoppel of city from asserting its right to the use of the percolating waters.

74. Waters and water courses 🔑101, 190

Where importation of water from outside the area by various parties claiming rights to percolating waters in common with water company induced no action on company's part, company could claim no estoppel against other parties from asserting their right to use of percolating waters in the area by reason of such importation.

75. Waters and water courses 🔑101, 190

The existence of water company's known public use of percolating waters and knowledge thereof by other parties claiming rights in common with company could not, standing alone, estop other parties from asserting their rights, in absence of a showing of some degree of moral turpitude in their conduct toward their company.

76. Waters and water courses 🔑152(2)

Where each party in action involving conflicting water right had been exercising its asserted water rights for years, none of them were under obligation to have rights adjudicated.

77. Equity 🔑69, 72(1)

"Laches" is delay prejudicial to another in asserting a right and what constitutes laches depends on facts of the particular case.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

78. Waters and water courses 🔑152(8)

Evidence supported finding that no party in action involving conflicting claims to percolating waters in area was barred from asserting its claim by reason of laches.

79. Waters and water courses 🔑42, 100, 101, 140, 143, 190

The rights of users of common supply of water in California are, subject to their respective priorities, correlative, and hence, when the supply is insufficient for all, it will be apportioned in accordance with priorities of right. Const.art. 14, § 3.

80. Waters and water courses 🔑152(11), 190

Although water company, and other two parties to action involving conflicting water rights not joining in water exchange agreement incorporated in judgment, were expressly exempted in the judgment from compliance with the agreement, water company could properly attack the agreement upon showing that its enforcement would adversely affect it in exercise of its rights at issue.

81. Stipulations 🔑3

In action involving conflicting water rights, trial court was not required to accept without substantial change the solution to the controversy reached by the parties other than one defendant, but it had affirmative duty to work out a solution in accordance with state's avowed policy with respect to its water resources embodied in Constitution. Const.art. 14, § 3.

82. Waters and water courses 🔑152(11), 190

In apportioning area ground water among those having water rights in common on basis of its safe yield, trial court must recognize established and public nature of water company's use and seek therefore to protect public which company serves, from interruption in the water supply, and should also consider availability to company on equitable and reciprocal terms of excess water of other parties having water rights in common with company in the area groundwater, irrespective of origin of such water. Const.art. 14, § 3.

83. Waters and water courses 🔑152(11)

Trial court's reservation of continuing jurisdiction of action involving conflicting water rights in order to provide means of adjusting its solution in future to changed conditions was proper as being in furtherance of basic water policy of state to utilize water resources thereof to fullest extent to which they are capable. Const.art. 14, § 3.

84. Judgment 🔑251(1), 538

A judgment is ineffectual until entered, and the rights adjudicated by a judgment are ordinarily those existing at time of commencement of the action save as rights acquired pendente lite have been brought into issue by supplemental pleading. Code Civ. Proc. § 664; § 1908 subd. 2.

85. Judgment ⇨251(1)

That part of judgment in action involving conflicting water rights which stated "that, except as provided herein, and except as rights decreed herein may be abandoned or forfeited by nonuser, in whole or in part, each and every right decreed herein hereby is fixed as of the date thereof", was subject to exception as purporting to adjudicate rights of parties up until time of judgment instead of up until time of commencement of action without supplemental pleadings bringing into issue any rights that might have been acquired pendente lite. Code Civ.Proc. § 664; § 1908, subd. 2.

◆

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by the City of Pasadena against City of Alhambra and others and the California-Michigan Land & Water Company for a declaration of rights of the parties to underground water in the Raymond Basin Area and for injunctive relief, wherein the case was referred to the Division of Water Resources as referee. From an order for interim or partial payment of referee's expense a final order determining expense of reference and apportionment thereof, and the final judgment, the defendant California-Michigan Land & Water Company appeals.

Orders affirmed, and judgment reversed and cause remanded.

Goodspeed, McGuire, Harris & Pfaff and Paul Vallee, all of Los Angeles, for appellant.

A. E. Chandler, of San Francisco, Sp. Counsel, and H. Burton Noble, City Atty., of Pasadena, for respondent City of Pasadena.

C. C. Carleton, Spencer Burroughs and Henry Holsinger, all of Sacramento, for referee-respondent Division of Water Resources.

James C. Bone, City Attorney, of Arcadia, and Gerald E. Kerrin, of Los Angeles, for respondent City of Arcadia.

Robert E. Moore, Jr., of Los Angeles, for respondent Lincoln Avenue Water Co.

Hahn & Hahn and Edwin F. Hahn, all of Pasadena, for respondent Las Flores Water Co.

Potter & Potter and Bernard Potter, Sr., all of Los Angeles, for respondents Mira Loma Mutual Water Co. and Canyon Mutual Water Co.

Merriam, Rinehart & Merriam and Ralph T. Merriam, all of Pasadena, for respondent Pasadena Cemetery Ass'n.

Laurence B. Martin, of Los Angeles, for respondent Sunny Slope Water Co.

Frederick G. Stoehr, of Pasadena, for respondent A. V. Wagner.

Emmett A. Tompkins, City Atty., and Kenneth K. Wright, Sp. Counsel, both of Los Angeles, for respondent City of Alhambra.

Paul F. Garber, City Atty., of Monrovia, and Kenneth K. Wright, Sp. Counsel, of Los Angeles, for respondent City of Monrovia.

Walter F. Dunn, City Atty., of Monrovia and Kenneth K. Wright, Sp. Counsel, of Los Angeles, for respondent City of Sierra Madre.

Anderson & Anderson, Trent G. Anderson, and Kenneth K. Wright, all of Los Angeles, for respondent Rubio Canon Land & Water Ass'n.

John C. Packard and Kenneth K. Wright, both of Los Angeles, for respondent El Campo Mutual Water Co.

Bacigalupi, Elkus & Salinger, and Claude Rosenberg, all of San Francisco, and Kenneth K. Wright, of Los Angeles, for respondent California Water & Telephone Co.

Derthick, Cusack & Ganahl, W. J. Cusack, and Kenneth K. Wright, all of Los Angeles, for respondent Crown City Ice Co.

Wilton W. Webster, of Pasadena, and Kenneth K. Wright, of Los Angeles, for respondent Royal Laundry & Dry Cleaning Co.

Dunn & Sturgeon and Walter F. Dunn, all of Monrovia, and Chandler & Wright, Howard Wright, and Kenneth K. Wright, all of Los Angeles, for respondents Stewart, Armstrong, and Graves.

Bailie, Turner & Lake and Norman A. Bailie, all of Los Angeles, Cruickshank, Brook & Dunlap, of Pasadena, and Kenneth K. Wright, of Los Angeles, for respondent Ernest Crawford May, executor.

Boyle & Holmes, John W. Holmes, and Kenneth K. Wright, all of Los Angeles, for respondent First Trust & Savings Bank of Pasadena.

Frank P. Doherty and Kenneth K. Wright, both of Los Angeles, for respondent La Canada Irr. Dist.

Gibson, Dunn & Crutcher, Ira C. Powers, and Kenneth K. Wright, all of Los Angeles, for respondents Trustees of Henry E. Huntington Library and Art Gallery.

Kenneth K. Wright, of Los Angeles, for respondents San Gabriel County Water Dist., Valley Water Company, and Ross M. Lockhart.

KINCAID, Justice pro tem.

Prior to rendition of judgment in this case two orders were made by the trial judge from which appeals were taken by the appellant California-Michigan Land & Water Company, a corporation (2nd Civil No. 14752). They were (1) "Order for interim or partial payment of referee's expense" and (2) "Final order determining expense of reference and apportionment thereof." Following a protracted trial judgment was rendered on December 26, 1944, from which this appellant alone appeals (2nd Civil No. 15241).

Appellant filed a petition for a writ of supersedeas in this court to stay the enforcement of the judgment. On June 24, 1946, such a writ was ordered issued staying all proceedings in the trial court as against appellant until the final determination of the cause on appeal. See opinion—City of Pasadena v. City of Alhambra, 1946, 75 Cal.App.2d 91, 170 P.2d 499. The issues on the appeals from the two orders and the judgment are so closely related and intermingled as to justify, in the interest of clarity, their consideration herein as in effect one appeal.

Within the semi-arid San Gabriel Valley and a few miles northeast of the City of Los Angeles there lies a forty square mile alluvial-filled basin of ground water known as the Raymond Basin Area. This Area is highly urbanized and within it are found the City of Sierra Madre, virtually all of the City of Pasadena, and a portion of the cities of South Pasadena, San Marino, and Arcadia. Bordering it to the south are the cities of Alhambra and San Gabriel. Much of the remainder of the Area is urban in character although not incorporated into municipalities. It is definitely delimited from the remainder of the valley by the Raymond Fault, also sometimes known as the Raymond Dike. This is a natural fault in the bedrock which has extended its influence into the alluvium, rendering it more or less impervious so that the passage of water through it is impeded, thus creating an underground basin or field of water behind it. This fault runs slightly north of east across the valley floor and is evidenced on the surface by a sudden rise in the ground along part of its course and beneath by a water table which is two hundred to three hundred feet lower on the southern side of the fault than on the northern side. The referee's report shows, and the court found, that ground water of the Raymond Basin Area is divided into two practically separate units, that of Pasadena sub-area and Monk Hill Basin, together comprising a single unit, designated as Western Unit, and that of Santa Anita sub-area being called the Eastern Unit. The wells of the appellant are located within a well field in the Western Unit and draw their water entirely therefrom. This Unit constitutes the common and only source of water supply for all wells located within it. Appellant's contrary claims as to the source of the water supply for its wells must be rejected since the finding of the trial court otherwise is amply supported by the evidence.

Plaintiff is the chief water user within the Area and in September, 1937, instituted the litigation now before us in order to secure an adjudication of the main ground water rights within the Area and to obtain injunctive relief against an alleged annual overdraft constituting a withdrawal of water from the basin in excess of the average yearly supply. In February, 1939, the trial court, acting under then section 24 (now Water Code, secs. 2000 to 2050) of the Water Commission Act (Stats.1913, ch. 586, p. 1012, as amended; Deering's Gen. Laws 1937, Act 9091), referred the matter to the Division of Water Resources, Department of Public Works, of the State of California, for investigation of and report upon the physical facts involved. Upon the basis of the referee's report plaintiff, in September, 1943, and during the early months of 1944, entered into a stipulation for judgment with all non-disclaiming defendants in the case, 26 in number, except the appellant herein. This stipulation purported to allocate the ground water of the Area among the parties to this suit on the basis of the safe yield thereof and set up a water exchange arrangement among substantially all of them under the supervision of a water master. The court then heard appellant's evidence in opposition to the referee's report and to the stipulation for judgment, thereafter causing to be entered the judgment from which this appeal is taken. This judgment in substance incorporated and enforced the terms of the stipulation against all parties, including the appellant, save as hereinafter noted.

Appellant urges three primary grounds for reversal: First. The trial court lost jurisdiction of the case by reason of its not having been brought to trial within five years after its commencement. Second. Improper and unconstitutional procedure was followed. Third. The final judgment of the trial court is fatally erroneous as a matter of law. Appellant also challenges the sufficiency of the evidence in numerous particulars to support the findings of the trial court, including the findings of the existence and the amount of the overdraft. The findings of the trial court relating to the physical facts involved, including those as to overdraft, are based largely upon the report of the referee, which report appellant attempted to rebut by other evidence. The trial court, however, resolved the conflict in evidence thus created against appellant. We have considered carefully appellant's various claims of insufficiency of evidence, and although the evidence is not without conflict it affords ample support for the trial court's findings except as specifically noted otherwise in this opinion.

With respect to its first primary ground appellant insists that the trial court lost jurisdiction of this action by reason of its not having been brought to trial within five years after its commencement, and the trial court erred in not granting its motions to dismiss. The respondents, in turn, argue that jurisdiction was not lost by the court and the motions to dismiss were correctly denied, in that (a) the cause was partially tried within the five year period, and (b) in any event it was impracticable and futile under the circumstances of this case to proceed with the trial within such period, thus tolling the five year statute. They further urge that, as these are now recognized exceptions to the mandatory application of such section, if either of them is established the action of the court in denying the motions to dismiss must be upheld.

[1] The complaint herein was filed September 23, 1937. On March 24, 1943, appellant filed a written motion to dismiss the case pursuant to section 583, Code of Civil Procedure. The motion was denied by the court on March 29, 1943. Appellant then petitioned the Supreme Court for a writ of mandate to compel such dismissal (LA 18761). This petition was denied without the issuance of an alternative writ, without a hearing and without opinion on July 8, 1943. On November 29, 1943, plaintiff moved the court to set the case for trial and appellant thereupon filed its written objections and a motion to dismiss. The motion was denied and the case then set for trial on March 7, 1944. Appellant petitioned the Supreme Court for a writ of prohibition or other appropriate relief (SF 17005). This petition included substantially all matters contained in the former petition to such court, with the additional facts that the referee filed his report with the court on or about July 16, 1943, and the case had been set for trial. On March 13, 1944, the Supreme Court denied the petition in the same manner as before. Although these petitions directed the attention of the court to practically all the matters here presented on this appeal as grounds for directing the trial judge to dismiss the case under section 583, we do not consider the ex parte denial thereof as being res judicata

as to our consideration of this subject and deem such denial simply to constitute a refusal by the Supreme Court to exercise its original jurisdiction resulting in no decision upon the merits of the petitions having been made. Funeral Directors Ass'n v. Board of Funeral Directors, 1943, 22 Cal. 2d 104, 106, 136 P.2d 785. The writs may have been denied solely on the ground that even though there was an excess of jurisdiction, the validity of the orders could be passed on by appeal, and that remedy was adequate. McDonough v. Garrison, 1945, 68 Cal.App.2d 318, 329, 156 P.2d 983. The actual trial, after notice and consisting of the taking of evidence in the presence of the parties and their witnesses, began May 18, 1944.

The applicable portion of section 583, Code of Civil Procedure, as it read at the time here in question, it having been since amended, is as follows: "Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have stipulated in writing that the time may be extended." It is conceded that the appellant at no time stipulated either orally or in writing that the time of the trial might be extended.

The proceedings had subsequent to the filing of the complaint and prior to the trial date of May 18, 1944, which plaintiff claims constitute a partial trial of the action, thus tolling the running of section 583, are as follows: Following the appointment by the court, on February 8, 1939, of the Division of Water Resources of the State of California as referee to investigate all physical facts involved in this water rights action, with directions to report seasonably to the court thereon, such referee, on June 2, 1939, applied to the court for instructions as to the scope of the investigation. This matter came on for hearing June 9, 1939, and over the objections of appellant the court made its order relative to the issues and for the referee's expenses. On June 21, 1939, the referee filed its "Preliminary report upon use of water by those not parties and recommendations as to bringing in additional parties." The trial court thereupon, after notice to all parties in the action and hearing such arguments and objections as were presented, made its order directing plaintiff to bring in certain additional parties. On April 10, 1942, the referee filed a notice of motion for an order for interim or partial payment of its expenses and on April 24, 1942, plaintiff moved for reimbursement for costs claimed to have been advanced. Hearings were held on these motions and orders were made thereon by the court.

[2] It is well settled that a partial trial within the prescribed five year period removes the case from the operation and effect of Code of Civil Procedure, section 583. City of Los Angeles v. Superior Court, 1940, 15 Cal.2d 16, 19, 98 P.2d 207; Meier v. Superior Court, 1942, 55 Cal.App. 2d 675, 676, 131 P.2d 554; Mercantile Invest. Co. v. Superior Court, 1933, 218 Cal. 770, 774, 25 P.2d 12.

[3] An examination of the record concerning the foregoing proceedings convinces us that they did not constitute a trial or a partial trial in any sense of the word. The hearings on these motions concerned matters preliminary only to the trial and were not for the purpose of determining any issue in the case or the merits of the action, nor were they in furtherance of the decisions made upon the issues in the case which form the basis of the judgment. They were merely steps directed toward instructing the referee concerning its duties, relating to its expenses and the bringing of the necessary parties into the suit in order that they might later litigate all relevant issues in a trial on the merits. Such a trial was subsequently had. In Superior Oil Co. v. Superior Court, 1936, 6 Cal.2d 113, 56 P.2d 950, an order to show cause why a preliminary injunction should not be granted was issued, voluminous affidavits were submitted as evidence and a hearing was had thereon. A subsequent motion to dismiss under section 583 was made wherein it was contended that the

foregoing proceedings constituted a partial trial of the case. In holding to the contrary the Supreme Court said, 6 Cal.2d at pages 116, 117, 56 P.2d at page 952: "No authority is cited in support of this contention and none has been discovered. The term 'trial' as applied to one of the steps in the disposition of an action is well understood in the practice in this state. It is the trial of the issues of fact (Perrin v. Miller, 35 Cal.App. 129, 169 P. 426), the purpose of which is to determine the cause on the merits, and it is not completed until the decision of the court is made and filed with the clerk (Broder v. Conkin, 98 Cal. 360, 33 P. 211; sec. 632, Code Civ.Proc.), unless findings be waived (sec. 634, Code Civ.Proc.). Whether made and filed or waived, judgment may then be entered and the cause thus be disposed of on the merits. On the trial the parties have the right of cross-examination. (Sec. 2048, Code Civ.Proc.) On the hearings on the order to show cause the privilege of orally examining and cross-examining witnesses was denied by the court. All answers to the complaint were required to be filed on or before December 2, 1930, and it must be assumed that the cause was ready to be set for trial after the issues of fact were thus joined. In Bandini [Petroluem Co.] v. Superior Court, 284 U.S. 8, 52 S. Ct. 103, 76 L.Ed. 136, 78 A.L.R. 826, involving the effect of a preliminary injunction in a similar case, it was correctly assumed that under the practice in this state a trial on the merits would ordinarily follow the hearing and issuance of the preliminary injunction. In June, 1932, one of the defendants in said action moved the court to set the cause for trial. There was much discussion as to a trial date convenient to counsel for all parties, but no date prior to the service and filing of the notice to dismiss was fixed. The defendant's motion to set was continued from time to time until February 27, 1934, when said motion and other motions and matters on the calendar that day were, on motion of counsel for the plaintiff in said action, stricken from the calendar. It does not appear that the attention of the court was ever called to the fact that time was running under section 583, or that the five-year period thereunder was about to expire. It may be assumed that the trial court had considerable evidence before it in order to enable it to determine whether the preliminary injunction should issue, and it is undoubtedly true that this evidence, if properly introduced at the trial, would have been determinative of some or many issues of fact. But the dismissal of an action for lack of prosecution is without regard to the merits or demerits of the cause of action. [Citing cases.]" To the same effect see Breakstone v. Giannini, 1945, 70 Cal.App.2d 224, 230, 160 P.2d 887; Meier v. Superior Court, supra, 55 Cal. App.2d 675, 677, 131 P.2d 554. Plaintiff strongly relies on the case of O'Day v. Superior Court, 1941, 18 Cal.2d 540, 116 P.2d 621, in support of its position that the enumerated preliminary proceedings were in fact a partial trial. The O'Day case differs materially from our instant situation in that it concerned a hearing to determine heirship in an estate and a trial of the issues of fact, the purposes of which were to determine the cause on the merits, was actually begun. As pointed out in Meier v. Superior Court, supra, 55 Cal. App.2d at pages 677, 678, 131 P.2d at page 556: "In O'Day v. Superior Court, 18 Cal. 2d 540, 116 P.2d 621, the court was passing upon a judgment of dismissal entered under subdivision 3 of section 581 of the Code of Civil Procedure for failure to appear at the trial. Respondent Meier relies on the statement therein made that a '"trial" includes all rulings of a court in proceedings before it made in furtherance of the decisions made upon the issues in the case which form the basis of the judgment.' It clearly appears that in using this language the court did not intend to hold that a ruling on a demurrer or some preliminary matter constitutes a trial within the meaning of section 583. The court pointed out that the rulings to which it had reference had been made after the trial court had commenced an examination of the evidence and in connection with its admissibility, and distinguished that case from the case of Superior Oil Co. v. Superior Court, supra, in which it had been held that the action had not been brought to trial within the meaning of section 583 of the Code of Civil Procedure.

"It seems to have been clearly held that a trial within the meaning of section 583 is a hearing and determination of the issues of fact involved and that a ruling on a demurrer is not sufficient to take a case out of the operation of that statute. The same has been held with respect to a hearing on whether or not a preliminary injunction should issue. So far as material here, we see no difference in principle between such a preliminary hearing and one in connection with the setting aside of a default. The latter proceeding is not in any respect a trial of issues raised, but it involves merely a consideration of whether a party is entitled to relief which will enable him to raise issues in the case."

Since the various hearings and other proceedings had prior to May 18, 1944, cannot be held to be a trial of the case, either in whole or part, we now consider the plaintiff's alternative argument that the denial by the trial court of the motions to dismiss was proper. It is simply this—that at all times between the commencement of the action and the trial a situation existed where, for all practical purposes, going to trial was both impracticable and futile due to excessive and unreasonable difficulty and expense.

In support of this position plaintiff points out, and the record of the case verifies, that this action involves the determination of the rights of 29 parties, including six municipal corporations, a county water district and an irrigation district, together with certain public utilities, mutual water companies and individuals, to take and divert water from the Raymond Basin Area and to prevent withdrawal of water from it in excess of the average annual supply of water thereto; that the issues are extremely complex and are of great importance to many thousands of people who are dependent upon the parties involved to furnish an adequate supply of water; that both prior to the trial date and the expiration of the period of five years from the commencement of the action many thousands of dollars had been expended on this litigation by the parties thereto and the referee; that pursuant to section 24 of the Water Commission Act, the trial court availed itself of the procedure established in this state by referring the case to the Division of Water Resources, Department of Public Works of the State of California, as referee to investigate all the physical facts involved and seasonably to report to the court thereon; the State of California, acting through its authorized agency, has an interest at stake herein by reason of the conservation of water in said basin sought by this action, and because of the expenditure of large sums in pursuit of its duties as referee.

In opposition to the appellant's two motions to dismiss the case pursuant to the provisions of section 583, Code of Civil Procedure, which were supported by affidavits by Richard C. Goodspeed, its attorney, affidavits were filed by Harold P. Huls, attorney for plaintiff. Such latter affidavits, dated March 29, 1943, and December 13, 1943, recite, in effect, that following the court's order of reference to the Division of Water Resources, as referee, the latter on June 3, 1939, made application for instructions upon the scope of its investigation and report, following which a hearing was had including appellant's objections, and on June 10, 1939, the court made an order instructing the referee and determining that the issues in the action embrace an adjudication of the rights of the defendants inter se and the rights of each and every party as against each and every other party, such referee to be entitled to its proper expenses for the performance of its work and to continue to investigate and report in accordance with said order. A preliminary report of the referee upon the use of water by parties not defendant in the action, and recommendations as to bringing in additional parties was filed, objections overruled and on July 13, 1939, the court made an order directing plaintiff to bring in additional parties. There followed motions by referee for interim payment of its expenses to be paid by all parties in the action and for reimbursement to plaintiff of costs advanced. A hearing was held, objections considered, appellant being represented and taking part, and on June 2, 1942, the trial judge made an order and judgment against all parties to the action whereby they were ordered to pay to the referee the sums of money therein stated, from which order and judgment appellant, on July 29, 1942, filed its notice of appeal, which appeal is now before this court. On March 3, 1943, the draft of report of the referee was served on all of the parties showing such referee to have expended approximately $52,516.17 to and including February 28, 1943, in the performance of its duties as referee pursuant to the order of the court. On July 12, 1943, the report of the referee and statement of the apportionment of its expenses was filed. On August 11, 1943, appellant filed objections thereto and after a hearing thereon the trial judge, on November 24, 1943, made and filed an order determining the expense of reference and apportionment thereof. On November 24, 1943, the stipulation of 26 of the 28 parties to this action was filed, whereby they consented to an order making the provisions of a proposed judgment herein effective as to them, which said order was thereupon made by the trial judge and filed. On November 26, 1943, plaintiff's motion to set a hearing on the objections and exceptions to the referee's report and to set the cause for trial was filed. Appellant's motion to dismiss and petition for writ of prohibition to the Supreme Court then followed; that since the year 1938 the parties to the action have discussed and taken steps toward ultimate settlement of the issues involved without the necessity of a costly and lengthy trial; that during the year and a half preceding March, 1943, numerous conferences and meetings pertaining to the settlement of the issues were held, at which appellant has been represented. That on January 15, 1943, appellant, through its attorney, wrote to Huls stating that it was very anxious to see the proposed settlement worked out substantially along the lines that were then under consideration, and made certain suggestions relative thereto.

Even a casual examination of the final report of the referee, as filed July 12, 1943, reveals the enormity of the task assigned to and assumed by it. The report itself (plaintiff's exhibit 1) consists of a large printed volume of 392 pages. It is supplemented by another similar volume of 555 pages entitled "Basic data submitted as exhibit to report of referee" (exhibit 2). The report itself is fortified by numerous maps and tables and, among many other things, covers the history of development of water supplies, history of water development and use by municipalities, companies and individuals named in the action, the geology of the area involved and particularly that of the Raymond Basin Area, including the structural features and conditions pertaining to ground water movement; the subject of hydrology covering past, present and future of water flow into and out of the Area, sewage, consumptive use of water, storage of water underground and the changes in water table elevations over long periods; safe yield and overdraft by water users, deep percolation, quality of water and pumping tests to determine extent of influence on water tables. These were followed by the referee's extensive summary, conclusions and findings rendered to the court. The statement and apportionment of expense of referee (exhibit 3) was also submitted, showing such expense to total $53,274.73.

[4] The trial judge was entitled, in his consideration of the motions to dismiss, to determine, under all the facts and circumstances of the case, whether the referee was proceeding with due diligence as to its duties and was following the court's instruction to report seasonably to the court the result of its investigation of the physical facts involved in its assignment. No time limit was imposed by the court upon the referee for the completion or filing of its report nor is any such limitation made by the Water Code. The reference to the Division of Water Resources for the purpose contemplated that all necessary work should be performed by the referee and its report thereof filed with the court as prima facie evidence of the physical facts therein found before any other evidence was to be received. A trial was then to be held at which time the court would hear such evidence as any party might desire to offer to rebut the report or the prima facie evidence. Water Code, sec. 2019.

[5, 6] A leading case on the subject of dismissal under section 583, Code of Civil Procedure, as here presented, is that of Christin v. Superior Court, 1937, 9 Cal.2d

526, 71 P.2d 205, 112 A.L.R. 1153. There the trial court had transferred the records in the case to another county and the case could not be tried without them. There was no reasonable ground to suppose that a motion to vacate the erroneous order would have been of any effect, or that a writ of mandate could be obtained to compel a retransference of the records and any trial held in the other county would have been a nullity. Under such circumstances the Supreme Court said, 9 Cal.2d at pages 530, 532, 71 P.2d at pages 207, 208, 112 A. L.R. 1153: "Petitioners relying upon the general language of such cases as Miller & Lux v. Superior Court, [192 Cal. 333, 219 P. 1006], and Rosefield Packing Co. v. Superior Court, [4 Cal.2d 120, 47 P.2d 716], argue that in the light of the plain language of the statute there is only one circumstance that can suspend the running of the period, and that is the written stipulation provided for by the section itself. These decisions cannot, however, be so narrowly interpreted. It may be true that they absolutely deny any means of suspension, save by written stipulation, where it is *possible* to bring the cause to trial. But, despite the mandatory language of the statute, *implied exceptions* have been recognized where it was *not possible* to bring the cause to trial. Thus, where an appeal from a judgment is taken, the trial court has no jurisdiction to proceed in the cause during the pendency of the appeal, and consequently the time consumed on appeal is not considered as part of the statutory period. Kinard v. Jordan, 175 Cal. 13, 164 P. 894. And where contestants of a will were induced by fraud to consent to a dismissal of their contest, and later had the dismissal vacated, the court held that the time between the dismissal and the reinstatement of the action was to be excluded in computing the five-year period. Estate of Morrison, 125 Cal. App. 504, 14 P.2d 102. See, also, Allyne v. Superior Court, 200 Cal. 661, 254 P. 564.

* * *

"The purpose of the statute is plain: To prevent *avoidable* delay for too long a period. It is not designed arbitrarily to close the proceeding at all events in five years, for it permits the parties to extend the period without limitation, by written stipulation. And, as we have already pointed out, despite the mandatory language implied exceptions are recognized. Are these exceptions based upon the technical concept of *jurisdiction,* and applicable only where the court is completely lacking in the legal power to proceed, or do they arise from the fact that the party is unable, from causes beyond his control, to bring the case to trial? The carefully reasoned opinion in Estate of Morrison, supra, is illuminating here. The court declared that the case of Kinard v. Jordan, supra, had 'established the precedent of disregarding the time during which the jurisdiction of the trial court was suspended, thereby setting reality above artificiality.' The opinion also states (at page 510 of 125 Cal.App., 14 P.2d 102, 106):

"'Situations are thus recognized which repel a strained construction of the statute.

"'No logical distinction can be made between a temporary suspension of proceedings in the trial court, consequent upon a dismissal induced by fraud or mistake, and a suspension of the power of the trial court to proceed by reason of the pendency of an appeal. In either case, the action or proceeding is withdrawn from the cognizance of the court of first instance during the period of suspension.'

"The theory of this decision seems to us to be equally applicable to a situation where, for all practical purposes, going to trial would be impossible, whether this was because of total lack of jurisdiction in the strict sense, or because proceeding to trial would be both impracticable and futile. In this connection, a useful analogy may be drawn from the rules on impossibility as a defense in the enforcement of contract obligations. Modern cases recognize as a defense not only objective impossibility in the true sense, but also impracticability due to excessive and unreasonable difficulty or expense. See Mineral Park Land Co. v. Howard, 172 Cal. 289, 156 P. 458, L.R.A. 1916 F, 1; People v. Meyers, 215 Cal. 115, 8 P.2d 837; Restatement, Contracts, § 454."

The latest expression on this subject by our Supreme Court is found in the case of Pacific Greyhound Lines v. Superior Court, 1946, 28 Cal.2d 61, 168 P.2d 665. On a petition seeking mandate to compel, in effect, reversal of an order denying a dismissal under section 583, Code of Civil Procedure, for failure to bring the case to trial within five years, facts were presented showing three defendants to have answered the complaint. No stipulation in writing for any extension of the trial time was ever had and the cause was once set for trial but went off calendar due to the failure of defendants to deposit jury fees. Some 15 months after the complaint was filed one of the defendants, Earl Bagby, Jr., entered the military service and it was orally agreed between counsel that the case should remain off calendar until such defendant returned to civilian status. After citing with approval and quoting from Christin v. Superior Court, supra, the court said 28 Cal.2d at page 64, 168 P.2d at page 667: "Again in Judson v. Superior Court, 1942, 21 Cal.2d 11, 14, 129 P.2d 361, 363, the rule was stated: 'The courts have recognized that the statute relating to dismissals although mandatory in form, should not be applied where, although the defendant was not guilty of acts tending to obstruct the administration of justice, it would have been *impracticable* for the plaintiff to have brought the action to trial.' (Italics added.) See, also, Westphal v. Westphal, 1943, 61 Cal.App.2d 544, 550, 143 P.2d 405, 408, wherein it was held that it would have been 'practically futile' and 'for all practical purposes * * * impossible' for certain plaintiffs to go to trial while their coplaintiffs' appeal was pending." And 28 Cal.2d at page 68, 168 P.2d at page 669: "Whether, in the light of the issues raised by such pleadings, in the further light of the representation made by defendants' counsel 'that the matter would have to remain off calendar,' and the other evidence before the trial court, it was 'impracticable and futile' (Christin v. Superior Court, 1937, supra, 9 Cal.2d 526, 533, 71 P.2d 205, 208, 112 A.L.R. 1153) to bring the case on for trial during the military service of defendant Bagby Jr., was a question of fact which the trial court resolved in favor of plaintiffs." See, also, Rauer's Law and Collection Co. v. Higgins, 1946, 76 Cal.App.2d 854, 174 P.2d 450.

[7] Under all the facts and circumstances existing in this case the trial judge, in the exercise of a reasonable discretion, was justified in believing that the referee was taking all possible steps, under existing conditions, to expedite his investigation and report, and that an earlier partial report would fail to provide evidence necessary for the commencement of the trial. He was likewise justified in finding that, during the period between February 8, 1939, the date of the reference, and July 12, 1943, the date of filing the referee's report, the plaintiff was unable, from causes beyond its control, to bring the case to trial and that going to trial was both impracticable and futile. The motions to dismiss were therefore properly denied as the time consumed by the referee in its work as such between the dates mentioned, is not to be counted as part of the five-year period specified by section 583, Code of Civil Procedure.

With respect to its second primary ground appellant contends that improper and unconstitutional procedure was followed which has the effect of invalidating both the reference and the judgment. It asserts as one of its points that the judgment goes beyond the issues raised by the pleadings in that it determines the rights of the defendants inter se although the several defendants made no claims against each other and therefore tendered and joined no issues between themselves. We cannot accept this contention or the argument in support of it. Plaintiff initiated this action to quiet its title to a stated amount of the ground water of the Area, to secure a declaration of the rights of all parties therein, and for injunctive relief against an alleged overdraft of such water resulting from its use by both plaintiff and defendants. Specifically, plaintiff alleged in its complaint that it possessed a paramount right to the use of a stated quantity of such water and that each of the defendants likewise asserted a right to the use of such water. Plaintiff therefore prayed inter alia that each defendant be required to set forth the nature of its claimed right to the use of such water and that all such rights be defined and determined by the decree of the court. Defendants in their respective answers, aside from the three who disclaimed, denied plaintiff's allegation of paramount right and alleged ownership of various rights to the use of such water, each superior to that of the plaintiff. With but three exceptions defendants prayed that the rights claimed by them be decreed to them. Appellant is among those who thus sought affirmative relief.

[8-10] In determining the issues raised by the pleadings, the pleadings of all parties must be considered. Estrin v. Superior Court, 1939, 14 Cal.2d 670, 676, 96 P.2d 340; Woods etc. Ditch Co. v. Porter etc. Ditch Co., 1916, 173 Cal. 149, 152, 153, 159 P. 427. Further, it is necesssary to consider their specific allegations. Luckey v. Superior Court, 1930, 209 Cal. 360, 366, 287 P. 450. As summarized above each party, with the exception of those disclaiming, was claiming a right to the use of an allegedly common overdrawn supply of water. These claims by their very nature raise issues inter se as to all such parties for the determination of one claim necessarily affects the amount available for the other claims. Marlett v. Prosser, 1919, 66 Colo. 91, 179 P. 141, 142. In quiet title actions, particularly where the plaintiff also is seeking declaratory relief as here, the rights of each defendant are in issue not only as against the plaintiff but also as against each and all of its codefendants. Strong v. Shatto, 1927, 201 Cal. 555, 557, 258 P. 71; Milton E. Giles & Co. v. Bank of America, 1941, 47 Cal.App. 2d 315, 323, 117 P.2d 943; Altman v. Blewett, 1928, 93 Cal.App. 516, 523, 269 P. 751; Cummings v. Cummings, 1921, 55 Cal.App. 433, 441, 203 P. 452. Here not only did plaintiff specifically seek a definition of the right of each party, but most of the defendants, including appellant, pleaded their respective rights affirmatively and sought to have them adjudicated. In so doing they in effect asked the court to determine the rights of each defendant, not merely as between it and the plaintiff, but also as between it and its codefendants. Miller v. Thompson, 1903, 139 Cal. 643, 645, 73 P. 583.

[11] In a suit to quiet title to water rights such as this the basic purpose is to determine the respective rights of all parties to the use of the water involved. A decree which leaves the controversy in any respect unadjudicated and consequently subject to future litigation defeats the very purpose for which the action was brought. Pacific Live Stock Co. v. Ellison Ranching Co., 1930, 52 Nev. 279, 286 P. 120, 123; Watson v. Lawson, 1913, 166 Cal. 235, 243, 135 P. 961. Article XIV, section 3 of the California Constitution and section 100 of the Water Code require that the water resources of this state be put to the highest beneficial use of which they are capable. To this end litigation over rights to the use of water enjoyed in common should be comprehensive in scope. As was done here all substantial users should be made parties and the issues between the parties should be so framed so as to make possible the complete adjudication of the rights of each party. Once the rights of all substantial users are thus conclusively determined the water resources in question may be devoted to their highest beneficial use without fear of further protracted litigation. The alternative method of ascertaining the rights of such users by individual suits, here urged by appellant, is necessarily piecemeal, unduly expensive, and plainly unsatisfactory. Meridian, Ltd., v. San Francisco, 1939, 13 Cal.2d 424, 457, 90 P.2d 537, 91 P.2d 105.

[12] Appellant charges a denial of procedural due process to it because, notwithstanding the determination that the issues were as to the parties inter se, no service was had among the defendants. While this procedure might be regarded as irregular, we fail to perceive therein a denial of due process to appellant. The jurisdiction of the trial court over the parties and subject matter of this action is not and can not be challenged by appellant. Van Loben Sels v. Bunnell, 1901, 131 Cal. 489, 493, 494, 63 P. 773. The inter se determination was made after due notice and hearing thereon. Appellant was duly served with the referee's report, with the stipulation for judgment of the other nondisclaiming parties, and, after due notice, had its day in court to contest these matters. The essentials of procedural due process, adequate notice and a full hearing, were therefore accorded to appellant.

Drummey v. State Board of Funeral Directors, 1939, 13 Cal.2d 75, 80, 87 P.2d 848; Dohaney v. Rogers, 1930, 281 U.S. 362, 369, 50 S.Ct. 299, 74 L.Ed. 904, 68 A.L.R. 434; Twining v. New Jersey, 1908, 211 U.S. 78, 111, 29 S.Ct. 14, 53 L.Ed. 97.

Briefly stated, appellant's objections to the reference follow: First, the reference procedure did not comply with the requirements of the Code of Civil Procedure governing references (secs. 638 to 645). Secondly, the reference procedure did not comply with its purported authority, section 24 of the Water Commission Act (now secs. 2000 to 2050 of the Water Code, but hereinafter in the discussion called section 24). Thirdly, the purported authority, section 24, is unconstitutional in many aspects. Reference will be made to the provisions of the sections as we proceed.

[13, 14] In view of the provision therein for the very type of reference here questioned compliance with the aforementioned general reference sections of the Code of Civil Procedure is not required since to do so would be to ignore completely the more specific authority. Brill v. County of Los Angeles, 1940, 16 Cal.2d 726, 732, 108 P.2d 443. Appellant's argument that only a natural person may be appointed by the court as referee and that consequently the appointment by court of the Division of Water Resources, Department of Public Works, State of California, pursuant to the special provisions of section 24, is void, seems to have been adequately answered by the Supreme Court in Fleming v. Bennett, 1941, 18 Cal.2d 518, 522, 116 P.2d 442, 445, when it said: "In actions involving numerous conflicting water rights it has been deemed expedient, both by the legislature and by this court (see Wood v. Pendola, 1 Cal.2d 435, 35 P.2d 526; Peabody v. City of Vallejo, 2 Cal.2d 351, 40 P.2d 486; Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., 3 Cal.2d 489, 45 P.2d 972, 1014; City of Lodi v. East Bay Municipal Utility Dist., 7 Cal. 2d 316, 341, 60 P.2d 439; Rancho Santa Margarita v. Vail, 11 Cal.2d 501, 559, 81 P.2d 533; Meridian, Ltd., v. City and County of San Francisco, 13 Cal.2d 424, 90 P.2d 537, 91 P.2d 105), that in the discretion of the trial court the investigation of the facts be confided to the division of water resources of the department of public works as referee."

Appellant contends that section 24 was not followed because at the time the order of reference was made, February 8, 1939, the Division of Water Resources of the State Department of Public Works, the referee named in the order, was not the statutory successor of the Water Commission, the referee named in section 24. It is appellant's position that under sections 363c and 363e of the Political Code the director of public works, as the head of that department, was in February, 1939, the statutory successor of the Water Commission. It should perhaps be noted that under the Water Code at present such a reference is to the State Department of Public Works (Secs. 2001, 22), and is administered through the State Engineer (Sec. 1050.5) who is the Chief of the Division of Water Resources in such department (Sec. 23.) Since pending actions and accrued rights were expressly declared to be unaffected by the adoption of the Water Code in 1943 (Sec. 4), the appropriate statutory law as it read on February 8, 1939, would seem to control this point. On that date section 363e, Political Code, in so far as relevant, read: "* * * the department of public works shall succeed to and is hereby vested with all the duties, powers, purposes, responsibilities and jurisdiction of the * * * state water commission * * * and of the several officers, deputies and employees of such bodies and offices; and "* * * whenever by the provisions of any statute or law now in force or that may hereafter be enacted, a duty or jurisdiction is imposed or authority conferred upon any of said bodies, offices, officers, deputies or employees, or upon any other person by any statute, the administration or enforcement of which is transferred to the department of public works, such duty, jurisdiction and authority are hereby imposed upon and transferred to the department of public works *and the appropriate officers thereof* * * *." (Italics ours.)

Sec. 363c, in so far as relevant, read: "The director of public works as head of the department of public works shall perform all duties, exercise all powers and jurisdiction, assume and discharge all responsibilities and carry out and effect all purposes now or hereafter vested by law in the department of public works * * *."

[15] The quoted language of section 363e plainly states that the Department of Public Works is the statutory successor of the Water Commission. East Bay M. U. D. v. Department of Public Works, 1934, 1 Cal.2d 476, 477, 35 P.2d 1027; Meridian Ltd. v. San Francisco, supra, 13 Cal.2d 424, 450, 90 P.2d 537, 91 P.2d 105. The difficulty, however, is to resolve the apparent conflict between the italicized words of section 363e and the quoted language of section 363c. In view of the ambiguity present, resort to judicial construction to ascertain the legislative intent is necessary. Cory v. Cooper, 1931, 117 Cal.App. 495, 500, 4 P.2d 581.

[16] Section 1875(3) of the Code of Civil Procedure enables this court to take judicial notice of public and private official acts of the legislative, executive and judicial departments of this state and of the state laws. We are further empowered, for aid in these cases, to resort to appropriate books and documents of reference. By reference to Stats.1921, ch. 607, p. 1039, Stats. 1929, ch. 373, p. 695, the biennial reports of the Division of Water Rights 1922–28, the forewords to the reprints of the Water Commission Act published by the Division of Water Resources (1930, 1931 and 1933), and the biennial budgets of the Governor 1933–41 (Allen v. Industrial Accident Commission, 1935, 3 Cal.2d 214, 215, 216, 43 P.2d 787; People v. Sanchez, 1942, 21 Cal.2d 466, 469, 132 P.2d 810; People v. Stralla, 1939, 14 Cal.2d 617, 620, 96 P.2d 941; Bell v. Southern Pacific Co., 1922, 189 Cal. 421, 425, 208 P. 970), we have ascertained the following facts, none of which are denied by appellant: In 1921 the Water Commission was abolished, the Department of Public Works was created, and the administration of the Water Commission Act passed from the Water Commission to the Division of Water Rights of the Department of Public Works. In 1929 the Division of Water Rights became the Division of Water Resources, and the latter took over the administration of the Act. It discharged this responsibility thereafter and was so acting in February, 1939. Consequently the Division of Water Resources, in February, 1939, was indubitably the de facto successor of the Water Commission.

This statutory succession has been recognized repeatedly both by the legislature and the courts. See Stats. 1927, ch. 286, p. 508; Stats. 1935, ch. 389, sec. 735, p. 1382; Crane v. Stevinson, 1936, 5 Cal.2d 387, 398, 54 P.2d 1100; Wood v. Pendola, 1934, 1 Cal.2d 435, 438, 35 P.2d 526; Yuba River Power Co. v. Nevada Irrigation District, 1929, 207 Cal. 521, 522, 279 P. 128. In fact a few months after the making of the order of reference here challenged, the legislature made its recognition of the statutory succession express. Stats. 1939, ch. 838, p. 2420. As so amended the relevant portion of section 1 of the Water Commission Act read: "* * * and the Division of Water Resources of the Department of Public Works as statutory successor of the State Water Commission shall be regarded as performing a governmental function in carrying out the provision of this act."

[17] We see then that the statutory succession of the Division of Water Resources to the administration of the Water Commission Act has been recognized by the executive, legislative and judicial departments. This unanimous, uniform and long-established practical construction of the ambiguity present in sections 363c and 363e with respect to the administration of the Water Commission Act should and will be followed by us since it is in no sense clearly erroneous, but quite the contrary. Los Angeles v. Superior Court, 1941, 17 Cal.2d 707, 712, 112 P.2d 10; Hoyt v. Board of Civil Service Com'rs, 1942, 21 Cal.2d 399, 402, 132 P.2d 804; 23 Cal.Jur. 775–777. Accordingly we hold that in February, 1939, the Division of Water Resources was the statutory successor of the Water Commission and was, therefore, the proper referee under section 24.

The constitutionality of Section 24, here attacked, was sustained generally in Fleming v. Bennett, supra, 18 Cal.2d 518, 116 P.2d 442, a case which involved the precise type of reference now before us, namely, a physical facts reference. The Supreme Court there said 18 Cal.2d at page 527, 116

P.2d at page 447: "It follows that all of the pertinent constitutional safeguards were observed by the legislature in enacting the provisions of section 24 * * *." In so stating the court was merely making express that which had been implicit in its earlier decisions commending the reference procedure of Section 24 and urging its use by the trial court. See Peabody v. City of Vallejo, 1935, 2 Cal.2d 351, 374, 40 P.2d 486; Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., 1935, 3 Cal.2d 489, 575, 45 P.2d 972; City of Lodi v. East Bay Mun. Utility Dist., 1936, 7 Cal.2d 316, 341, 60 P.2d 439; Rancho Santa Margarita v. Vail, 1938, 11 Cal.2d 501, 559, 81 P.2d 533; Meridian, Ltd., v. San Francisco, supra, 13 Cal.2d 424, 457, 458, 90 P.2d 537, 91 P.2d 105.

Nevertheless appellant contends that as applied in this case section 24 violates article III, section 1, and article IV, section 25, subsections 3 and 33, of the California Constitution, and further that the admission of the referee's report in evidence, as provided for in section 24, constituted a denial of due process of law to appellant since the report was unsworn, contained much inadmissible evidence, and was based upon an objectionable ex parte investigation of the referee. We now proceed to a consideration of these grounds of appeal in the order just presented.

[18] Article III, section 1, of the California Constitution is the separation of powers provision under which the government of the state is divided into three separate departments—the legislative, executive and judicial. In so far as here relevant, it provides: "[N]o person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others * * *." Since as stated in Fleming v. Bennett, supra, 18 Cal.2d at page 524, 116 P.2d at page 445, and developed at length thereafter, "It must be taken as settled that the division does not exercise judicial functions" the application of the provision to section 24 is not at once apparent. Appellant, however, argues that its applicability lies in the control exercised by the trial court under section 24 over the referee. The untenability of this position is apparent from an examination of the section. In the first place, the division may refuse the reference if it deems that the provisions for reimbursement to it of the expenses of the reference are inadequate. In the second place, it is the division which decides whether or not its investigation shall include any hearings. Once the court has issued its order of reference to the division together with any clarification order the latter may require, it retains no control over the work of the division. Thus the separation of powers compelled by article III, section 1, has been maintained in the reference procedure of section 24.

Article IV, section 25 prohibits local and special laws in certain cases, including (subsection 3) regulating the practice of the courts, and (subsection 33) all other cases where a general law can be made applicable. While appellant strongly relies upon the case of Mojave River Irr. Dist. v. Superior Court, 1927, 202 Cal. 717, 262 P. 724, in support of its contention that section 24 violates these constitutional provisions as being a special law providing for a variation from the general practice and procedure in the superior court, the Supreme Court has directly distinguished the holding in that case from the situation here presented by stating in Fleming v. Bennett, supra, 18 Cal. 2d at page 528, 116 P.2d at page 447: "The case presents no special procedure differing from the ordinary practice and procedure of superior courts in original actions, such as was considered in the case of Mojave River Irr. Dist. v. Superior Court, 202 Cal. 717, 262 P. 724. As we have noted, the legislature has power to provide for reference in special classes of cases of which the present case is one.

"It follows that all of the pertinent constitutional safeguards were observed by the legislature in enacting the provisions of section 24 * * *." (See also Wood v. Pendola, supra, 1 Cal.2d 435, 35 P.2d 526; Bray v. Superior Court, 1928, 92 Cal.App. 428, 268 P. 374, 1081.)

[19] Appellant's final procedural objection is that it was denied due process of law in the admission of the division's report in evidence pursuant to section 24. This point was likewise decided adversely

to appellant in Fleming v. Bennett, supra, 18 Cal.2d 527, 116 P.2d 442. Nevertheless it argues that decision is not controlling here because various objections raised by it were not specifically considered therein. We are unable to agree with this contention. The reference passed upon in the Fleming case is precisely the type of reference before us, and the objections advanced are substantially identical. With the exception of one point hereinafter discussed no objection is urged which is not fully answered by the court in that case when it said, 18 Cal.2d at page 525, 116 P.2d at page 446: "On the hearing before the trial court the appellants objected to the report on the ground that it was hearsay and incompetent. They also now claim that the report was inadmissible as evidence because it was compiled from ex parte investigations conducted by the division of water resources without hearings or the taking of testimony and without the presence of any of the parties to the suit." And, 18 Cal.2d at page 527, 116 P.2d at page 447: "The parties were not deprived of any constitutional right. They were afforded full opportunity to be heard in opposition to the report as evidence, and to introduce evidence contrary to the facts appearing therein. Constitutional mandates are observed where such facts are not made incontrovertible and opportunity is given to refute them in court."

As the Supreme Court of the United States pointed out in denying a like contention in Pacific Live Stock Co. v. Lewis, 1916, 241 U.S. 440, at pages 453, 454, 36 S.Ct. 637, 60 L.Ed. 1084, the report made admissible in evidence is that of an official, disinterested, impartial expert, and opportunity is given to rebut it. Thus the fact that during the Division's investigation appellant was afforded no opportunity to confront and examine adverse witnesses, since the Division held no hearings, is of no consequence in view of the further fact that the report of the Division disclosed the identity of those chiefly responsible for both the investigation and the report, and, as the record shows, appellant examined such of those individuals at length as were available at the trial. Where appellant had and exercised its opportunity to offer evidence in rebuttal to the Division's report, there was no denial of due process to appellant in admitting it in evidence, particularly in view of its expert and impartial character.

[20] The one new point raised by appellant in this connection is entirely specious. In order to state the point it is necessary to quote both the first and second sentences of the section: "In case suit is brought in any court of competent jurisdiction for determination of rights to water or the use of water, the court may, in its discretion, order a reference thereof to the state water commission, as referee, which reference may include any issue or issues, or all issues, involved in such suit. Also, the court may, in its discretion, refer such a suit to the state water commission for investigation of and report upon any one or more or all of the physical facts involved, in which event, said commission may, in its discretion, base its report solely upon its own investigation or investigations or in addition thereto may hold a hearing or hearings and take testimony and the report filed by the commission upon such a reference for investigation by it shall be prima facie evidence of the physical facts therein found; provided, however, that the court shall hear such evidence as may be offered by any party to rebut such report of the state water commission or such prima facie evidence." Appellant construes the word "solely" in the second sentence of section 24 to preclude participation by the parties in the Division's investigation such as admittedly took place, and contends that by reason of such participation the referee did not base its report solely upon its own investigation. Read in its context the word "solely" carries no such import as is urged by appellant. Its true effect is to establish that the referee, in a physical facts reference such as we have here, has the choice of basing its report solely upon its own investigation or basing it as well upon hearings conducted by it. An investigation is no less the referee's own by reason of its having accepted the assistance of the parties, thereby possibly expediting the reference and reducing its cost.

It should be noted that appellant's attack has been exclusively upon the validity of the reference itself and no question has been advanced as to the propriety of the total expense of the reference nor of its proportionate allocation.

[21] This brings us to a consideration of appellant's third primary ground for reversal, that the final judgment of the trial court is fatally erroneous as a matter of law. Appellant initially contends that the trial judge erroneously assumes the ground water at issue to be, as a matter of legal category, percolating water. Ground water is divided, when discussing water rights, into (1) water flowing in defined subterranean streams and (2) percolating water. Appellant's position is that the ground water here involved is a subterranean stream since, according to the referee's report, it consists of two fields moving slowly in definite directions and accustomed locations to their junction.

[22-24] In order for ground water to be considered a subterranean stream, it must possess all the attributes of a surface body of water except location upon the surface. City of Los Angeles v. Pomeroy, 1899, 124 Cal. 597, 626, 57 P. 585; Maricopa etc. Dist. v. Southwest Cotton Co., 1931, 39 Ariz. 65, 4 P.2d 369, 376, 377. Its channel or boundaries must be known and well defined. Its course or location must be traceable with an exactness comparable to that possible with respect to surface bodies of water. The explanation for these requirements is that the law of surface bodies of water applies to subterranean streams. City of Los Angeles v. Pomeroy, supra, 124 Cal. at pages 632–634, 57 P. at page 585. Percolating water, on the other hand, is ground water which is not part of the subsurface flow of a surface body of water and which does not possess the above-named characteristics of a subterranean stream (Vineland Irr. Dist. v. Azusa Irr. Co., 1899, 126 Cal. 486, 494, 58 P. 1057, 46 L.R.A. 820), although it may possess both movement and direction and be interdependent with surface bodies of water.

[25-28] From the foregoing it is apparent that ground water which may not be classed as a subterranean stream must be classed as percolating water. Since ground water is invisible, it is presumed to be percolating water and consequently the burden of proof is upon the party asserting the contrary. Arroyo Ditch & Water Co. v. Baldwin, 1909, 155 Cal. 280, 284, 100 P. 874. To satisfy this burden the boundaries of the subterranean body of water must be located with considerable certainty. The referee's report does no more than suggest the possible boundaries of the broad movements of ground water in the Area. Appellant did not supply this hiatus in proof. Under the rules of law stated the ground water of the Area must be held to be percolating water.

Appellant's principal authority for its contrary claim is the Pomeroy case. That case involved merely the subsurface flow of a surface stream. The record before us clearly shows that the ground water of the Area is in no sense subsurface flow. Its movement does not correspond in direction or location with any of the surface bodies of water in the Area. It may be accurately described as a large, completely underground lake or reservoir, the boundaries of which cannot be traced with any exactness. Such underground bodies of water are commonly called basins. This basin very strongly resembles the one held to be percolating water in Katz v. Walkinshaw, 1903, 141 Cal. 116, 138-140, 70 P. 663, 74 P. 766, 64 L.R.A. 236, 99 Am.St. Rep. 35. Ground water basins of this character consistently have been treated as percolating water. See Newport v. Temescal Water Co., 1906, 149 Cal. 531, 532, 87 P. 372, 6 L.R.A.,N.S., 1098; San Bernardino v. Riverside, 1921, 186 Cal. 7, 11-13, 198 P. 784; Corona Foothill Lemon Co. v. Lillibridge, 1937, 8 Cal.2d 522, 524, 66 P. 2d 443; Hillside Water Co. v. Los Angeles, 1938, 10 Cal.2d 677, 679-682, 76 P.2d 681; Allen v. Calif. Water & Tel. Co., 1946, 29 Cal.2d 466, 472, 176 P.2d 8.

Appellant's second contention respecting the final judgment of the trial court is that it erroneously assumes appellant's ground water rights to be equal to those of the other parties, whereas they are in fact prior and paramount to those of various other parties. It should be noted that the equality of ground water rights among all parties, other than appellant, is not in issue since this equality was expressly stipulated by these parties.

The trial court concluded that the ground water rights of all parties, including appellant, are prescriptive in character and therefore are equal in priority. This legal conclusion is supported by the record in only two particulars, which respondents contend are sufficient. The first is a stipulation in which all parties to the suit, including appellant, joined, as follows: "That all of the water taken by each of these parties to this stipulation and agreement, at the time it was taken, was taken openly, notoriously and under a claim of right, which claim of right was continuously and uninterruptedly asserted by it to be and was adverse to any and all claims of each and all of the other parties joining therein." The second supporting factor is the circumstance, established by the referee's report, that during all of the claimed prescriptive periods an overdraft of the ground water in issue existed. Two elements necessary to the perfecting of a prescriptive right, the running of the prescriptive period and adverse use, are omitted from the stipulation. While hostility of claim is covered by its terms it is silent as to hostility of use. Aside from appellant's taking of water since the institution of the suit, however, the running of the prescriptive periods is conceded.

[29-31] Respondents argue that the existence of the overdraft rendered the takings mutually adverse and, as a consequence, the missing element of adverse use was supplied by the existence of the overdraft. We cannot agree with the conclusion of the trial court as to the prescriptive character of all the ground water rights in issue or with the argument of respondents in support thereof. It is thoroughly established that the existence of adverse use is fundamental to the acquisition of prescriptive status. City of San Diego v. Cuyamaca Water Co., 1930, 209 Cal. 105, 134, 287 P. 475. Adverse use of water involves the invasion of the usufructuary right of another in a water supply common to both. City of Los Angeles v. City of Glendale, 1943, 23 Cal.2d 68, 79, 142 P.2d 289. What constitutes an invasion of a water right depends upon the nature of the right involved.

[32-38] In California, aside from the special pueblo right, water rights are riparian, overlying, appropriative or prescriptive. A riparian right is reciprocal in character as to other riparian rights in the same body of water, extends only to the water during its passage by the land to which the riparian right attaches, and embraces both present and prospective reasonable beneficial riparian use. Pabst v. Finmand, 1922, 190 Cal. 124, 129, 211 P. 11; Miller & Lux, Inc., v. Enterprise Canal etc. Co., 1915, 169 Cal. 415, 441, 147 P. 567; Meridian Ltd., v. San Francisco, 1939, 13 Cal.2d 424, 445, 90 P.2d 537, 91 P.2d 105. The very nature of the right precludes its being fixed in amount. Seneca Consol. Gold Mines Co. v. Great Western Power Co., 1930, 209 Cal. 206, 220, 287 P. 93, 70 A.L.R. 210. A riparian right may be invaded either by an excessive upper riparian use interfering with its present exercise or by any upper nonriparian use. Peake v. Harris, 1920, 48 Cal.App. 363, 380, 381, 382, 192 P. 310; Moore v. California Oregon Power Co., 1943, 22 Cal.2d 725, 734, 735, 140 P.2d 798. The reason why an upper nonriparian use constitutes an invasion of a lower riparian right is that it, per se, infringes upon the prospective aspect of the lower riparian right. Pabst v. Finmand, supra, 190 Cal. at page 132, 211 P. at page 11. An overlying right is analogous in nature to a riparian right since both originate in the juxtaposition of land and water. Consequently it may be invaded in much the same manner as a riparian right. San Bernardino v. Riverside, supra, 186 Cal. 7, 15, 16, 198 P. 784. The riparian concept of upper and lower use, however, has not been applied to percolating water.

[39] In contrast to riparian and overlying rights, appropriative and prescriptive rights are dependent for their existence upon reasonable beneficial exercise thereof, have no prospective aspect, and are absolute in amount. Northern Calif. Power Co. v. Flood, 1921, 186 Cal. 301, 304-306, 199 P.

315; Akin v. Spencer, 1937, 21 Cal.App.2d 325, 328, 332, 69 P.2d 430. Accordingly, appropriative or prescriptive rights may be invaded only by interference by another resulting in actual diminution of the amount of water covered by such right. Faulkner v. Rondini, 1894, 104 Cal. 140, 147, 37 P. 883; E. Clemens Horst Co. v. Tarr Mining Co., 1917, 174 Cal. 430, 440, 163 P. 492; cf. Peck v. Howard, 1946, 73 Cal.App.2d 308, 329, 167 P.2d 753; City of San Diego v. Cuyamaca Water Co., supra, 209 Cal. 105, 133, 134, 287 P. 475.

[40] Appellant has never suffered any involuntary diminution in its ground water production and has always had more water available than its use required. Consequently, under the principles of law stated the taking of ground water of the Area by the other parties has not been adverse to appellant's appropriative rights in the water supply common to the other parties and appellant.

[41-43] Moreover, the acquisition of prescriptive title is a species of forfeiture. Forfeiture should not be permitted without notice thereof during the prescriptive period to the one suffering the forfeiture. This principle has been recognized in water right law. The taking of water by a riparian owner is presumed to be in the exercise of his riparian right. Oliver v. Robnett, 1922, 190 Cal. 51, 55, 210 P. 408. An upper riparian owner cannot gain a prescriptive title against a lower riparian owner unless there has been either actual notice to the lower owner of such upper owner's adverse claim or the circumstances are such, as substantial interference with the lower flow or a nonriparian use, as to bring home to the lower riparian owner the adverse nature of the upper riparian owner's use. Morgan v. Walker, 1933, 217 Cal. 607, 615, 616, 20 P.2d 660; Scott v. Fruit Growers' Supply Co., 1927, 202 Cal. 47, 52, 258 P. 1095. We do not consider the existence of the overdraft as such a circumstance in view of the facts that appellant at all times had more water available to it than its use required, and, so far as the evidence shows, has had no notice, either actual or constructive, that any overdraft of the ground water in issue existed.

[44] The nature of appellant's ground water rights is in dispute. Appellant claims both overlying and appropriative rights, while respondents assert that appellant's rights are purely appropriative. At the time these proceedings were initiated by plaintiff and for over ten years at least prior thereto, appellant, a public utility, exported about three-fourths of its water production annually to customers located outside of the overlying area. To the extent of these exports, appellant's rights are appropriative. Burr v. Maclay Rancho Water Co., 1908, 154 Cal. 428, 434, 435, 98 P. 260. The other one-quarter of its water production, it is claimed by appellant, has been devoted to beneficial uses on lands overlying the area. About ninety percent of these lands are owned in fee by others but appellant retains title to the ground water rights thereof. The finding of the trial court to the effect that appellant did not introduce any evidence as to the extent of the use of water by it upon property overlying the area which it owns or to which it retains the ground water rights is borne out by the record of the case. Such evidence as there is on the subject, aside from the export proportion mentioned, shows that appellant merely produces water which it sells to others, some of whom own property within and others without the area. The water, when taken and reduced to possession, is impressed with a public use, is carried to reservoirs for distribution and is there sold without reference to the underlying basin from which it was taken. As will be developed below, we believe appellant's rights to be entirely appropriative.

[45-48] Our conclusion that the other parties have gained no prescriptive rights against appellant leaves without basis the trial court's action in distributing the burden of the overdraft equally between all parties including appellant. For, as will be hereafter shown, appellant's water rights are prior and paramount to those of various of the other parties.

This does not mean, however, that the trial court may not restrict appellant's water production in accordance with the exact priority of its water rights. We do not subscribe to appellant's view that, under the circumstances of this case, its established public use of water is immune to injunctive restraint. The immunity of an established public use of water is not absolute. The right to such use may be lost completely by prescription. San Joaquin etc. Irrigation Co. v. Worswick, 1922, 187 Cal. 674, 694, 203 P. 999; Big Rock M. W. Co. v. Valyermo Ranch Co., 1926, 78 Cal.App. 266, 275, 248 P. 264. Accordingly, under proper circumstances it should be liable to restriction by injunction. The basis of this immunity lies almost wholly in the inconvenience caused the public should the service to it be interrupted by injunction. Miller & Lux, Inc., v. San Joaquin L. & P. Corp., 1937, 8 Cal.2d 427, 436, 65 P.2d 1289. In this case we are hereafter directing the trial court to take into consideration in restricting appellant's production of Area ground water the availability to appellant in equitable and reciprocal terms of the excess water of the other parties, irrespective of the origin of such water. Consequently, no interruption of appellant's service to its customers should result from any restriction of its production as a result of this suit. Under these circumstances appellant's defense of the intervention of its public use is scarcely apposite. Furthermore, independent of the foregoing considerations, this defense is without basis in the facts of this case. It rests upon two grounds, estoppel and public policy. Peabody v. City of Vallejo, supra, 2 Cal.2d 351, 377–379, 40 P.2d 486; Miller & Lux, Inc. v. Enterprise Canal etc. Co., 1915, 169 Cal. 415, 423–434, 147 P. 567. The circumstances of this case furnish no ground for an estoppel in favor of appellant. Plaintiff's development of additional water from the San Gabriel River and its subsequent substitution therefor, in availability of use, of Colorado River water merely has made the overdrawn condition of the ground water of the Western Unit less critical. Public policy, as embodied in Article XIV, section 3, of the California Constitution, demands that this supply be protected from eventual exhaustion by continued overdraft. See Burr v. Maclay Rancho Water Co., supra, 154 Cal. 428, 438, 98 P. 260. Public use by parties other than appellant already exceeds the safe yield of this supply. We see no reason why appellant should be treated differently from these other public users.

This case then must be returned to the trial court for retrial to determine the exact priority of appellant's water rights in the common supply so that its water production may be restricted accordingly to the end of terminating the overdraft. The determination of appellant's priority of water right will alter not only the water allocation made to it but also those made to the other parties. Appellant by appealing from the entire judgment of the trial court has drawn into issue the validity of every allocation made. The redetermination of the various allocations should be for the limited purpose of ascertaining the correct allocation to be made to appellant. In accordance with the express stipulation of the parties other than appellant, the adjustment in their allocations shall be made so that the proportions now obtaining among them will be maintained.

[49, 50] In order that the retrial may be a limited one, we now set forth, for the guidance of the trial court, our views on the priority of appellant's water rights, and the correctness of the judgment both with respect to the allocations made and otherwise. To determine the exact priority of appellant's water rights, the nature of the water rights of all parties must be ascertained. The present record is too incomplete in regard to the character of the use of water made by each party for us to make this determination; but it is nevertheless sufficient to establish the incorrectness of respondents' contention that such rights of all parties are purely appropriative or prescriptive. As already stated, by analogy to the rule prevailing for riparian rights, overlying use should be presumed to be an exercise of an overlying right. Many of the parties are using and have used the water underlying them upon their overlying land for purely private purposes. We refer to such users as Altadena Golf Club, Crown City Ice Company, the Hastings and Kinneloa Ranches, the Huntington Library, Pasadena Cemetery Association and Royal Laundry and

Dry Cleaning Co. Their use is clearly and exclusively an overlying use, and their water rights are therefore purely overlying rights. Burr v. Maclay Rancho Water Co., supra, 160 Cal. 268, 280, 116 P. 715. Further, several of the parties are mutual water companies which apparently serve and have served only their own overlying stockholders. To the extent of such service, such companies are likewise only overlying users since their use is a private use. Stratton v. Railroad Commission, 1921, 186 Cal. 119, 122, 198 P. 1051.

[51-56] On the other hand all parties who devote and have devoted the water produced by them to public use are to the extent of such use making and have made a non-overlying and therefore appropriative use. San Bernardino v. Riverside, supra, 186 Cal. 7, 30, 198 P. 784; Eden Township Water Dist. v. Hayward, 1933, 218 Cal. 634, 640, 24 P.2d 492. Appellant as a public utility is such a public user as to its entire production notwithstanding its claim to overlying rights in so much of its production as is used on land, the overlying rights to which it owns. The fact that water devoted to a public use is taken from overlying land owned by the taker does not affect the appropriative character of the use. San Bernardino v. Riverside, supra, 186 Cal. at page 29, 198 P. at page 784. Likewise the fact that water devoted to a public use is used on overlying land is without effect upon the appropriative character of the use. Eden Township Water Dist. v. Hayward, supra. While it is true that appellant owns and has owned certain overlying rights, since 1913 its exercise of those rights has been by appropriative use by virtue of both the character of such use and its public utility status. The essential nature of a water right is determined by the character of its exercise. Duckworth v. Watsonville etc. Co., 1907, 150 Cal. 520, 532, 89 P. 338. Admittedly appellant's service to its overlying customers has been made on precisely the same basis and by identical means as its service to its non-overlying customers. We see no reason under the principles of law just stated to make a distinction in character of right where none exists in character of use. Accordingly, since 1913 appellant's rights with respect to its entire water production have been exclusively appropriative.

[57-59] So far as the priority of appellant's rights are concerned all ground water rights here involved are either appropriative or overlying. The appropriative rights are of two kinds—those based upon public use and those based upon export of the water from the overlying area. All appropriative rights, whatever their source, have, where the prescriptive period has run, ripened into prescriptive rights as against the overlying rights. This is so under the stipulation relating to the elements of prescriptive title quoted earlier and under the principles of law set forth in our exposition of adverse use. By analogy to the rule prevailing for riparian rights, the prospective aspect of an overlying right is invaded by any appropriation from a source common to both the holder of the overlying right and the appropriator. However, appellant's appropriative right to the increase in its water production made since the filing of this suit has not ripened into a prescriptive right. We have determined this suit to be inter se so far as the defendants, including appellant, are concerned. This inter se character has prevented the running of the prescriptive period of this particular appropriative right. Alta Land etc. Co. v. Hancock, 1890, 85 Cal. 219, 227, 228, 24 P. 645, 20 Am.St.Rep. 217. An appropriative right is subordinate to existing rights. Duckworth v. Watsonville etc. Co., supra, 150 Cal. 520, 530, 531, 89 P. 338. Accordingly, appellant's appropriative right to its increase in production made since this suit was filed is subordinate to all overlying rights.

[60] Finally, under the reasoning set out in our discussion of adverse use, the appropriative rights of the parties hereto are not prescriptive between themselves because their exercise has not been mutually adverse. The record discloses no facts showing that any appropriator has suffered an involuntary diminution in its production of Area ground water as a result of the production of other users. As a consequence, in accordance with section 1414 of the Civil Code, among themselves, their respective priority in time is their respec-

tive priority in right. It is to be remembered, however, that what we have said regarding the relative priorities of the water rights of the parties applies only to the redetermination of the priority of such rights of appellant. As mentioned previously, the question of the priorities of such rights of the other parties between themselves is not before us, and between themselves they remain unchanged.

[61-63] We now turn to a consideration of the correctness in amount of the various allocations made. Under Article XIV, section 3 of the California Constitution one's right to use water in California, irrespective of the kind of right, is limited to the amount required for reasonable beneficial use. This constitutional limitation means that an allocation may not be based upon an unreasonable method of obtaining or using water or upon an unreasonable use or waste thereof. Peabody v. City of Vallejo, supra, 2 Cal.2d 351, 366, 367, 40 P.2d 486. Appellant's argument that, under these principles, it is the only party which has established a right to any allocation of water, ignores facts contained in the referee's report showing the amounts of the extractions and diversions of the parties and in general the use to which all water has been put. While it is true that the record is silent as to the detail of the use of each party, proof of long-continued use of a definite quantity under proper circumstances gives rise to the presumption that the use has been reasonably beneficial. The use required is not the most efficient possible but merely a reasonable one in keeping with the general custom of the locality so long as the custom does not involve unnecessary waste. Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., supra, 3 Cal.2d 489, 547, 548, 45 P.2d 972.

[64–66] Appellant claims that plaintiff has been guilty of wasteful use in its storm drainage, sewerage, street-cleaning and fire-fighting operations. According to Meridian, Ltd., v. San Francisco, supra, 13 Cal.2d 424, 447, 90 P.2d 537, 91 P.2d 105, waste occurs when water is used needlessly, prodigally and without serving a purpose. Manifestly the use of water attacked has been for ordinary municipal purposes. City of Los Angeles v. Pomeroy, supra, 124 Cal. 597, 640, 57 P. 585. There is no evidence in the record even suggesting wasteful methods of use by the plaintiff. The fact that as a consequence of these operations a certain amount of water escapes from the Area that would not otherwise escape does not in itself, under the principles just stated, establish waste on the part of the plaintiff. Furthermore, since the entire Area is highly urbanized the bulk of the water here involved is used for domestic purposes including domestic irrigation, and in such use there can be little waste. The finding of the trial court as to reasonable beneficial use by each of the parties is amply supported by the evidence; accordingly, the allocations are unassailable on that ground. Allen v. Calif. Water & Tel. Co., supra, 29 Cal.2d 466, 483, 484, 176 P.2d 8.

[67] Obviously, so far as appellant's rights are concerned, certain of the allocations attacked are incorrect in amount. Those parties holding only overlying rights should be allocated water upon that basis. But since the priority of the appropriative rights over the overlying rights is dependent upon the prescriptive status of the former with respect to the latter, the computation of amounts to be allocated to those appropriators properly is made on a prescriptive basis. The prescriptive allocations made purport to be the highest continuous annual ground water production of the party made within any five-year period preceding the institution of this suit which was not thereafter forfeited by a lessened continuous annual production during a subsequent five-year period. This is the established method of computation for acquisition and forfeiture of prescriptive rights in surface bodies of water. E. Clemens Horst Co. v. Tarr Mining Co., 1917, 174 Cal. 430, 439, 163 P. 492; Lindblom v. Round Valley Water Co., 1918, 178 Cal. 450, 454-456, 173 P. 994. We see no objection to its application to percolating water.

[68] Appellant, however, attacks this formula as applied by the trial court on two grounds. In the first place, objection is made to the basing of the prescriptive

amount upon the overall production of a party instead of its production well by well. Where a party has frequently shifted its production from well to well as plaintiff has done here, plainly the suggested method would yield a smaller total. To us the objection appears to be without merit. A water user is privileged to shift his points of extraction from an underground supply as he desires so long as he does not thereby injure other users thereof. Barton v. Riverside Water Co., 1909, 155 Cal. 509, 517, 101 P. 790, 23 L.R.A.,N.S., 331. The overall production method is an incident of such privilege.

[69] Appellant's second objection is to the five-year forfeiture period for nonuse, the contention being that the three-year forfeiture requirement of section 1241 of the Water Code governs. This section is substantially section 20a of the Water Commission Act (Stats. 1917, ch. 554, p. 746), now repealed. By its terms it applies to appropriative or adjudicated rights. Although the rights now being discussed are prescriptive as to the overlying rights involved, they are as to each other entirely appropriative. Nevertheless we do not think that section 1241 applies to the rights in question. Section 20a was enacted in 1917 as an amendment to section 20 which deals with permits and licenses for the appropriation of water. Under section 42, now section 1200 of the Water Code, the term "water" when used in relation to such permits and licenses refers only to surface water and subterranean streams flowing through known and definite channels. We have already held the ground water in controversy here to be percolating water, and the record discloses that all the parties, together with the referee as administrator of the Water Commission Act and the successor provisions of the Water Code, seem always to have treated it as such. Under the reasoning stated, section 1241 has no application to appropriative rights in percolating water.

[70] A final word is necessary as to the correctness of the prescriptive allocations in amount. The quoted stipulation of the parties setting forth all of the elements of prescription except the running of the prescriptive period and adverse use plainly applies only to taking of water by the various parties themselves; it does not cover taking by any of their predecessors in interest. Consequently, there is no basis in the present record for including in any party's prescriptive amount any taking by a predecessor in interest. Further, a successor in interest stands in no better position than his predecessor as to the latter's taking. Mt. Shasta Power Corp. v. McArthur, 1930, 109 Cal.App. 171, 189, 190, 292 P. 549. To illustrate, a taking by an overlying owner for private use is not affected in character and therefore in priority by the acquisition of the water rights of that owner by an appropriator for public use or for export. However, aside from these stated objections, we see no basis whatsoever for attack upon the correctness in amount of the allocations made to those holding prescriptive rights and it will not be necessary to retry the correctness of the prescriptive allocations except to the extent our stated objections apply to any particular allocation.

We now turn to consideration of the correctness of the judgment otherwise. As mentioned at the start of this opinion the judgment before us is substantially the one proposed by stipulation of all parties save appellant. The trial court accepted with slight modifications the judgment proposed after a hearing thereon. Aside from the evidence offered upon the acquisition of rights in issue since the commencement of the suit and evidence directed to the issues of estoppel and laches, substantially the only evidence introduced at such hearing in support of the judgment proposed and accepted was the stipulations previously mentioned and the referee's report.

[71, 72] Appellant urges us to set the judgment aside on the broad grounds of public policy, estoppel and laches. As to the first ground, we only wish to comment that any judgment in water rights litigation must conform to and be in furtherance of the fundamental policy of this state with regard to the waters thereof which is set forth in Article XIV, section 3, of our state constitution. That is the basic requirement for affirmance of any such judg-

ment. As to estoppel, we do not see how plaintiff or any other appropriator is estopped from asserting its appropriative rights. It is well established that where one's right has not been invaded, he is not estopped to assert it even against an established public use. Empire West Side Irr. Dist. v. Stratford Irr. Dist., 1937, 10 Cal.2d 376, 382, 383, 74 P.2d 248; City of San Diego v. Cuyamaca Water Co., supra, 209 Cal. 105, 142, 287 P. 475; San Joaquin etc. Irrigation Co. v. Worswick, supra, 187 Cal. 674, 693, 694, 203 P. 999; Miller & Lux, Inc., v. Enterprise Canal etc. Co., supra, 169 Cal. 415, 430, 147 P. 567. Nevertheless we shall consider appellant's claims as to estoppel in detail in order to show that, no matter how broadly construed, they are completely without merit.

Appellant, in its answer, alleged that plaintiff was estopped from asserting its right to the use of water in issue by reason of its excessive taking and wasteful use thereof, its use of San Gabriel River water, and its acquiescence in appellant's notorious and established public use of the water at issue. We have already sustained the trial court's finding that each party is making and has made a reasonable beneficial use of the ground water of the Area. Further, it is apparent from the record that this conclusion is equally sound as regards the use of the tributary surface water diverted by various of the parties. This leaves for present consideration merely plaintiff's use of the San Gabriel River water, in availability of use now supplanted by Colorado River water, and appellant's established public use of the water at issue.

[73–75] The supplementation by any party of its local water supply by the use of water from outside the Area is no ground for estoppel of that party in favor of appellant. The record is barren of evidence opposed to the trial court's finding that the importation of water did not induce any action by appellant. The referee's report shows that as the Area developed and the population increased most of the parties, including appellant, increased their production of Area ground water. Appellant made no particular increase in its production following the inception of plaintiff's use of San Gabriel River water; the recent substantial increase in its production occurred after the institution of this action. Since importation of water by various parties induced no action on the part of appellant, it can claim no estoppel by reason of that circumstance. Verdugo Canon Water Co. v. Verdugo, 1908, 152 Cal. 655, 673, 674, 93 P. 1021. The existence of appellant's known public use likewise is insufficient to create an estoppel in appellant's favor. Standing alone, appellant's public use, the knowledge of the other parties thereof, and their failure to object thereto are inadequate. In the absence of a showing of some degree of moral turpitude in the conduct of the other parties toward appellant, the assertion of their rights in a court of equity cannot be estopped. Stevens v. Oakdale Irr. Dist., 1939, 13 Cal.2d 343, 353, 90 P.2d 58.

[76] Appellant's claim of laches is also without merit. Each party has been exercising its asserted water rights for years; they have been therefore under no obligation to have them adjudicated. Miller v. Thompson, supra, 139 Cal. 643, 645, 73 P. 583. Of course, as previously set forth, overlying rights have lost priority to appropriative rights exercised adversely to them for the prescriptive period and prescriptive rights have suffered diminution to the extent of nonuser thereof. The appropriative rights herein, not having been invaded, are immune to the charge of laches. City of San Diego v. Cuyamaca Water Co., supra, 209 Cal. 105, 135, 287 P. 475.

[77, 78] In essence laches is delay prejudicial to another in asserting a right. Newport v. Hatton, 1924, 195 Cal. 132, 148, 231 P. 987; 10 Cal.Jur. 520, sec. 60. What constitutes laches depends on the facts of the particular case. Austin v. Hallmark Oil Co., 1943, 21 Cal.2d 718, 734, 134 P.2d 777. The trial court found in effect that no party was guilty of laches in regard to appellant. This finding is supported by the evidence, as recounted with respect to appellant's claim of estoppel. It will not be disturbed. Wolpert v. Gripton, 1931, 213 Cal. 474, 483, 2 P.2d 767.

[79] Having disposed of appellant's broad objections to the judgment, we shall now consider its specific objections. Appellant objects to the provision of the judgment permitting certain parties to continue their diversion of surface water contributing to the supply of ground water here in controversy in certain specified amounts purporting to be the maximum capacities of their respective diversion works and facilities within the five-year period prior to the institution of this litigation. This objection appears to us to be well taken. While it is true that this provision expressly exempts appellant from its operation, its mere existence reduces the amount of water that would otherwise be available to appellant. We see no reason why a restriction entirely comparable to that imposed on the takers of ground water should not be placed upon diverters of surface water contributing to the ground water supply. It has long been recognized in California that the rights of users of a common supply of water are, subject to their respective priorities, correlative; and, consequently, when the supply is insufficient for all, it will be apportioned in accordance with priorities of right. Eckel v. Springfield Tunnel etc. Co., 1927, 87 Cal.App. 617, 624, 262 P. 425. This principle of allocation of the common supply between users thereof has been applied not only where percolating water fed a stream but also where a stream fed percolating water. Hudson v. Dailey, 1909, 156 Cal. 617, 628, 105 P. 748; Miller v. Bay Cities Water Co., surpa, 157 Cal. 256, 278-280, 107 P. 115, 27 L.R.A.,N.S., 772; City of Lodi v. East Bay Mun. Utility Dist., supra, 7 Cal.2d 316, 337-339, 60 P.2d 439; Peabody v. City of Vallejo, supra, 2 Cal.2d 351, 370-372, 40 P. 2d 486. We leave to the trial court the formulation of the restriction upon diversion of surface water contributing to the supply of Area ground water. Upon retrial all parties should be afforded the opportunity of supplementing or rebutting the evidence upon the matter in the referee's report.

[80] Appellant attacks two provisions of the judgment which are contained in the water exchange agreement incorporated in the judgment. Appellant and the other two parties to the suit who did not join in the agreement are expressly exempted in the judgment from compliance with the agreement. Nevertheless we feel that appellant may properly attack the agreement upon a showing that its enforcement may adversely affect appellant in the exercise of its rights here at issue.

The first provision attacked permits plaintiff to restrict its production from the Monk Hill basin and to produce instead from the Pasadena sub-area. Monk Hill basin is the northwestern and higher portion of the Western Unit, the Pasadena sub-area being the remainder thereof. Appellant's wells are located in the southeastern corner of the Pasadena sub-area. Appellant fears that if plaintiff should increase its production materially in the vicinity of appellant's wells, the water levels of those wells would drop to its injury. That this fear may not be groundless is indicated by the referee's finding "that from the standpoint of economics of operation, reductions in pumping draft in the Western Unit would be preferable in the southern part of the Unit." The second provision of the agreement within the judgment attacked is that setting forth the varying duration of the agreement. Plaintiff, the major water producer, is obligated to exchange excess water for fifteen years only, while certain of the other parties are so obligated for greater terms up to fifty years.

[81] There is no evidentiary support in the record for these attacked provisions. They appear to have been agreed upon without regard for the referee's report. We find no reasonable basis for their acceptance by the trial judge nor their inclusion in the judgment. The trial court was not required to accept without substantial change the solution to the controversy reached by the parties other than appellant. Rather, it had the affirmative duty to work out a solution in accordance with the state's avowed policy with respect to its water resources embodied in Article XIV, section 3 of the California constitution. Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., supra, 3 Cal.2d 489, 574, 575, 45 P.2d 972;

Rancho Santa Margarita v. Vail, supra, 11 Cal.2d 501, 559, 81 P.2d 533. These attacked provisions were not shown to conform to this policy.

[82] In apportioning Area ground water on the basis of its safe yield the trial court must recognize the established and public nature of appellant's use and seek therefore to protect the public which appellant serves from an interruption in their water supply. The existence of the water exchange agreement indicates the expectation of the various water users that there will be excess water available for exchange on equitable and reciprocal terms. The trial court may be without power to order the exchange of excess water from all sources among the parties, a question we do not decide, but it may properly refuse to make a part of its judgment any water exchange agreement which does not conform to the state's constitutional water policy to which we have so frequently alluded. In addition it has the positive duty to see that no discrimination, whether by way of the existence of an improper water exchange agreement or otherwise, is practiced against appellant so far as availability of excess water is concerned. Finally in making its apportionment of the water in controversy it may properly and should take into consideration the availability to appellant on equitable and reciprocal terms of the excess water of the other parties to this suit, irrespective of the origin of such water. In this connection we note a finding of the trial court to the effect that appellant has available for its use a water supply outside the Area which may be developed at a reasonable cost. This finding is, however, so far as we are able to ascertain from the record, without support in the evidence. A re-examination of the attacked provisions of the judgment is indicated, and upon retrial the parties should be afforded the opportunity to present additional evidence as to them.

[83] Appellant challenges the reservation in the judgment of continuing jurisdiction in the trial court. The jurisdiction of that court is reserved not only to modify or add to the judgment or to make such further orders "as may be necessary or desirable for the adequate enforcement, protection, or preservation of the rights of the respective parties" but also is specially reserved in a more limited manner. According to the terms of this special reservation the court may review its determination of the safe yield of the Units at five-year intervals or the rights in the aggregate of the parties to the ground water of the Units at any time for the purpose of giving effect to material changes in the demand and supply of such ground water by adjusting the allocations in such manner as to preserve the proportions obtaining between the parties in the original judgment. The reservation of continuing jurisdiction by the trial court in order to provide the means of adjusting its solution in the future to changed conditions is to be commended since it is in furtherance of the basic water policy of this state to utilize the water resources thereof to the fullest extent of which they are capable. Allen v. Calif. Water & Tel. Co., supra, 29 Cal.2d 466, 468, 176 P.2d 8. In our opinion however the special limitation upon the reserved jurisdiction requires reexamination upon retrial in view of appellant's priority in right and in view of the directed inclusion within the allocations of tributary surface water. We think a broad retention of jurisdiction, to be exercised upon a satisfactory showing of the necessity therefor, is preferable. The trial court should preserve in its judgment its continuing jurisdiction to change its decree and its orders thereunder as the occasion may require. City of Lodi v. East Bay Mun. Utility Dist., supra, 7 Cal.2d 316, 344, 60 P.2d 439; Peabody v. City of Vallejo, supra, 2 Cal.2d 351, 380, 40 P.2d 486. As was said in the Peabody case, 2 Cal.2d at page 380, 40 P.2d at page 497: "Therein may lie a solution of many of the difficulties and uncertainties in safeguarding the rights of the parties."

[84, 85] Appellant takes exception to the following language of the judgment: "That, except as provided herein, and except as rights decreed herein may be abandoned or forfeited by non-user, in whole or in part, each and every right decreed herein hereby is fixed as of the date hereof." We think the exception is well taken. A judgment is ineffectual until entered.

Code Civ.Proc., sec. 664; Tulare Irr. Dist. v. Superior Court, 1925, 197 Cal. 649, 669, 242 P. 725. The rights adjudicated by a judgment are ordinarily those existing at the time of the commencement of the action save as rights acquired pendente lite have been brought into issue by supplemental pleading. Brown v. Brown, 1915, 170 Cal. 1, 6, 147 P. 1168; Code Civ.Proc., sec. 1908(2); 2 Freeman, Judgments, 5th Ed. 1925, sec. 716.

The findings of fact, save as noted otherwise in this opinion, are fully supported by the evidence. Upon the retrial the court should ascertain the exact priority of appellant's rights to Area ground water and should make an equitable allocation of such water to appellant in accordance with the priority found.

Nothing in this opinion should be construed as holding that the water exchange agreement is invalid as between the parties to it or that it is so invalidated by a reversal of the judgment before us.

The objections to the reference procedure having been found to be without merit, the orders of the trial court allocating to appellant its proportionate share of the expense thereof, from which appeal has been taken, are affirmed. The judgment is reversed and the case is remanded to the trial court for a new trial in accordance with the views herein expressed and as herein limited.

WOOD, J., concurs.

SHINN, Acting Presiding Justice. (concurring).

I concur in the foregoing opinion and judgment. It states conclusions in which we all agree upon the points presented on the appeal. We hold that appellant's rights are purely appropriative. The judgment declares them to be equal in right to those of all other parties upon what we consider to be an erroneous theory as to the governing principles of law. The point at issue is of great moment, not only to appellant but to others who may be similarly situated. Our views differ widely from those of the trial court. For these reasons I feel that I should state the reasons for my agreement with the views stated in the main opinion upon the principal point, even though they may only supplement what has already been said.

The basic substantive issues between appellant and respondents in this case are (1) the legal character of the body of ground water involved; (2) the existence of an overdraft of such water, and (3) the legal effect of such an overdraft. I agree that under the evidence the body of ground water involved was properly treated as percolating water and that an overdraft of such water exists. This separate opinion states the basis for my concurrence in the third conclusion of the main opinion, as to the legal effect of the overdraft.

The principal question between appellant and the respondents as to the effect of the overdraft is how the burden of the curtailment of withdrawals should be borne. The trial court found in favor of respondents' contention that the rights of all parties are equal in priority and therefore the burden of the overdraft must be shared ratably by each. Appellant contends that its rights are prior to those of various of the other users and that such priority must be recognized in making the reduction. The main opinion upholds this contention of appellant, and it is upon this point that I wish to supplement what my associates have said.

The trial did not result in a determination as to original priorities, but in a determination that such priorities as had existed in favor of any of the parties had been lost by reason of the acquisition by all users of prescriptive status as against all other users. Upon this phase of the case the principal questions were (1) whether the uses made by the appropriators were adverse to the rights of each other and (2) whether they were adverse to the rights of overlying owners. It was the theory of the respondents that the existence of the overdraft and the circumstances under which waters were withdrawn from the basin rendered the takings of each of the parties adverse to the uses of all other parties. This theory was adopted by the court and carried into the conclusion that all titles are prescriptive and without priority. We may consider first the sufficiency of the evidence to support this finding as it applies to the rights of the appropriators. I agree that there was a failure of proof to establish prescriptive status of the several appropriators against each other and equality of right, and that the judgment is therefore erroneous as between all appropriators. In reaching the conclusion that the rights were prescriptive, the court failed to distinguish between the proof required to establish a prescriptive title *against* an appropriator and that which is required to establish a prescriptive title *in an appropriator* against the owner of an overlying right. It held that a use which amounted to an invasion of the rights of an overlying owner which would initiate a prescriptive right would also constitute a like invasion of the rights of appropriators. The law, as I understand it, is to the contrary. The nature of the rights is basically different. The rights of an appropriator originate in and are dependent upon use. Those of an overlying owner exist irrespective of use and are part and parcel of the land itself. These characteristics are vital in determining what constitutes an invasion of one right or the other.

The rights of an appropriator are not invaded by withdrawals of water by others which do not interfere with his present use and give him a right to legal redress. A use which does not amount to such interference is not legally adverse so as to initiate a claim of prescriptive status. The cases so holding are cited in the main opinion. Respondents contend that a different rule applies to prescriptive claims to percolating water, and that appropriative rights therein are invaded by every use that is made of it when the total uses exceed the average annual supply. This alleged invasion, they claim, renders all uses mutually adverse. It is a novel theory, unsupported by authority and, in my opinion, insupportable in reason. Respondents rely upon certain statements of the court in Burr v. Maclay Rancho Water Co., 154 Cal. 428, 98 P. 260, 264, and San Bernardino v. Riverside, 186 Cal. 7, 198 P. 784, 788. In the Burr case the court made an apportionment of percolating water and restrained the defendant, who was an appropriator, from taking such quantities as would cut off or interfere with plaintiff's use of water from its wells in the exercise of his overlying right. Respondents quote from the opinion as follows: "It is manifest that, if the quantity taken therefrom exceeds the average annual amount contributed thereto, the underground store will be gradually depleted and eventually exhausted. This should not be permitted. The judgment should be so modified as to provide for or permit the prevention of such a catastrophe, and to limit the amount taken by all the consumers to a quantity, as near as may be equal to the average constant supply from the rainfall. It should also be framed so as to prevent the lowering of the permanent level to such an extent that the plaintiff will be unable to obtain by his pumps sufficient water therefrom for use upon his lands." The effect of this judgment was to recognize the paramount right of the overlying owner and to restrain the appropriator from interfering therewith. By the express provisions of the judgment the overlying right was protected against the acquisition of prescriptive rights by the appropriator. The protection was expressly extended by the Supreme Court to the future increment of use upon the overlying lands. Nothing was decided in the Burr case which lends support to respondents' argument on the point under discussion. The San Bernardino case was between appropriators of percolating water. Respondents quote from the opinion in that case as follows: "With respect to such cases—'The court unquestionably has power to make reasonable regulations for the use of such water by the respective parties, fixing the times when each may take it and the quantity to be taken, provided they be adequate to protect the person having the paramount right in the substantial enjoyment of that right and to prevent its ultimate destruction.'" These cases are authority for a decree ordering a reduction of use of the available supply of percolating water upon a basis which gives effect to priorities. Insofar as the present decree limits withdrawals to the average annual supply, it accords with the principles stated in those cases. There can be no doubt that withdrawals of water from the Raymond Basin should be curtailed, but this cannot be done in disregard of rights of priority. No question was presented or discussed in the cited cases as to prescriptive rights nor as to whether the uses that were being made of the water were mutually adverse. In the San Bernardino case the court, after observing that the priority of right of an appropriator does not become an important question until there is an interference with his use, stated, 186 Cal. on page 28, 198 P. on page 793: "We understand the true rule to be that, when a conflict arises between two appropriators of water, and their rights are otherwise equal, the prior appropriator will prevail so far as the conflict extends. It necessarily follows that in an action to quiet his title the prior appropriator is entitled to have his prior right declared to be superior to that of subsequent appropriators. We do not hold that the findings show that the diversions of water by the respective parties have not interfered with the diversion and use of water by the other parties. On the contrary, the facts found indicate that the several diversions have interfered with each other. We do not take up this question, but leave the extent and effect of the interferences from the facts found, as well as the question of priorities, for the consideration of the trial court when the case is remanded for further proceedings." The trial court was directed to confine itself to an adjudication of the existing rights and priorities of the parties to the waters involved. Certainly, neither of these decisions can be read as an abrogation of the established rule that a prescriptive title against an appropriator can be initiated only by a taking which deprives him of the use of the full quantity of water covered by his appropriation.

The policy of the state to protect paramount rights—and as between the appropriators this means rights of priority—has not been abandoned. The limitations imposed by the reasonable use doctrine, and declared in section 3, Article XIV, of the Constitution, which section was adopted November 6, 1928, were not intended to permit interference with rights of priority. The absence of such intention was expressly stated in the section with reference to riparian and appropriative rights. It has not been held, either before or after the constitutional amendment, that the use of the water resources of the state to the fullest extent of which they are capable may be controlled by the court to the length of decreeing equality of right where it does not exist, whether the rights in question be riparian, overlying, or appropriative. This was made clear in Peabody v. City of Vallejo, 2 Cal.2d 351, at page 374, 40 P.2d 486, at page 494, where the court said: "There is and should be no endeavor to take from a water right the protection to which it is justly entitled. The preferential and paramount rights of the riparian owner, the owner of an underground and percolating water right, and the prior appropriator are entitled to the protection of the courts at law or in equity. When there is no substantial infringement of the right, that is, when there is no material diminution of the supply by reason of the exercise of the subsequent right, the owner is entitled to a judgment declaring his preferential and paramount right and enjoining the assertion of an adverse use which might otherwise ripen into a prescriptive right." It may not be questioned that the form of judgment that was entered here affords a satisfactory solution of the problems of the parties who stipulated to the judgment. They wished to eliminate the overdraft, as the Burr and San Bernardino cases held may be done in cases of percolating water. For convenience, or other reason, they waived their priorities, which they had a right to do. They were willing to agree that the rights of appellant were upon an equality with their own, but appellant was unwilling to waive its claimed priority in right. The judgment places appellant upon an equality with the other appropriators, without evidence that such equality exists, unless the existence of the overdraft furnished such evidence. It cannot be determined from the record to what extent its rights may be prejudiced by the judgment. That will depend upon the priorities, if any, which it may be able to establish upon a new trial.

Respondents' authorities do not sustain their contention, and their argument that as between the appropriators all their titles had acquired prescriptive status is not convincing. I cannot agree that when the overdraft developed and the withdrawals continued, each appropriator was a violator of the rights of every other appropriator. There were originally priorities of right between all the appropriators. These priorities could not have been lost except through their being invaded for the prescriptive period. Invasion, under the authorities, means a violation of a right giving ground for legal redress. Under the principle stated, the early appropriators, whatever their relative priorities may have been, could not have claimed that their rights were being invaded by the withdrawals of those having lower priorities so long as the former were receiving all the water to which they were entitled. The earlier appropriators would have had no cause of action for legal redress. The later appropriators could claim only the water which remained after prior rights had been satisfied. The fact that continuance of the overdraft would eventually render unavailable to them the full amount of their appropriations would have given them no right to limit the withdrawals of the earlier appropriators or to encroach upon their priorities. The existence of the overdraft gave them no ground for legal redress.

Respondents are unable to point to any invasion of an appropriator's right. The findings, except by inference, are silent as to such invasion. There was a failure to distinguish between the exclusive, or adverse, nature of the several titles to water, and the non-interfering and non-adverse enjoyment of the rights. Every exclusive right or title is adverse in the sense that it is held against the world. The assertion of an exclusive title against all others is the assertion of an adverse claim. But a use within the owner's rights is adverse to no one, and it is adverse use alone which we are considering. It is true, as stipulated by the parties, including appellant, that they claimed their respective titles to water to be exclusive of the rights of all other users. This was by no means a stipulation that the use of any one of them infringed upon the rights of any other, nor was it a stipulation that any two or more of them used, or asserted the right to use, the same water. They were claiming separate and independent rights in a common water supply. So far as disclosed by the stipulation or the evidence, each was using water without interfering with or attempting to infringe upon such priorities of right as existed. How, then, could there have been any adverse use as between appropriators, or by overlying owners against appropriators?

The foregoing reasoning has no application to the exercise of appropriative rights against overlying rights. As will be pointed out later, an appropriative use is adverse to overlying rights, as it is adverse to lower riparian rights. It is true that there has been no interference with the present taking by the overlying owners, but such interference was not necessary to render the uses of the appropriators adverse. Any withdrawal of water from the basin by the appropriators was necessarily adverse to the rights of all overlying owners, in that it diminished the total supply which would be available for their use. They had a right to all the supply if they had need for it. The overlying rights presumably were initially superior to those of the appropriators, and any use by the appropriators which would have interfered with the immediate reasonable use by the overlying owners would have furnished occasion for injunctive relief. But, although no such interference was shown, the withdrawal of water from the basin by the appropriators was nevertheless an invasion of the rights of the overlying owners which gave the latter a right to a decree establishing their priorities over the appropriative rights, enjoining interference therewith, and protecting them against the appropriative rights ripening into a prescriptive status. Burr v. Maclay Rancho Water Co., supra. The prospective aspects of the overlying rights were invaded, in that the withdrawals by the appropriators might well have prevented increase in use by the overlying owners and even rendered necessary a ratable apportionment of the remaining available supply among the overlying owners. In this respect the rights of overlying owners are similar to those of riparian proprietors. In Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 333, 88 P. 978, 11 L.R.A., N.S., 1062, which was an action by a riparian proprietor to enjoin diversion to non-riparian lands, the court quoted from Southern California Inv. Co. v. Wilshire, 144 Cal. 68, 77 P. 767, 769, as follows: "It is not necessary in such cases for plaintiff to show damages, in order that it may be entitled to a judgment. It is enough if it appears that the continuance of the acts of the defendant will deprive it of a right of property—a valuable part of its estate. * * * The taking of the water beyond the watershed would therefore be an injury to the plaintiff's riparian right, which under the pleadings and findings in the case, the plaintiff was entitled to have enjoined." And again, 150 Cal. at page 335, 88 P. at page 982, 11 L.R.A., N.S., 1062: "The theory of the law of riparian rights in this state is that the water of a stream belongs by a sort of common right to the several riparian owners along the stream; each being entitled to sever his share for use on his riparian land. * * * Nor can it be said that plaintiffs, on account of the present abundance, could safely permit defendants to acquire, as against them, a right to a part of the water. The riparian right is not lost by disuse, and other riparian owners above may take or others below may be entitled to take, and may insist upon being allowed to take, all of the stream, excepting only sufficient for the plaintiffs' land. In either alternative, the taking of a part of the water by the defendants would not leave enough for the plaintiffs' use."

These statements and illustrations with respect to the nature of riparian rights and the uses by others which amount to an invasion of such rights apply directly and with equal force to overlying rights. It was the circumstance of the withdrawals by the appropriators from the western unit of the basin, rather than the extent of them, which furnished the basis for the claims of the appropriators to title by prescription as against the overlying owners. It was not necessary that there should have been interruption of the overlying owners' use. The water, to the extent of their needs, belonged to the land. Unlike the rights of the appropriators, the rights of overlying owners are not dependent upon use. Equality of right as between all parties was a necessary prerequisite to a ratable reduction in the withdrawal of water from the basin. Otherwise, priorities would have prevailed. The theory that all rights were prescriptive was adopted as a basis for declaring them to be equal in right.

The blanket finding that all titles were prescriptive was an implied finding that even the uses of the overlying owners had been adverse to each other. This merely shows the extent to which the parties to the stipulated judgment were willing to go in order to lay a foundation for a judgment ordering a ratable reduction of drafts upon the supply. The use of water upon overlying land is not, of course, adverse to the rights of other overlying owners when there is sufficient water for all.

The theory that withdrawals from a diminishing supply amount to mutual adversity of use as a principle of law is novel, and has been shown to be unsound. It is in irreconcilable conflict with settled principles of the law of prescriptive titles, whether to water rights or other classes of property. It assumes adverse use where none exists and would set up prescriptive titles to obliterate vested rights of priority. Priority of right is as sacred as any other type of ownership. It is the rule rather than the exception in our water law. The appropriative system is wholly one of priority. The superior rights of riparian and overlying owners are in reality priorities of right, although not based, as appropriative rights are, upon priority in time. Priority of right in the use of water is not dependent upon there being a sufficient supply for all users. Upon the contrary, priority is of consequence only in times of actual or threatened deficiency of supply, and if it is not to be protected under such conditions, the right means nothing.

If priority of right is to be abandoned in the law of percolating water, in times of overdraft, it must be by legislative action. Even if that were done, vested rights of priority would have to be protected. Such vested rights of priority, as this appellant has, have been overridden by the judgment.

One further thought upon this subject. The main opinion makes clear that a prescriptive title cannot be established against one who has no actual or constructive knowledge of the assertion of the adverse right. There was no evidence and no finding that appellant had knowledge of the existence of the overdraft. But if appellant had possessed such knowledge it would not have made a different case. The earlier appropriator would have continued his withdrawals in the exercise of his prior right. The later appropriator would have been presumed to be continuing his withdrawals with the knowledge that he would be the first to suffer when the demand exceeded the supply. Under what theory could it be said that priorities were being invaded? There may have been an intention to respect them, but if not there still would have been no invasion. Adverse use consists of acts, not merely of undisclosed intentions.

79 Cal.App.2d 675

McPHAIL et al. v. PACIFIC INDEMNITY CO. et al.

Civ. 13150.

District Court of Appeal, First District, Division 2, California.

May 15, 1947.

1. Insurance 🔑434, 435

Where liability policy should not cover damage arising out of ownership, maintenance, or use of motor vehicles, trailers or nonmotor-driven equipment while being towed behind or carried on motor driven equipment, policy covered damage resulting from insured's operation of a motorized concrete mixer, which was rented by insured, and which was not being towed behind or being carried on motor driven equipment.

2. Insurance 🔑434, 435

Where insurer sought to insert in policy an indorsement excluding coverage of policy to damage arising out of use of a hired motor vehicle, and insurer's general agent notified insurer's special agent that he would not have the indorsement inserted, and, nine days before collision, insured told general agent that they had hired three pieces of motorized concrete mixing equipment, and general agent assured insured that policy covered such equipment and wrote insurer requesting an indorsement covering the equipment, but insurer did not communicate with general agent or insured concerning matter, insurer was estopped to contend that the policy did not cover such equipment.

3. Insurance 🔑146(3)

If language in policy protecting contractors against liability for damage in operation of their business was ambiguous, policy was to be construed more strongly against the insurer, who is presumed to have drawn the policy and caused the uncertainty to exist. Civ.Code, § 1654.

4. Insurance 🔑665(4)

In action against insurer to recover money that insured were required to expend because of a prior action brought against them for damage resulting in a collision between an automobile and insured's motorized concrete mixer, evidence concerning investigation made by insurer before it wrote policy, that insurer's general agent stated to insurer's representative that insured wanted policy to cover hired vehicles, and that insured were assured that they would get such a policy, warranted court in construing the policy as covering hired vehicles. Civ.Code, § 1649.

5. Insurance 🔑146(1)

A policy is to be construed so as to ascertain and carry out the intention of the parties viewed in the light of surrounding circumstances, the business in which the insured is engaged, and the purpose the parties had in view in making the contract.

6. Insurance 🔑434, 435

Where policy covering contractors' business operations provided for a base or minimum premium and for periodical audits based on the exposure to risk because of insured's operations, looking to additional premiums, billing of premiums was insurer's own concern, and insurer was not entitled to escape liability under policy for money expended by insured in defending an action against them for damages arising out of collision between an automobile and a concrete mixer hired and operated by the insured, merely because mixer was hired after execution of the policy and no additional premium was paid.

◆

Appeal from Superior Court, Marin County; Edward T. Butler, Judge.

Action by Graham McPhail and John McPhail, individually and as copartners doing business under the firm name and style of McPhail Fuel Company, against the Pacific Indemnity Company (a corporation) and others to recover for the amount that plaintiffs had been compelled to expend because of a prior action against them for personal injuries and property damage, on ground that the named defendant was obligated to defend the prior action under a policy issued by it to the plaintiffs. From a judgment in favor of the plaintiffs, the named defendant appeals.

Judgment affirmed.

C. R. Burks, of San Francisco, for appellant.

Wallace S. Meyers, of San Anselmo, for respondents.

GOODELL, Justice.

Respondents sued appellant for $2607.90 which they had been compelled to expend because of an earlier action brought against them for personal injuries and property damage. They recovered judgment in the instant case for $2407.90, interest and costs, and this appeal was taken from the latter judgment.

On October 6, 1943, one Henry Zeidell sustained bodily injuries and property damage in a collision between an automobile driven by himself and a motorized concrete-mixer then being operated by respondents upon and along the highway. When sued by Zeidell respondents called on appellant to undertake the defense as required by their policy. Appellant declined to do so, claiming that the risk was not within the terms of the policy but was, on the contrary, excluded by the language of a rider attached thereto. Zeidell recovered judgment against respondents in that action for $1750. Attorneys' fees for defending the action, fixed at $550, and costs and other expenses, $107.90, make up the $2407.90 which respondents are out of pocket.

In March, 1942, respondents negotiated with appellant's general agent in San Rafael, F. Lloyd Grandi, for a policy of insurance. They already had a policy with Ocean Accident and Guarantee Corp. covering liability arising from the operation of *all their own motor vehicles.* Everybody connected with the transaction knew this, hence the negotiations had to do with an entirely different coverage. Appellant made a survey of the business operations of respondents and of the activities which they desired covered by the new policy, and investigated as well the policy which they already had covering the operation of motor vehicles owned by themselves. Respondent John McPhail talked with a representative of appellant some days before the policy was issued, and told him that they "wanted a comprehensive liability policy that would cover all operations of the business except that which was covered by the Ocean Accident on our own automobiles and they assured me that is what I would get; that is the policy they would write."

On April 1, 1942, the policy in question was written. Under the "Insuring Agreements" thereof appellant bound itself, "(1) To pay on behalf of the Assured all sums which the Assured shall become obligated to pay by reason of the liability imposed upon him by law or by written contract for damages (including damages for care and loss of services) because of bodily injury, disease or illness, including death at any time resulting therefrom, suffered or alleged to have been suffered, by any person or persons * * * (2) To Pay on behalf of the Assured all sums which the Assured shall become obligated to pay by reason of the liability imposed upon him by law for damages because of injury to or destruction of property (including the loss of use thereof) arising out of the ownership, maintenance or use of automobiles * * *."

Attached to the policy was "Endorsement No. 1," reading as follows:

"It is understood and agreed that the insurance provided by this policy, shall not extend to cover any bodily injuries, illness, death or property damage arising out of the ownership, maintenance or use by the assured of automobiles, motor vehicles, trailers and/or any non motor driven road making or maintenance equipment *while being towed behind or carried upon motor driven equipment, including the loading and unloading thereof.*" (Emphasis added.)

"Appellant contends," to quote from its brief, "that the plain, ordinary and popular meaning of Endorsement No. 1, is that the policy does not cover liability arising from:

"1. The ownership of motor vehicles; 2. The use of motor vehicles; 3. The maintenance of motor vehicles; 4. The ownership of trailers; 5. The use of trailers; 6. The maintenance of trailers; 7. And/or liability imposed upon the assured by reason of any motor driven road making or maintenance equipment while being towed behind or carried upon motor driven equipment, including the loading and unloading thereof."

The facts of the underlying case of Zeidell v. McPhail Fuel Company were simply that respondents were operating a piece of motorized concrete mixing equipment, *which they had hired,* upon and along the highway and caused it to run into the Ford automobile operated by Zeidell, causing him bodily injuries, and damaging his Ford.

[1] It is clear that the policy never was intended to cover the operation of motor vehicles *owned by respondents* and that the vehicle which did the damage was admittedly hired. It is equally clear that trailers (4, 5 and 6 above) are in no way involved. It is clear that the vehicle which damaged Zeidell was not "being towed behind or carried upon motor driven equipment."

The contention of appellant, if sustained, would leave the policy to a large extent illusory for the rider would cancel out whatever protection the policy pretended to give with respect to damage done by motor vehicles, other than respondents' own, used or maintained by them. See 2 and 3 above.

Respondents testified that their understanding of the rider was that the concluding words thereof i. e. *"while being towed behind or carried upon motor driven equipment, including the loading and unloading thereof"* apply to and modify each and every type and kind of vehicle theretofore named.

Appellant contends that those words apply to and modify only "motor driven road making or maintenance equipment" and that the coverage of all other types and kinds of vehicles theretofore named is by this rider excluded.

The court found: "5. That said policy * * * was a comprehensive policy which insured plaintiffs against all and every risk of whatsoever kind or character, save and except certain risks involving motor and non-motor driven equipment *while said vehicles were being towed behind or carried upon motor-driven equipment;* that the only exclusion of risk in said policy was the risk incurred while certain motor vehicles and non-motor driven road-making equipment *were being towed behind or carried upon other motor-driven equipment;* 6. That at all time[s] during the existence of the policy and prior to its issuance and during negotiations therefor, it was the intention and understanding of the parties that plaintiffs would be covered by insurance afforded by said policy in the operation of hired vehicles." (Emphasis added.)

These findings are amply supported by the record. The respondents' understanding of the rider has been already stated. That the trial judge read the rider in exactly the same way, and gave it the same meaning, appears from the language of the finding which we have emphasized. It is interesting to note, moreover, that this was the judge's first impression, for at the very outset, and before any evidence was introduced, he said:

"That looks to me as though it meant if I had a large truck and I carried either an automobile or a motor vehicle or a trailer or a non-motor-driven road-making or maintenance piece of equipment, like a scraper or a road machine, and towed it behind my large truck or carried it upon it, including loading and unloading thereof, it would not be insured while it was either being towed or carried upon the truck. On first reading that is the way it looks to me."

The evidence (introduced in a one-day trial) did not change in the least the judge's first impression, but rather confirmed it, for at the close of the trial he said: "Well, this case seems to me relatively as rather simple. It turns on the construction given on the first rider to the policy. I read it this morning and heard the arguments pro and con about it since, and I have not changed my views of it. To me I read it one way, without ambiguity—I think it covers automobiles except that they are either towed or carried on another automobile. If, to take Mr. Burks' construction of it, instead of putting something in there that may have some ambiguity—it doesn't to me—instead of putting some clause in there like that why didn't they say 'Endorsement No. 1—this policy does not cover automobiles or motor vehicles of any kind or character at any place.' Period. Then there would be no ambiguity at all. There it would be, right there. They were drawing the document; it was their wording. They fathered it and put it out. It was accepted, and instead of wording it like that where a seven-year-old child could read it and understand it they worded it in another way. So I think that the vehicles were covered by the policy and that any attempted modification was not the fault of Mr. McPhail; in fact, he knew nothing about it, and if Mr. Grandi was negligent it possibly went to some of the higher-ups because they did nothing for quite a while, and there was some controversy. They took it very easy and did not do much about the reformation or cancellation. Mr. Grandi refused to accept it. If he did wrong in doing that—I don't think he did—but if he did wrong in doing that that doesn't relieve the company from their obligation to Mr. McPhail, their insured. I do not think it is necessary to decide the case on estoppel. I think the view I take of it is decisive of the case and I will render judgment accordingly for the amount that has been stipulated here."

The reference by the judge to an "attempted modification" undoubtedly related to the following circumstances: after the policy had been in effect a couple of months appellant notified its San Rafael general agent, Grandi, that it had cancelled endorsement No. 1 (quoted above) and replaced it with endorsement No. 3 reading as follows: "* * * This policy shall not extend to cover bodily injuries, illness of [or] death or damage to property arising out of the use by or for the assured of any motor vehicle owned by, registered in the name of, *or hired by the assured.* * * *." (Emphasis added.) Appellant gave as its reason for this change that as endorsement No. 1 then read *the assured would not have coverage even on non-owned cars.* The full connotation of "non-owned" in insurance parlance is not disclosed by this record, which is none too clear at best. However this may be, the proposed endorsement, in the clearest kind of language, provided that the policy should not extend to any motor vehicle "hired by the assured." Grandi promptly notified appellant's special agent that he *would not* have it attached to the policy or substituted for endorsement No. 1 because it did not conform to the agreement of the parties, in that it excluded hired vehicles. To this rather positive assertion the special agent replied that he would take it up with appellant and if Grandi heard nothing further he could disregard the proposed endorsement No. 3. Grandi heard nothing further; he did disregard it; he wrote "Refused" on it and filed it away without even consulting the respondents. Respondents learned nothing of this attempted change until about a week before the trial of this case. The action of Grandi, through whom this policy was negotiated, indicates that he understood the policy in the same sense as respondents understood it, and in the same sense as the judge understood it. Grandi's refusal to make the change and appellant's acquiescence, unquestionably impressed the court, and influenced him in arriving at the finding that hired vehicles were covered.

The judge's reference to the appellant taking it very easy, doubtless relates to the following incident: on September 27, 1943, which was just nine days before the Zeidell collision, respondents told Grandi that they had hired three pieces of motorized concrete mixing equipment, and were checking with him to make sure that their policy covered the risk of operation of such hired vehicles. Grandi assured them that it did, and promised to write appellant. That evening he did so, requesting an endorsement under the "Hired cars" section of the policy, covering three Ford trucks with four yard concrete mixers for both public liability and property damage. Appellant received the letter but did not communicate with either Grandi or respondents concerning it.

[2] If, when this question was put squarely up to appellant, it had overruled Grandi and had flatly taken the position that the policy did *not* cover hired vehicles, and that they would *not* write a hired car rider, respondents could have gone elsewhere for this coverage before their hired truck collided with Zeidell and subjected them to the defense of litigation eventuating in a judgment against them. The foregoing incident forms the subject-matter of respondents' second count, based on estoppel. On that count the court made a finding in favor of respondents, which we are satisfied is amply supported by the conduct not only of appellant's general agent, but by that of appellant as well, in the face of full knowledge on the two occasions just recounted.

Appellant contends, as we have seen, that endorsement No. 1 means something altogether different from what the court held it to mean. Respondent aptly says, "If a Judge of the Superior Court cannot understand the policy the way appellant would urge this Court to understand it, then certainly respondents cannot be blamed for understanding the language of endorsement No. 1 as they did."

[3] While the judge did not find the rider ambiguous, he remarked that there was "something in there that may have some ambiguity" and in a few words he showed how simple it would have been for appellant's draftsman to have removed all doubt. If it be conceded that the language is ambiguous, then the case is brought within the familiar rule that "it is to be construed most strongly against the insurer, who is presumed to have drawn the policy and caused the uncertainty to exist." Sec. 1654, Civil Code; 14 Cal.Jur., 443–445 and 7 Cal. Jur. 10 year Supp., 1945 rev., 89, and cases cited. The judge had this rule in mind when he said, "They were drawing the document; it was their wording. They fathered it and put it out."

[4, 5] The testimony respecting the survey and investigation made by appellant before it wrote the policy; the statement made by John McPhail to appellant's representative of just what coverage they wanted, and the assurance, quoted earlier, that that was what they would get, "that is the policy they would write" indicates that appellant knew the sense in which respondents understood the policy, and warranted the court in putting that construction on it, Sec. 1649, Civil Code. As was said in Goss v. Security Ins. Co., 113 Cal. App. 577, 580, 298 P. 860, 861, "A policy or contract of insurance is to be construed so as to ascertain and carry out the intention of the parties, viewed in the light of surrounding circumstances, the business in which the insured is engaged and the purpose they had in view in making the contract. 32 Cor. Jur. p. 1150; Ogburn v. Travelers Ins. Co., 207 Cal. 50, 276 P. 1004."

Whichever way the case is viewed, ambiguity or no ambiguity, the conclusion reached by the court, in our opinion, was correct.

[6] Finally, it is contended that, as no premium was paid for hired vehicles no recovery should be had. The complaint alleged that respondents had "paid, when due, all premiums and charges for said policy during the period it was effective." In paragraph IV of its answer appellant expressly admitted this (and the court so found) but later, in paragraph IX, it denies it. Be this as it may, it clearly appears that the policy provided for a basic or minimum premium and for periodical audits based on the exposure to risk because of the insured's operations, looking to additional premiums. The billing of premiums was appellant's own concern. There is no claim that repondents' books were not open to audit at all times. The hired vehicles were put into commission about nine days before the collision, and it is obvious that

after the collision appellant could not very well have charged for premiums on hired cars without thereby admitting that hired cars were covered.

There is no need to discuss respondents' third count based on reformation, or the authorities cited on that point.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

80 Cal.App.2d 39

BARNES v. MOORE.

Civ. 3573.

District Court of Appeal, Fourth District, California.

May 27, 1947.

1. Partnership 🔑311(3)

In absence of fraud or a special agreement, there is no occasion for a further account when one partner buys out the interest of another on specific terms, especially where buyer knows fact which might otherwise call for further accounting. Civ. Code, § 2416.

2. Partnership 🔑311(3)

Where one partner purchases the interest of the other, a rebuttable presumption exists that the transaction includes a final settlement of all partnership indebtedness existing between the partners. Civ.Code, § 2416.

3. Partnership 🔑311(1)

Provision in escrow agreement whereby one partner sold his interest to other partner that buyer was to receive all money on hand and in bank and accounts receivable, referred to such accounts as had become receivable through operation of business named, as a going concern, and not to some separate contractual obligation as between partners themselves. Civ.Code, § 2416.

4. Partnership 🔑311(3)

Evidence failed to overcome presumption that sale of a partnership interest by one partner to the other partner was a full settlement of the partnership debts between partners, and, hence, buying partner could not thereafter recover from selling partner for an alleged deficiency in his capital account contribution. Civ.Code, § 2416.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action by Guy F. Barnes against Jay B. Moore for an accounting after dissolution of a partnership. From judgment entered, both parties appeal.

Reversed.

West, Vizzard & Howden, of Bakersfield, for plaintiff-appellant-respondent.

Siemon, Maas & Siemon, Alfred Siemon, Walter L. Maas, Jr. and Bennett Siemon, all of Bakersfield, for defendant-respondent-appellant.

BARNARD, Presiding Justice.

This is an action for an accounting after dissolution of a partnership. The plaintiff, having bought the defendant's interest, now seeks to recover a claimed shortage in his original contribution.

The plaintiff bought a share in a refrigeration business started by the defendant. The partnership agreement was dated October 23, 1944. It provided that the building should be erected with partnership funds and that it, with the land and equipment, were to be partnership assets; that Barnes was to put $4,000 into the partnership and give Moore a note for $3,450 and have a one-fifth interest; that Moore was to contribute $21,250 cash on that date; that he was further to borrow $12,000 from a bank, secured by a mortgage on the partnership property, contributing the $12,000 to the business; and that he was to have a four-fifths interest. The contract further provided that at any time either party might make an offer to buy or sell at the same price, with the right to exercise either option if the other failed to do so.

In accordance with the agreement the plaintiff devoted his full time to the business, drawing a stipulated salary, and the defendant drew lesser amounts for less service. On July 26, 1945, the defendant, in writing, offered to buy the plaintiff's one-fifth interest for $11,000 or to sell his own four-fifths interest for $44,000, with the understanding that all debts owed by the partnership must be paid. On August 4, 1945, the plaintiff gave a modified written acceptance, agreeing to buy the defendant's four-fifths interest for $44,000, stating that this amount would be deposited in a bank with instructions that it be paid to the defendant upon the execution of such documents as might be agreed upon, and "upon the completion of accounting as to obligations of the partners of the business."

After some discussion between the partners an escrow agreement was executed at a bank on August 7, 1945, and the $44,000 was deposited in escrow. The escrow agreement provided that the $44,000 should be paid to the defendant, less the amounts chargeable to him, when title to the partnership property could be vested in a third party, from whom the plaintiff was borrowing the $44,000. This required a conveyance of the real property from the defendant and the payment of the $12,000 which he had borrowed on the property and put into the business. This was done and this amount was charged to the defendant.

The escrow agreement provided that "The following adjustments Only are required in this escrow:" Then followed provisions that insurance and taxes were to be prorated; that the buyer would pay $1,881 for merchandise and supplies; that the buyer would pay the seller $200 on certain notes; that the seller would pay the buyer $937 for key deposits and accrued payroll taxes; that the buyer would pay the seller $4 in settlement of a salary account; that "Buyer is to receive all monies on hand and in bank and accounts receivable and is to assume the accounts payable of Moore's Refrigerator Locker Service;" and that the seller would furnish any papers necessary to a complete transfer of this business and its equipment.

The transfer was completed and the escrow closed on August 22, 1945, a balance of $30,409 being paid to the defendant. A complete statement was furnished by the bank to both parties, the one to the plaintiff showing that he still owed $92 to the bank, which he paid. Before the escrow was started the plaintiff had obtained an audit of the books of the partnership by an accountant, and his report was on hand and used to a certain extent in drawing the escrow agreement. This report disclosed that the defendant, who had agreed to contribute $21,250 in cash on October 23, 1944, had put in $10,000 in cash on that date and had also made prior expenditures of $6,790.06 for which vouchers appeared in the partnership books, and that this left a deficiency of $4,459.94 on this item. It does not appear in the auditor's report or anywhere in the record that Moore was credited anything for the land on which the plant was located.

When Barnes first received the auditor's report showing this original deficiency he demanded that Moore make it good, which he refused to do. The parties then went to the bank and entered into the escrow agreement, providing for the sale of the business and property at the offered price, nothing being said as to the size of Moore's interest or about this claimed shortage. Shortly after the escrow was closed and the transfer completed this action was brought, the complaint alleging that the defendant had failed to pay $4,459.94 into the business and still owed that amount, and also that he had withdrawn and withheld $6,370 from the business. The answer admitted that the defendant had not paid $4,459.94 into the business but alleged that this matter had been liquidated and denied that the amount was still owed. As an affirmative defense the offer of sale, the conditional acceptance, and the agreement of the parties as consummated through the escrow were set up as a full settlement and adjustment of all partnership matters.

The findings set out in full the partnership agreement, the offer of sale, the conditional acceptance and the escrow agreement, as they were executed by the respective parties. It was found that the plaintiff had contributed the $4,000 to the partnership; that the defendant had contributed $22,000 in cash and that he had further transferred to the partnership properties which he had owned and operated in said locker business of an agreed value of $6,790.06; that at the time of dissolution he owed $4,459.94 to the partnership as a deficit in his capital contribution; that the plaintiff was entitled to one-fifth thereof since the defendant was entitled to four-fifths of said asset upon dissolution; and that the purchase by the plaintiff of the defendant's interest was made subject to an accounting. As conclusions of law, it was found that the partnership was dissolved at the closing of the escrow; that the purchase by the plaintiff of the defendant's interest was subject to an accounting; that at the time of dissolution the defendant owed the partnership $4,459.94; and that the plaintiff was entitled upon dissolution to one-fifth of this deficit.

Judgment was entered to that effect and both parties have appealed. The plaintiff's appeal is based on the contention that he should have had judgment for $4,459.94, the amount of the deficit, since he had purchased all of the defendant's interest. It is further contended that he should have had judgment for an additional $6,790.06, it being claimed that this amount was improperly credited to the defendant in the accounting. On his appeal the defendant contends that the judgment should have been in his favor since the sale covered such interest as he actually had and involved an adjustment of all accounts, fully settling all partnership matters.

With respect to the plaintiff's appeal, two observations may be made. His claim for an additional $6,790.06 is based upon a mere technicality, is neither in accordance with the facts nor with the principles of equity, and is obviously without merit. His claim for the full $4,459.94 depends on whether he was buying such interest as Moore had, or a guaranteed four-fifths interest. It is unnecessary to further consider this appeal in view of our decision on the defendant's appeal.

[1] Section 2416 of the Civil Code provides that any partner shall have the right to a formal account as to partnership matters when the right exists under the terms of any agreement or "whenever other circumstances render it just and reasonable." The agreement here provided that upon termination of the partnership each partner would account for and adjust "all things relating to this business." The sale was such a termination, and would naturally include an adjustment of their respective accounts with the business and exclude the necessity for any other "formal account". In the absence of fraud or a special agreement there is no occasion for a further account when one partner buys out the interest of the other on specific terms. This is especially true where the buyer knows the facts which might otherwise call for a further accounting. Such a sale and purchase includes and is, in itself, a form of accounting which is ordinarily sufficient, and which should be conclusive unless good reason is shown to the contrary. It appears here that Barnes gave his full time to the business, with an opportunity to know its condition, and that he had his attention directly called to Moore's contribution shortage by the auditor's report before he went into escrow and before he agreed to the final terms of the sale. After Moore had refused to recognize this liability in connection with this proposed sale of his interest, Barnes entered into escrow agreement which superseded the prior negotiations, and the sale and transfer were completed in accordance therewith. No circumstances appear which make it just and reasonable that a further "formal account" be had.

[2] The general rule is thus stated in Wilbur v. Wilbur, 197 Cal. 1, 239 P. 332, 337, in which case it was claimed that the selling partner had withheld $1,000 or more of partnership money. "It is the law of partnerships that when one partner purchases the interest of the other the transaction presumptively includes a final settlement of all partnership indebtedness existing between the partners. Bates on Partnerships, §§ 629, 630, pp. 664, 665; Hattenhauer v. Adamick, 70 Ill.App. 602; Edens v. Williams, 36 Ill. 252." In Schlicher v. Vogel, 61 N.J.Eq. 158, 47 A. 448, 450, it is said: "The purchase by one partner of all the interest of another partner, in the absence of fraud, must of necessity be an adjustment, as between seller and pur-

chaser, of the accounts of the former with the firm. * * * Such a purchase, therefore, is practically an account stated between the parties in respect to their relations as members of the firm." In Thoma v. Reisch, 214 Ill.App. 328, it is said: "The general rule is that when a partner sells his interest in the firm property, the presumption arises that, in the valuation upon which the sale was based, the debt of the selling partner is taken into account, and it cannot be assumed that such partner sold or intended to sell his own indebtedness to the firm, if any existed." In Hamilton v. Wells, 182 Ill. 144, 55 N.E. 143, 145, the reason for this rule is thus expressed: "This results from the presumption that arises that in the valuation upon which the sale is based the debt of the selling partner is taken into account, and the value of his interest is thereby reduced to that extent."

[3] While conceding this general rule, the plaintiff argues that this presumption is rebuttable, and that the evidence here overcomes any such presumption. He argues that the defendant's contribution shortage was a debt due on an open account; that it was an account receivable; and that an intention to transfer this debt to him appears in the provision of the escrow agreement which reads: "Buyer is to receive all monies on hand and in bank and accounts receivable and is to assume the accounts payable to Moore's Refrigerator Locker Service."

This provision refers to and seems to relate solely to the money and the accounts, receivable and payable, of the business being conducted by the partnership. The debt here in question arises from a contractual obligation as between the partners, and is not one which is usually considered as an account receivable. The language used strongly implies an intention to refer to such accounts as had become receivable through the operation of the business named, as a going concern, and not to some separate contractual obligation as between the partners themselves.

Moreover, the evidence shows that the parties did not intend this provision as a transfer of this debt. It clearly appears from the evidence that the defendant did not so intend, and that he intended this sale as a full settlement of all matters, including any such debt. The plaintiff's own evidence discloses that he did not intend this provision to include this claimed contribution shortage, and that he purposely omitted that matter from the escrow agreement. He testified that before the escrow agreement was executed he knew that Moore was short $4,459.94 in his original contribution; that he asked Moore to straighten it out which Moore refused to do; that the parties then went to the bank and made the escrow agreement; that he said nothing to the escrow agent who prepared the agreement about this shortage; that "I thought that could be settled any time"; and that since he was buying the business he said nothing about this matter as he figured in his own mind that he could collect this in court. When asked if it occurred to him that the amount he was paying for the business might be reduced by charging the defendant with this shortage he replied: "I never thought anything about that, I wanted to buy the business, and there was a price set on it and I paid it."

[4] This debt was not specifically transferred by the terms of the escrow agreement, and there is no evidence to overcome the presumption that this sale was a full settlement of partnership debts between the partners. To overcome this presumption would require evidence indicating either an agreement to the contrary or an intention to leave something unsettled. Certainly, evidence of a secret intention by one party to exclude some matter from the general adjustment being made, to keep that debt alive, and to later sue the other party, who understood that a full settlement was being made, would not be sufficient.

Nothing more here appears than that Barnes, after he was told that Moore would not consent to being charged this amount, decided and agreed to go ahead with the sale, knowing Moore's actual interest in the partnership, and then purchased Moore's interest through a consummation of the escrow agreement, which did not specify the amount or extent of that interest, with a secret intention that a different result should obtain. Not only does it appear that

Moore relied on the sale, thus arranged, as being a full settlement of this debt, but the conclusion is inescapable that Barnes misled him into so thinking, with the secret intention of getting the property and later suing Moore for this debt, thus reducing the purchase price he was agreeing to pay. This conduct not only violated every principle of equity, but it well illustrates the reasons behind, and the necessity for, the general rule to which we have referred.

This rule is here applicable, and the resulting presumption was not dispelled or overcome. The effect of the evidence is quite to the contrary. It follows that, under the law, neither the evidence nor the findings are sufficient to support the judgment, and the conclusions drawn are erroneous.

The judgment is reversed. The defendant to recover costs on appeal.

MARKS, and GRIFFIN, JJ., concur.

79 Cal.App.2d 753

BEARD v. CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 13297.

District Court of Appeal, First District, Division 2, California.
May 20, 1947.

Rehearing Denied June 19, 1947.
Hearing Denied July 17, 1947.

1. Municipal corporations ⇨39

The governmental structure of a consolidated city and county, viewed in its political relations, becomes both a county and municipal corporation and functions performed by its officers in each instance determine whether it is to be viewed as a city or a county. Const. art. 11, §§ 6–8, 8½, 11.

2. Municipal corporations ⇨39

Assuming that the city and county of San Francisco, acting under the city's power to make "local, police, sanitary" regulations, established and maintains the city and county hospital, the functions as performed would be municipal affair subject to control of the municipal charter. Const. art. 11, § 11.

3. Municipal corporations ⇨742(4)

In action against city and county of San Francisco to recover damages for death of infant patient in city and county hospital, though provisions of charter were not pleaded nor referred to, allegation in complaint that patient was received as a paying patient was a sufficient statement that hospital was not operated for indigent patients alone under the general state law.

4. Municipal corporations ⇨733(1), 734

The power to make local, police and sanitary regulations may be evidenced by the construction and operation of parks, playgrounds, public utilities, and other facilities in aid of the health and welfare of the community, and when operated for profit, some in competition with private institutions of the same character, are "proprietary".

See Words and Phrases, Permanent Edition, for all other definitions of "Proprietary".

5. Municipal corporations ⇨742(4)

In action to recover damages for death of infant patient in city and county hospital, complaint alleging that "municipal corporation" was operating hospital "in a proprietary capacity" and that patient was admitted "as a paying patient" was sufficient, against a general demurrer, to raise the issue that, notwithstanding dual capacity of the consolidated city and county government, the hospital was operated as a municipal affair incident to municipal status of city and county. Const. art. 11, §§ 6–8, 8½, 11.

6. Municipal corporations ⇨742(4)

In action to recover damages for death of infant patient in city and county hospital, as alleged result of negligence, whether operation of the hospital under charter of the consolidated city and county was a governmental or proprietary function involved question of law and fact which could not be disposed of upon demurrer. Const. art. 11, §§ 6–8, 8½, 11.

7. Municipal corporations ⚷742(4)

In action to recover damages for death of infant patient who had been placed in city and county hospital as a paying patient, complaint was sufficient to tender issue that consolidated city and county had elected to operate hospital in a proprietary capacity and stated a cause of action requiring answer.

◆

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by William Beard against the City and County of San Francisco and others for damages based on alleged negligent lack of supervision causing death of plaintiff's infant son. Judgment for defendants, and plaintiff appeals.

Reversed.

Marshall Rutherford, of Oakland, and Healy & Walcom, of San Francisco, for appellant.

John J. O'Toole, City Atty., Thomas C. Ryan, Deputy City Atty., and Bernard J. Ward, Deputy City Atty., all of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued for damages on a complaint alleging that he had placed his fifteen months old son in the city and county hospital for hospitalization and medical care as a paying patient, that the hospital was operated by the city and county of San Francisco in its proprietary capacity, that, because of defendants' negligent lack of supervision, the child fell from its crib causing his death. A general demurrer to the complaint was sustained without leave to amend.

The appeal presents the single issue whether the operation of the hospital under the charter of the consolidated city and county is a governmental or a proprietary function. The parties concede that, under the rule of Calkins v. Newton, 36 Cal.App.2d 262, 97 P.2d 523, and Griffin v. County of Colusa, 44 Cal.App.2d 915, 113 P.2d 270, a county is not liable for injuries arising from the operation of a county hospital. It is also conceded by respondents that the activities of a city, while operating in a purely proprietary capacity, are actionable. Incident to the issue is the inquiry whether a consolidated city and county operating under a municipal charter stemming from article XI of the Constitution acquires the role of a municipality, or of a county, or of both. Then the question arises whether the operation of the hospital under the charter does not become a municipal as well as a county affair and, if this is so, whether these dual functions do not make the facility a proprietary one as to paying patients.

[1] The consolidation of the city and county of San Francisco is authorized by section 7 of article XI of the Constitution reading: "City and county governments may be merged and consolidated into one municipal government, with one set of officers * * *." Note that the governmental product thus created becomes "one municipal government." Under section 8 of the same article a consolidated city and county may frame a charter "for its own government." By section 8½ a charter framed under the previous section is permitted to provide for the manner of election or appointment, and the terms of office, of the "several county and municipal officers and employees." Though this section does not designate the manner in which the duties of the several county and municipal officers shall be prescribed, section 6 of the same article does authorize a municipal charter to provide for the performance by county officers of certain municipal functions under certain circumstances. And the same section declares that such municipal charters shall prevail over general laws "in respect to municipal affairs." Viewed in its political relations the governmental structure becomes both a county and a municipal corporation and the functions performed by its officers in each instance determine whether it is to be viewed as a city or a county. San Francisco v. Collins, 216 Cal. 187, 191, 13 P.2d 912.

[2-4] Assuming that the city and county, acting under the city's power to make "local, police, sanitary" regulations (Art. XI, sec. XI), established and maintains the

city and county hospital, the functions thus performed would be municipal affairs subject to the control of the municipal charter. Jardine v. City of Pasadena, 199 Cal. 64, 68, 248 P. 225, 48 A.L.R. 509. Though the provisions of the charter are not pleaded nor referred to, the allegation in the complaint that the boy was received as a paying patient is a sufficient statement that the hospital was not operated for indigent patients alone under the general state law. The power to make local, police and sanitary regulations may be evidenced by the construction and operation of parks, playgrounds, public utilities, and other facilities in aid of the health and welfare of the community. These facilities may be operated for profit—some in competition with private institutions of the same character. They are then said to be "proprietary."

[5] The record does not disclose the manner in which the San Francisco city and county hospital was organized or how it is financed or operated. And on this appeal we cannot consider ordinances or local regulations. But the complaint alleges that the "municipal corporation" operates the hospital "in a proprietary capacity." The appellant argues that this is sufficient to carry the pleading beyond the general demurrer. Respondents argue that it is a mere conclusion of law. Ordinarily this would be true. But here, because of the unusual status of the two governmental agencies, the manner of operation of the hospital becomes a mixed question of law and fact. There is no controversy over this—the operation of a city hospital is a municipal affair finding direct authority in the Constitution. When a chartered city accepts the grant of power and establishes a hospital for the health and public welfare of the community it has two courses to follow—it may maintain a hospital for the indigent alone, or it may maintain one in competition with private hospitals in the same community, charging fees for both medical care and hospitalization. If the latter course is followed patients need not be restricted to the indigent members of the community but they could be accepted without regard to legal residence and would be charged fees in competition with the private hospitals. If this course is followed a city would be operating the hospital in a proprietary capacity as to paying patients just as it operates its street railways, water, gas and electric facilities, and other utilities for the benefit of the community at large. Hence the allegation in the complaint that the "municipal corporation" was operating the hospital "in a proprietary capacity" and that plaintiff's son was admitted "as a paying patient" is sufficient, against a general demurrer, to raise the issue that, notwithstanding the dual capacity of the consolidated city and county government, this particular hospital was operated as a municipal affair incident to the municipal status of the city and county.

The case is thus distinguished from Calkins v. Newton, 36 Cal.App.2d 262, 97 P.2d 523, and Griffin v. County of Colusa, 44 Cal.App.2d 915, 113 P.2d 270, both of which involved county hospitals operated under the state statutes which were held to be delegations to the various counties of the governmental duty of the state as a whole to care for the indigent sick. It is more akin to those cases where a city assumes, either through its charter or under general laws, to operate a public utility for the benefit of the health and public welfare of the community.

This relation was recognized by the Supreme Court in the early case of Bloom v. San Francisco, 64 Cal. 503, at page 504, 3 P. 129, where the court said: "We think the city and county of San Francisco had such proprietorship of the city and county hospital as rendered it liable for damages * * *." It is true that this was a case involving a nuisance arising out of the operation of the hospital and for that reason respondents contend that it is not applicable. We have here an action in tort for negligence in the operation of the hospital. The nuisance in the Bloom case also arose from negligent operation. But the Bloom case was not decided on the ground of governmental nuisance. It was expressly based on the city's "proprietorship." The case was cited with approval in Chafor v. Long Beach, 174 Cal. 478, 487, 163 P. 670, L.R.A.1917E, 685, Ann. Cas.1918D, 106, and Sanders v. City of

Long Beach, 54 Cal.App.2d 651, 660, 129 P.2d 511.

The latter case involved the operation of a municipal auditorium. The opinion listed as similar municipal activities a city owned electric plant, Davoust v. City of Alameda, 149 Cal. 69, 72, 84 P. 760, 5 L.R.A.,N.S., 536, 9 Ann.Cas. 847; a municipal water system, South Pasadena v. Pasadena Land & Water Co., 152 Cal. 579, 593, 93 P. 490; a municipal garage, Bertiz v. City of Los Angeles, 74 Cal.App. 792, 796, 241 P. 921, and a municipal air port, Coleman v. City of Oakland, 110 Cal.App. 715, 719, 295 P. 59.

[6] The Sanders case states that receipt of revenue from the activities is not the essential factor which makes them proprietary. The determining factor is whether the activities "are essentially governmental in character." [54 Cal.App.2d 660, 129 P.2d 517.] If we must accept as settled law the ruling in Calkins v. Newton, supra, and Griffin v. County of Colusa, supra, that, in the operation of a county hospital, the county is acting merely as an agent of the state under a delegation of the state's governmental duty to care for the indigent the rule does not apply to a municipal corporation which on its own choice and initiative has elected to maintain and operate a hospital for paying patients. These questions are factual and cannot be disposed of on demurrer. Cases may arise in the operation of the city hospital in which no liability would attach. But on the other hand, proof of the proprietary character of the particular functions would fix the liability.

The allegations of the complaint, though not as comprehensive as they might have been, present a case closely akin to those cases involving the question of the liability in tort of a charitable hospital receiving paying patients. A county or municipal hospital maintained solely for the care of the indigent members of the community and without charge would seem to enjoy the same status, so far as that liability is concerned, as a strictly charitable hospital. The rule of nonliability of such institutions to paying patients has been effectively rejected in this state in Silva v. Providence Hospital of Oakland, 14 Cal.2d 762, 776, 97 P.2d 798, where cases from other jurisdictions are cited.

[7] The complaint is sufficient to tender the issue that the consolidated city and county of San Francisco has elected to operate the San Francisco hospital "in a proprietary capacity" and we must hold that it states a cause of action requiring an answer.

Judgment reversed.

GOODELL and DOOLING, JJ., coucur.

80 Cal.App.2d 46

CARROLL et al. v. AGLIANO et al.

Civ. 3618.

District Court of Appeal, Fourth District, California.

May 27, 1947.

1. Easements 🔑8(2)

If the use of a roadway by a neighbor is with express or implied permission of owner of property over which it passes, its continued use is not adverse and cannot ripen into a right.

2. Appeal and error 🔑1008(1)
Easements 🔑5

Where use of way was continuous and so openly and notoriously adverse to justify inference that owner of land should have had knowledge that use under claim of right, a prescriptive right may be sustained, but whether use is adverse and under claim of right or is permissive is usually question of fact to be settled in trial court.

3. Easements 🔑36(3)

In action to quiet title to private roadway easement over defendants' property, evidence sustained finding that plaintiffs and their respective predecessors in interest had not used the roadway openly, notoriously, uninterruptedly, and adversely to defendants.

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Action by Ruth Carroll against Frank Agliano and another to quiet title to an easement, wherein the defendants filed a cross-complaint. Judgment for defendants and cross-complaints, and plaintiffs appeal.

Affirmed.

Garfield & Garfield, of La Mesa, and John B. Peterman, of Los Angeles, for appellant.

Wilmer Breeden, of San Diego, for respondent.

MARKS, Justice.

This is an action to quiet title to an easement 20 feet wide and 675 feet long for use as a private roadway over defendants' property. Defendants' answer denied the material allegations of the complaint. They filed a cross-complaint seeking to quiet their title to the roadway. Judgment went for defendants and cross-complainants and this appeal followed.

[1] Plaintiffs base their claim of title to the roadway on prescriptive use for many years. Such use by plaintiffs and their predecessors is fully established by the evidence, but whether that use was adverse and under claim of right or was permissive is the important question for decision here. If the use of a roadway by a neighbor is with the express or implied permission of the owner of the property over which it passes its continued use is not adverse and cannot ripen into a right. Pacific Gas & Electric Co. v. Crockett Land & Cattle Co., 70 Cal.App. 283, 233 P. 370; Nay v. Bernard, 40 Cal.App. 364, 180 P. 827; Irvin v. Petitfils, 44 Cal.App.2d 496, 112 P.2d 688; Los Angeles Brick & Clay Products Co. v. Los Angeles, 60 Cal.App.2d 478, 141 P.2d 46.

[2] Plaintiffs rely on the rule that where the use of the way was so continuous and so openly and notoriously adverse as to justify the inference that the owner of the land should have had knowledge that the use was under claim of right, a prescriptive right may be sustained. See, McMorris v. Pagano, 63 Cal.App.2d 446, 146 P.2d 944; Wallace v. Whitmore, 47 Cal.App.2d 369, 117 P.2d 926; Redemeyer v. Carroll, 21 Cal.App.2d 217, 68 P.2d 739. This rule is well established but whether the use is adverse and under the claim of right or is permissive is usually one of fact to be settled in the trial court. Thomas v. England, 71 Cal. 456, 12 P. 491; McMorris v. Pagano, supra.

Mr. Frank J. Beuchner bought the property in question in 1919. He occupied it until 1944 when he sold it to defendants. He testified that when he bought it he erected a large sign at the entrance to the way on which was the following: "Southland Poultry Ranch, Hatching Eggs, Foundation Stock, Baby Chicks, Private Road," with an arrow pointing to the road and at the bottom was "Visitors Welcome". He also testified that the way "was posted when I bought the place and it has been posted ever since, 'Private Road.'"

Ruth Brown, formerly Ruth Carroll, one of the plaintiffs testified that a sign with "Private Road" on it was posted at the entrance to the way from a public street at the time of trial and that Mr. Beuchner gave her permission to use the way. Several other witnesses testified to seeing these signs posted along the way and to other facts indicating permissive use of the way.

[3] The existence of these signs indicate that the use of the way was permissive (Tarpey v. Veith, 22 Cal.App. 289, 134 P. 367; Jones v. Tierney-Sinclair, 71 Cal.App.2d 366, 162 P.2d 669; City of Laguna Beach v. Consolidated Mortgage Co., 68 Cal.App.2d 38, 155 P.2d 844) and this and other evidence supports the finding to the effect that plaintiffs and their respective predecessors in interest had not used the driveway openly, notoriously, uninterruptedly and adversely to defendants. This finding is sufficient to support the judgment.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

ROSE v. NELSON.

Civ. 13280.

District Court of Appeal, First District,
Division 2, California.

May 20, 1947.

Hearing Denied July 17, 1947.

1. Gaming ⚷18

A lender who advances money to a borrower with understanding that it is to be used in gambling, or who participates and shares in the gambling transaction thus promoted by his act, becomes particeps criminis and cannot recover the money thus advanced.

2. Gaming ⚷19(1)

Where, during progress of a game of poker in which plaintiff and defendant with a number of other persons were participating, the defendant gave to plaintiff seven I. O. U.'s for cash used by defendant to continue the game, and thereafter defendant gave to plaintiff in amount of the I. O. U.'s a check which was returned from bank unpaid, the obligation was such a gambling debt as to preclude recovery by plaintiff.

◆

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by Frank Rose against M. Nelson, also known as Melvin Nelson, to recover amount of check which was returned from bank unpaid. From summary judgment for defendant, plaintiff appeals.

Affirmed.

Edward E. Craig, of Berkeley, for appellant.

Nathan G. Gray, of Berkeley, for respondent.

NOURSE, Presiding Justice.

During the progress of a game of poker in which plaintiff and defendant with a number of other persons were participating the defendant gave to plaintiff seven I. O. U.'s for cash used by defendant to continue the game. Thereafter defendant gave to plaintiff his check for $2,750 covering the face of the I. O. U.'s. This check was returned from the bank unpaid and is the basis of this action. The cause was tried to a jury which returned a verdict for plaintiff. A new trial was granted, but pending the hearing, the defendant moved for a summary judgment under section 437c, Code of Civil Procedure. This motion was granted and from that order the appeal is taken.

The appellant argues just one issue, which, though incorrectly stated in the brief, is this: "Is money loaned by one player to another while both are participating in a poker game without further (stipulation as to its use) such a gambling debt" as to preclude recovery? The answer is in the affirmative.

[1] The general rule covering such transactions is found in 24 Am.Jur. p. 464, reading: "A lender who advances money to a borrower with the understanding that it is to be used in gambling, or who participates and shares in the gambling transaction thus promoted by his act, becomes particeps criminis and cannot recover the money thus advanced. Similarly, if the lender takes any active part in the gambling contract, such as depositing the loan as margins, he cannot recover."

In accord are 38 C.J.S., Gaming, § 26, page 97; Union Collection Co. v. Buckman, 150 Cal. 159, 161, 88 P. 708, 9 L.R.A., N.S., 568, 119 Am.St.Rep. 164, 11 Ann.Cas. 609; Hamilton v. Abadjian, 30 Cal.2d 49, 179 P.2d 804; Wallace v. Opinham, 73 Cal.App.2d 25, 28, 165 P.2d 709.

In Hamilton v. Abadjian (supra) the court said, 30 Cal.2d at page 52, 179 P.2d at page 806: "The owner of a gambling house who honors a check for the purpose of providing a prospective customer with funds with which to gamble and who then participates in the transaction thus promoted by his act cannot recover on the check. See Burke & Co. v. Buck, 31 Nev. 74, 80, 99 P. 1078, 22 L.R.A. N.S., 627, 21 Ann.Cas. 625; Poorman v. Mills & Co., 39 Cal. 345, 353, 2 Am. Rep. 451; Appleton v. Maxwell, 10 N.M. 748, 750, 65 P. 158, 55 L.R.A. 93; L.R.A. 1918C 247, 251."

[2] Here the undisputed evidence is that the loans were all made by plaintiff to defendant for the sole purpose of enabling defendant to use the proceeds in the game in which both were participating.

Though some exceptions are made to the general rule when there is no evidence that the lender knew that the loan was intended to be used for gambling purposes the universally accepted rule is that where the lender does know and actually participates in the gambling game he cannot recover. This rule is adhered to in Appleton v. Maxwell, 10 N.M. 748, 750, 65 P. 158, 161 cited with approval in Hamilton v. Abadjian (supra).

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

Hearing denied; SCHAUER and CARTER, JJ., dissenting.

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80 Cal.App.2d 36

ROSENBERG v. KNESBORO.

Civ. 15373.

District Court of Appeal, Second District, Division 3, California.

May 27, 1947.

1. Appeal and error 🔑100(1)

Order denying application to restrain defendant from proceeding with application for judgment on cross-complaint on ground that cross-complaint raised no issues in addition to those raised by complaint and answer was not an appealable "order" or "judgment". Code Civ.Proc. §§ 577, 963.

See Words and Phrases, Permanent Edition, for all other definitions of "Judgment" and "Order".

2. Appeal and error 🔑870(1)

Procedural orders prior to trial, from which no appeal is allowed, are reviewable upon appeal from judgment. Code Civ. Proc. § 577.

3. Appeal and error 🔑80(1)

An adjudication of rights which leaves nothing to be done except to carry it into execution is a "final judgment" and appealable, but it is not final if further judicial action is required for a complete determination of rights. Code Civ.Proc. § 577.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Judgment"

4. Trial 🔑2

Where plaintiff sought ruling, prior to trial, that cross-complaint raised no issues in addition to those raised by complaint and answer, and denial of plaintiff's application left defendant free to apply for default judgment on cross-complaint, proper procedure would be to bring case on for trial in order that all matters in issue might be heard together and disposed of by a single judgment.

5. Pleading 🔑34(1)

In action for specific performance, in determining whether defendant's cross-complaint raised new issue, court could properly construe answer liberally, in view of statute which specifies conditions under which specific performance cannot be enforced. Civ.Code, § 3391.

6. Appeal and error 🔑792

Where order appealed from was not appealable, appellate court must dismiss appeal, although nonappealability of order was not suggested by respondent.

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by Lawrence Rosenberg against Jane Knesboro for specific performance of an agreement for sale of realty wherein the defendant filed a cross-complaint. From an order denying an application of plaintiff enjoining defendant from proceeding with an application for judgment on cross-complaint, plaintiff appeals.

Appeal dismissed.

J. George Bragin, of Hollywood, for appellant.

Rosalind Goodrich Bates and Aileen M. MacLymont, both of Los Angeles, for respondent.

SHINN, Acting Presiding Justice.

This action was instituted by Lawrence Rosenberg against Jane Knesboro for the specific performance of an agreement for the sale by defendant to plaintiff of a city lot for the sum of $5,500. Defendant answered, denying the execution of the agreement, denying that the consideration named was the fair and reasonable value of the property, and alleging that she had served a notice of rescission on plaintiff based upon section 1689 of the Civil Code, subdivision 1, which section specifies as grounds for rescission mistake, duress, menace, fraud, and undue influence. The answer alleged no facts constituting grounds for rescission of the agreement. Defendant also filed a cross-complaint in which she alleged that on the date of the agreement she was in bed with laryngitis and influenza, that one George Landesman falsely and fraudulently represented to her that the property was of the value of $5,500, and due to its surroundings it would greatly depreciate in value, that he overpowered her will, and that she signed the agreement not understanding or realizing the nature of her act. She alleged that shortly after the date of the agreement, February 9, 1944, she attempted to serve a notice of rescission upon plaintiff but learned that he was absent from the state and would not return until March 25, 1944, and that she served notice of rescission upon plaintiff, Bank of America, and George Landesman on March 14, 1944. On June 12, 1944, she filed an amended cross-complaint alleging that the land was on the date of the agreement worth $6,500, and elaborating somewhat upon the allegations of the original cross-complaint. The amended cross-complaint was served upon plaintiff's attorney June 10, 1944, and affidavit of service was duly made and filed. Plaintiff did not demur to or answer the amended cross-complaint, although he was given extensions of time for that purpose, and his default on the cross-complaint was entered on July 17, 1944. On March 8, 1945, plaintiff filed an answer to the amended cross-complaint. The time had then expired for him to move to vacate the default. The action came on for trial July 24, 1945, and was placed off calendar. On September 27, 1945, on motion of defendant, and on notice, the answer to the amended cross-complaint was stricken out upon the ground that it had not been filed and served within the time allowed by law. On the same day, upon application of plaintiff, an order was issued for the defendant and cross-complainant to show cause why she should not be enjoined and restrained from proceeding with an application for judgment upon the cross-complaint, and why plaintiff's default on the cross-complaint should not be vacated. The ground upon which plaintiff sought the order staying proceedings was that the cross-complaint raised no issue that was not raised by the complaint and the answer, which he claimed placed in issue all the material facts. Upon the hearing of the order to show cause, November 9, 1945, it was discharged and the application was denied. Plaintiff gave notice of appeal from this order.

[1-3] Although the point is not raised by respondent, we are of the opinion that the order from which the appeal was attempted is not an appealable order. Plaintiff's application was only a request for a ruling, prior to trial, that the cross-complaint raised no issues in addition to those raised by the complaint and answer. Section 963 of the Code of Civil Procedure provides that appeals may be taken from final judgments and from certain specified orders. The order here is not among those specified. Procedural orders prior to trial, from which no appeal is allowed, are reviewable upon appeal from the judgment. The order in question was certainly not a judgment. A judgment is defined by section 577 of the Code of Civil Procedure as "the final determination of the rights of the parties in an action or proceeding." An adjudication of rights which leaves nothing to be done except to carry it into execution is a final judgment and appealable, but it is not final if further judicial action is required for a complete determination of rights. Lyon v. Goss, 19 Cal.2d 659, 670, 123 P.2d 11.

[4, 5] The denial of plaintiff's application left defendant free to apply for a default judgment on her cross-complaint, but it was not even a determination that she was entitled to judgment. The court might even decline to hear her application until the trial of the action, or it might decide that the proof which she offered

was insufficient to entitle her to a judgment on the cross-complaint. It would seem that the proper procedure would be to bring the case on for trial in order that all matters in issue be heard together and disposed of by a single judgment. In deciding whether her cross-complaint raised new issues, the court no doubt would construe the answer liberally in view of section 3391 of the Civil Code, which specifies conditions under which specific performance cannot be enforced.

[6] Although the non-appealability of the order is not suggested by respondent, it is our duty to dismiss the appeal, and it is so ordered. Collins v. Corse, 8 Cal.2d 123, 64 P.2d 137.

WOOD, J., and KINCAID, Justice pro tem., concur.

79 Cal.App.2d 683

PEOPLE v. DARCY.

Cr. 2436.

District Court of Appeal, First District, Division 2, California.

May 15, 1947.

Hearing Denied June 12, 1947.

1. Criminal law 🔑1023(12)

Where notice of appeal from an order denying petition for writ of error coram nobis was filed immediately and transcripts of the proceedings from arraignment right through to and including the hearing on the writ of error coram nobis were filed, the appeal was properly before the District Court of Appeal as an appeal from an order made after judgment. Pen. Code, § 1237.

2. Criminal law 🔑997

The writ of error coram nobis never issues to correct an error of law nor to redress an irregularity occurring at the trial, such as misconduct of the jury, or of the court, or of any officer of the court, except under circumstances amounting to extrinsic fraud, which in effect deprived the petitioner of a trial on the merits.

3. Criminal law 🔑997

Alleged errors consisting of admissibility of evidence, errors in transcript of trial, double jeopardy, showing of forfeiture of bail, reference to prior convictions, denial of compulsory process, irregularity in reception of verdict, and alleged illegality in sentence and fixing of prison term, did not come within scope of writ of coram nobis.

4. Criminal law 🔑997

The alleged fact that district attorney violated his alleged promise to say nothing about defendant's prior convictions before jury if defendant admitted the prior convictions would not necessarily undermine the entire case, so as to call for granting of writ of error coram nobis.

5. Criminal law 🔑997

Writ of error coram nobis would not lie because facts relied on were discovered too late for motion for new trial.

6. Equity 🔑55

The statutory maxim that for every wrong there is a remedy is not to be regarded as affording a second remedy to a party who has lost the remedy provided by law through failing to invoke it in time, even though such failure accrued without fault on his part. Civ.Code, § 3523.

7. Criminal law 🔑997

The writ of error coram nobis has become practically obsolete by the extended powers of the writ of habeas corpus and the adoption of modern procedure generally, except in rare instances, and the scope of the writ is extremely narrow and is anything but a catch-all or omnibus remedy.

8. Criminal law 🔑1081

Where defendant's counsel merely gave oral notice of appeal from judgment of conviction in open court immediately after sentence was pronounced, though at the time court rule required written notice of appeal, no appeal was taken from the judgment.

Appeal from Superior Court, Santa Clara County; Wm. F. James, Judge.

Gordon K. Darcy was convicted of robbery, and he filed a petition for a writ of error coram nobis to have the judgment of conviction vacated and a new trial granted. From an order denying the petition, the defendant appeals.

Order affirmed.

Gordon K. Darcy in pro. per.

Robert W. Kenny, Atty. Gen., for respondent.

GOODELL, Justice.

[1] This is an appeal from an order denying appellant's petition for a writ of error coram nobis by which he sought to have a judgment of conviction vacated and a new trial granted. The petition, filed in the trial court (see In re De La Roi, 28 Cal.2d 264, 169 P.2d 363) some months after judgment, was presented by appellant himself, and was denied from the bench. A notice of appeal was filed immediately and transcripts of the proceedings from arraignment right through, to and including the hearing on the writ, have been filed herein. We are satisfied the appeal on the writ is properly before the court as an appeal from an order made after judgment sec. 1237, Pen.Code.

At the outset it should be noted that at every stage of the proceedings in the Superior Court, from and including arraignment to and including sentence and commitment (with the possible exception of the entry of the plea), appellant was represented in court by counsel appointed by the court (three different attorneys, successively) and when his petition for the writ was presented an attorney of his own selection was in court and added his own argument to that made by appellant.

The present proceeding is the outgrowth of a prosecution initiated by the filing of an information charging appellant (together with one Wallace) with the robbery on February 27, 1945, of a Safeway Store in San Jose, and (in a separate count) with the grand theft on the same day of a Chevrolet Sedan from McKenley-Glans Furniture Co. of San Jose.

Appellant was released on April 11 on the deposit of $5,000 cash in lieu of bail. When the case was called for trial on May 14 and 15, appellant was absent. The bail was forfeited and a bench warrant issued. On May 31 he was apprehended at Richmond, California, and on June 14, after the denial of his motion for a continuance, the case went to trial before a jury.

The principal facts of that case are as follows: On February 27, 1945, a green 1942 Chevrolet sedan, license number 2–F–7038, belonging to the San Jose furniture house, was parked in the rear of its store about 4:30 p. m. and when the salesman returned for it about 6:30 p. m. it was missing.

Between 6 and 6:30 p. m. of the same afternoon three women were in the Safeway Store on First Street in San Jose, one of them a customer and the other two employees. The clerks were preparing to close the store. One of them, a checker, was at the cash registers, the other a short distance away. Two men entered the store. The first, later identified by all three women as appellant, wore a dark suit and a grey hat with a black band which was pulled down over his face. He was unshaven. The second man wore a black hat, a dark leather jacket and was unshaven. He was later identified as Wallace who was tried separately.

The first man said to the clerk at the cash registers, according to her testimony, "This is a stick-up, Sister." She saw no gun but testified that he had his hand in his pocket and then, after turning her around, she felt something pressed against her back between her shoulders. According to the testimony he told her to keep still and she would not be hurt. The second man took from the cash register $242 in cash and about $150 in checks.

As they left and got into an automobile parked at the curb, the two woman clerks went to the front door and one called out to the other the number of the license plate of the Chevrolet, 2–F–7038.

About 2:30 a. m. on March 1 two police officers were cruising in a radio patrol car in San Francisco and as they drove north on Octavia Street, between Bush and

Pine, an automobile came out of Austin Avenue, headed into Octavia. Their suspicions were aroused and they drew up. Two men got out of the automobile, and walked along Octavia Street. One of them, later identified as Darcy, went to the door of an apartment house and had a key out as if to enter. When addressed by one of the officers he said he lived there, but the officer tried the key and it did not fit. He lived, as a matter of fact, several blocks away. The other man, later identified as Wallace, was stopped by the other officer. The automobile from which they alighted was a green 1942 Chevrolet sedan, license number 2-F-7038. The list of "hot cars," which the officers consulted, showed that car listed from San Jose as a stolen car. Darcy wore a grey hat with a black band. Wallace wore a dark leather jacket. Both men were taken into custody and the next day they and the car were turned over to the San Jose police. The three women identified the two men and the automobile at San Jose police headquarters without hesitation.

Appellant testified that on February 27 at the time when this robbery was committed he was in the hiring hall of the longshoremen's union in San Francisco and did not leave there until after 6 p. m. He admitted he had known Wallace about a year. He testified that when stopped by the two officers in the early morning of March 1 he and Wallace were returning from down town having traveled by street car.

The testimony of defendant's wife was confined to showing that the defendant was not in need of a shave on the 25th, 26th or 27th of February.

When arraigned for judgment appellant's attorney (who had been appointed by the court) gave oral notice of appeal, and applied for a stay so the appeal could be perfected while the defendant remained in the county jail. The judge explained that such stay could be granted only in the regular way, on a certificate of probable cause, and he remarked further that such writ could not possibly be granted without self-stultification because the evidence of appellant's guilt was "overwhelming."

[2] It is settled law, as shown by numerous authorities—including some of those cited by appellant—that the writ of error coram nobis "never issues to correct an error of law nor * * * to redress an irregularity occurring at the trial, such as misconduct of the jury, or of the court, or of any officer of the court (except under circumstances amounting to extrinsic fraud, which in effect deprived the petitioner of a trial upon the merits)." People v. Reid, 195 Cal. 249, 258, 232 P. 457, 461, 36 A.L.R. 1435.

Appellant's briefs present the following instances of claimed errors of law, irregularities and misconduct occurring at the trial:

1. That the court erred in admitting in evidence a toy pistol found in the glove compartment of the Chevrolet and the leather jacket said to have been worn by Wallace.

2. That there was prejudicial error in the testimony of the prosecution's witnesses on the subject of appellant's identification; that suggestion had been resorted to both at police headquarters and in court; that the witnesses were mistaken; that some of them gave false testimony; that they made conflicting statements as to how they were taken to police headquarters and what went on there; that the witnesses were coached "as to whom to 'put the finger on.'"

3. Appellant claims that the transcript of the trial "is replete with errors and omissions"; that it has been deliberately changed; that questions and answers were "deliberately left out."

4. Numerous assignments are made of alleged false, erroneous, conflicting and self-contradictory statements of the people's witnesses; arguments are made as to the impossibility of the testimony of some of them.

5. Double jeopardy is claimed in several particulars. The second count was for the theft of the Chevrolet sedan. It was the theory of the prosecution that the defendants took the car from the rear of the furniture store, drove to the Safeway Store, parked it in front, and then drove away in it after the robbery. (a) Appel-

lant argues "included offenses" on the theory that as he was found not guilty of the theft of the Chevrolet, he could not be guilty of the robbery of the store, his contention being "that he could not have committed the offense charged in Count Number One (robbery) without committing the offense charged in count number two (grand-theft)"; further, that the grand theft "was an 'essential' part of the whole which was but one transaction." (b) That "judgment on the escape charge (after revocation of probation and sentence to prison for same) was definitely an evident example of double jeopardy and avoidance of judgment."

6. A deputy clerk read from the register entries showing the forfeiture of bail. Counsel for appellant conceded that flight from the scene of a crime would be admissible but objected that subsequent absence was not, to which the court replied: "Flight from the trial, flight from the court house, abandonment of bail I think is material * * *." This is claimed to be prejudicial misconduct.

7. Appellant claims that he "was made to appear a habitual criminal of the most vicious kind before the jury" because (a) on cross-examination the district attorney drew from him the admission that he had been theretofore convicted of three felonies, namely, robbery, grand theft and escape; (b) the district attorney asked him, so he claims, "Isn't it a fact that you were previously convicted and sent to San Quentin Prison for the very same charge that you are now being tried for?" This question is one of those claimed to have been deliberately omitted from the record.

8. Appellant claims that while the prior convictions are three in number there was but one prison term served, for the reason that under *one* indictment or information he was charged in two counts with second degree robbery and in another count with grand theft; he was sentenced to three years on each of the three counts, to run consecutively, and as a condition of probation he was to serve one year in the Los Angeles county jail on each of the three counts. After one year he was transferred to the county road camp "from whence he walked away the second day." He was apprehended at once and sentenced to the state prison on the three original counts and, in addition, to serve a consecutive sentence for the escape which, he argues, "was but a violation of trust." Hence he argues that prior to his present confinement he had been arrested only once in his lifetime. His complaint that he was not represented by counsel when his plea was taken revolves around the foregoing circumstances, his point being that with legal representation, or proper advice, he would not have admitted the three priors unconditionally as he did, or at least without the explanation given above.

9. Appellant claims that his conviction "was brought about through the use of fraud on the part of the prosecution, to-wit, that an agreement was made with him by the prosecution that, if he would admit having been previously convicted, as charged in the information, no word of his previous convictions would be made within the hearing of the jury." The record shows that after the jury was sworn the clerk read the information to the jury. It does not show that only that part was read which contained the charges then before the court. Moreover, as we have seen, the appellant was questioned by the district attorney as to the three priors.

10. Appellant complains that he was denied compulsory process. He apparently uses this term in a sense other than its generally accepted sense. As already pointed out, appellant was represented by counsel at every appearance in the Superior Court except when his plea was taken. The issuance of process was available to him at all times and his attorneys could have compelled it. Appellant apparently means by the denial of compulsory process that the two affidavits of alibi witnesses should have been considered. Those affidavits are dated January 26, 1946, and were filed as exhibits attached to the application for the writ on April 5, 1946, which was long after the time had expired for a motion for new trial.

11. Appellant contends that there was an irregularity in the reception of the ver-

dict. The record shows that the signed verdict was one of conviction "of Robbery, and find the degree as Robbery in the Second Degree." In directing a poll the court stated that, "As to the first charge of robbery, the verdict was guilty of robbery in the first degree. Call the jury on that. (The Clerk calls the name of each juror, and each juror responds yes.)" In arraigning the appellant for judgment the court stated "The case was tried and submitted and the jury returned with a verdict finding you guilty of a charge of robbery, fixing the degree thereof at second degree and not guilty on a charge of larceny." In delivering the judgment itself the court said "It is the judgment of the Court that you, Gordon K. Darcy, for the offense of which you stand convicted before this Court, to-wit, robbery, fixed at second degree, be imprisoned in the State Penitentiary at San Quentin, for such term as may be lawfully appointed therefor * * *." Appellant now contends that "if the court holds that the verdict of the jury, as polled individually, is correct, then the judgment as rendered in the trial court is indeed void and appellant is entitled to a new trial on this point alone * * *" as the verdict was in fact second degree.

12. Appellant contends that the sentence "for such term as may be lawfully appointed therefor" was "an illegal and void sentence" because the "punishment must be determined by the court authorized to pass sentence."

13. Akin to the last point is appellant's attack on the legality of the fixing of a prison term by an administrative agency and not by a court.

While in the development of the foregoing points appellant has made several charges of false testimony, nowhere does he allege in his application for the writ, or argue in his briefs, that any false testimony was given with the knowedge or by the procurement of the district attorney. Nowhere does he claim that any fact was suppressed and could now be disclosed, which would have upset the judgment or completely destroyed the evidentiary structure on which the conviction was founded.

[3] Numerous cases have been cited by appellant, and by the respondent as well, on the points which we have just enumerated. For reasons which already appeared, we are satisfied that none of thirteen points comes within the scope of the writ of coram nobis hence we refrain from a discussion of such authorities. To discuss them would be to treat this as an appeal from the judgment of conviction itself, which it is not.

In the recent case of In re Lindley, 29 Cal.2d 709, 177 P.2d 918, 928, 929, the Supreme Court quotes from People v. Reid, 195 Cal. 249, 232 P. 457, 36 A.L.R. 1435, supra. It is not necessary in the instant case to go beyond the Reid case for authority. That was a murder case where the jury returned a verdict of guilty without recommendation. In an application for a writ of error coram nobis it was attempted to be shown that the jury would not have reached that conclusion but for information which reached them in the jury-room that the Judge had stated that a life sentence would mean no more than about ten years confinement. The court held on appeal that the writ had been properly denied because such an irregularity was not within its scope. In that opinion the history of the writ and its scope and functions are discussed at considerable length. At pages 258, 259 of 195 Cal., at page 461 of 232 P., after enumerating the types of cases where the writ has issued, the court says: "It appears that in each case where the writ of error coram nobis has issued to vacate a judgment, it has been upon the ground that such judgment was predicated upon the assumed existence of a fact or a condition which did not in truth exist, and the nonexistence of which would have prevented the rendition of the judgment if it had been known. *We find nothing in the authorities to justify the conclusion that this remedy has ever been available for the correction of an irregularity occurring at the trial, such as is here complained of.*" (Emphasis added.)

It must be remembered that upon the "irregularity" there complained of, turned the vital question whether or not Reid was to suffer the extreme penalty.

The appellant's contention, which we have numbered 9, that he had admitted the three prior convictions only because the district attorney had promised to say nothing about them before the jury, not only suggests, but asserts, fraud. For that reason it calls for discussion which the other points do not. This point is mentioned for the first time in appellant's opening brief. It was not alleged in the petition for the writ. True it was alleged therein that the district attorney "made illegal and unlawful references to said prior conviction" contrary to section 1025, Pen. Code, and that the district attorney violated the trust of petitioner, but nowhere is it alleged that a promise was made. At the hearing of his application for the writ appellant was represented by counsel of his own selection. Appellant, however, made the principal argument—his counsel supplementing it—and in neither argument was it claimed that the district attorney had made such promise. At that hearing no sworn testimony was given or tendered. The promise finds no support in the record, and does not even appear as an allegation. With respect to the failure to allege this claimed fraud see People v. Reid, supra, 195 Cal. at page 260, 232 P. 457, 36 A.L.R. 1435, where the court notes a similar absence of allegation.

[4] Even if the violation of such claimed promise had been found as a fact it would not have necessarily undermined the entire case so as to call for a granting of the writ.

[5] We have already pointed out that there was no denial of compulsory process. However, the appellant deals with the affidavits of Dennis Ocha and W. E. York under this head. Those were alibi affidavits which were clearly within the category of newly discovered evidence. On this point, also, People v. Reid is directly in point. At page 257 of 195 Cal., at page 460 of 232 P., the court says: "He [appellant] argues that because the defendant did not discover the facts here relied upon until too late to present them in support of his motion for new trial, the statutory remedy should be deemed 'unavailable,' and the common-law remedy should therefore be resorted to. He sites no authority which supports this conclusion and we are convinced that it is not sound." On page 258 of 195 Cal., on page 461 of 232 P., the following is quoted from the Mooney case, People v. Mooney, 178 Cal. 525, 174 P. 325: "The remedy in such case is by motion for a new trial, and if newly discovered evidence is too late in its production, its consideration cannot be brought about under the guise of a motion to vacate the judgment upon the ground of fraud."

Appellant cites fourteen California cases under the general heading "The following citations support appellant's contention that he was entitled to the writ of error coram nobis and/or a new trial" without making any particular point, or showing how or in what manner they lend support to his position. None of them supports his contention. Ten of them were cases where petitions to set aside judgments of conviction or for writs of error coram nobis were denied, and such denials were affirmed. People v. Mooney, 178 Cal. 525, 174 P. 325; People v. Davis, 187 Cal. 750, 203 P. 990; People v. Schwarz, 201 Cal 309, 257 P. 71; People v. Mendez, 28 Cal. 2d 686, 171 P.2d 425; People v. Black, 114 Cal.App. 468, 300 P. 43; People v. Deutsch, 16 Cal.App.2d 121, 60 P.2d 155; People v. Kretchmar, 23 Cal.App.2d 19, 72 P.2d 243; People v. Harincar, 49 Cal.App.2d 594, 121 P.2d 751; People v. Lewis, 64 Cal.App.2d 564, 149 P.2d 27; People v. Egan, 73 Cal. App.2d 894, 167 P.2d 766. One of them (In re Schenk, 61 Cal.App.2d 168, 142 P.2d 343) was habeas corpus not coram nobis, where the writ was discharged. One (People v. Egan, 135 Cal.App. 479, 27 P.2d 412) involved the dismissal of an appeal. One (Austin v. Lambert, 11 Cal.2d 73, 77 P.2d 849, 115 A.L.R. 849) involved the constitutionality of section 170.5, Code Civ.Proc. relating to "peremptory challenges" of judges, and one (People v. Gilbert, 25 Cal. 2d 422, 154 P.2d 657) reversed an order which attempted to modify to life imprisonment judgments imposing the death penalty, which judgments had been affirmed on appeal.

Neither People v. Bevans, 19 Cal.App. 2d 288, 65 P.2d 92, nor People v. Stangler, 18 Cal.2d 688, 117 P.2d 321 is in point.

[6, 7] The appellant seeks this writ on general grounds. He says, "a case showing such evident untrue, erroneous and fraudulent testimony should be reversed, and that law and justice require that he be given his day in court before imposing an illegal sentence such as that which has been imposed upon him as a result of aforesaid denial of the due process of the law, equal protection of the law, and the same rights and privileges granted to others in like cases." Elsewhere he says, "Where prejudicial errors are evident in the record, and the reviewing Court has jurisdiction, there should be no delay in the correction thereof; especially so when a miscarriage of justice has resulted therefrom. What the remedy is called makes no great difference; what is essential is that there still is a remedy, different in form though it may be, in situations where there would be great injustice if the law gave no assistance." With respect to such general contentions the Supreme Court has said, "The maxim, 'for every wrong there is a remedy' (Civ. Code, § 3523) is not to be regarded as affording a second remedy to a party who has lost the remedy provided by law through failing to invoke it in time—even though such failure accrued without fault or negligence on his part. This is made clear by the cases of People v. Mooney, supra, and People v. Superior Court, 190 Cal. 624, 213 P. 945." People v. Reid, supra, 195 Cal. at page 260, 232 P. at page 461, 36 A.L.R. 1435. And "The annulment of said portions of the judgment is attempted to be justified on the theory that plenary and almost omnipotent power is vested in courts by virtue of the ancient writ of coram nobis, a writ which has become practically obsolete by the extended powers of the writ of habeas corpus and the adoption of our modern procedure generally, except in the most rare of instances". People v. Lumbley, 8 Cal.2d 752, 68 P.2d 354, 355. All the cases point out that the scope of the writ is extremely narrow and that it is anything but a catch-all or omnibus remedy. In recent weeks two appeals from orders denying writs of error coram nobis, came before the courts where, as in this case, the points relied on were such as might have been raised on an appeal from the judgment of conviction or from the denial of a new trial. In each of them the order was affirmed. People v. Tate, 78 Cal.App.2d 894, 178 P.2d 470; People v. Dale, 79 Cal.App.2d 370, 179 P.2d 870.

[8] In the main case of People v. Darcy appellant's counsel gave oral notice of appeal from the judgment of conviction in open court immediately after sentence was pronounced on June 18, 1945. At that time a written notice of appeal was required by rule 31 which had become effective on July 1, 1943. There was, therefore, no appeal taken from the judgment. No motion for new trial was made. For these reasons the judgment of conviction has long since become final and, as said in People v. Reid, the writ sought does not afford "a second remedy to a party who has lost the remedy provided by law through failing to invoke it in time."

The order is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

79 Cal.App.2d 478

LEDERER v. MUIR.

Civ. 15638.

District Court of Appeal, Second District, Division 2, California.

May 5, 1947.

Rehearing Denied May 19, 1947.

Hearing Denied June 30, 1947.

1. Mortgages 🔑1

A "mortgage" is a contract by which specific property is hypothecated for the performance of an act. Civ.Code, § 2920.

See Words and Phrases, Permanent Edition, for all other definitions of "Mortgage".

2. Mortgages 🔑5

Note for $2,400 containing provision that, to secure amount of note, maker agreed to return such amount from the sale of the vacant south portion of certain property for not less than $11,000, was not a "mortgage", and therefore the payee was entitled to waive the security and sue on the note. Civ.Code, §§ 2920, 3268.

3. **Bills and notes** ⚿129(1)

Note containing provision that, to secure amount of note, maker agreed to return such amount from the sale of the vacant south portion of certain property for not less than $11,000, did not, because of statement as to sale of the realty, fix the time that the note was to be paid.

4. **Appeal and error** ⚿1071(6)

In action by real estate broker on a note evidencing money loaned to defendant, failure to find that broker was duly licensed within meaning of statute was not prejudicial error, though complaint alleged that broker was duly licensed and that allegation was denied, since issue was immaterial. Business and Professions Code, § 10136.

WILSON, J., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Action by Mary Helena Lederer against Frances Muir to recover the balance allegedly due on a note. From a judgment for the plaintiff, the defendant appeals.

Judgment affirmed.

Ralph Sadler Rosen, of Los Angeles, for appellant.

Hy Schwartz, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action to recover the balance due on a promissory note, defendant appeals.

The essential facts are these:

Prior to February 3, 1945, defendant was the owner of a parcel of property known as 1438 San Ysidro Drive, Los Angeles. She engaged plaintiff, a real estate broker, to sell the property and agreed to pay a commission of $900. In early February, 1945, a sale of the property was consummated and the commission earned. Shortly thereafter plaintiff interested defendant in the purchase of a home at 2020 Coldwater Canyon Drive, Los Angeles. The owner of the property had agreed to pay to plaintiff upon the sale of the property a commission of $1500. In order that defendant might finance the purchase of the Coldwater Canyon property plaintiff agreed to loan defendant $2400, which sum consisted of the $900 commission defendant owed plaintiff and the $1500 commission plaintiff was to receive from the vendors of the Coldwater Canyon property. Thereafter defendant purchased the Coldwater Canyon Drive property. As evidence of the foregoing loan defendant signed the following note:

"L & D No. — $2400.00

Beverly Hills, Calif. February 14, 1945

"As per written agreement of even date, on demand, after date, for value received, the undersigned, jointly and severally promise(s) to pay to Mary Helena Lederer or assigns or order at its offices in Beverly Hills, Calif., The Sum of Twenty-four Hundred and no/100 Dollars, to bear no interest until date of demand—Thereafter interest at 6% per annum.

"Should the interest not be so paid, it shall thereafter bear like interest as the principal. Should default be made in the payment of any installment of interest when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note. The undersigned (jointly and severally) further promise(s) to pay all costs of collection, including attorney's fees, which may be incurred in the collection of this note or any portion thereof. In case suit is instituted for such purpose, the amount of such attorney's fees shall be such amount as the court shall adjudge reasonable. Principal and interest payable in lawful money of the United States of America. The makers, sureties, guarantors and endorsers of this note hereby consent to extension of time prior to, at or after maturity and hereby waive, diligence, protest, demand and notice of every kind. Should this note be signed by more than one person, firm or corporation, all of the obligations herein contained shall be considered the joint and several obligations of each signer hereof.

"This note is given as security and agreement to repay the sum of $2400.00 cash loaned to Frances Muir by Mary Helena Lederer.

"(Signed) Frances Muir."

At the same time plaintiff and defendant signed the following agreement:

"It is hereby agreed that the $900.00 commissions due Mary Helena Lederer, as agent, from the sale of 1438 San Ysidro Drive and also the commission of $1,500.00 due Mary Helena Lederer from the sale of 2020 Cold Water Canyon Drive to Frances Muir, is hereby loaned to the undersigned, Frances Muir, for her purpose of purchasing the above mentioned 2020 Cold Water Canyon Drive property.

"To secure the above $2,400.00, the undersigned, Frances Muir, agrees to return said $2,400 from the sale of the vacant south portion of 2020 Cold Water Canyon property, running approximately 50 feet parallel to the Feldman property, for not less than $11,000.00 plus any cost of carrying charge, interest and escrow charges from date of close of escrow plus sales commission, if any.

"This loan and agreement is secured by note of even date herewith.

"Dated this 14th day of February, 1945.

"(Signed) Frances Muir

"(Signed) Mary Helena Lederer"

On September 19, 1945, plaintiff made written demand upon defendant for the payment of the foregoing note.

There are three questions presented for our determination:

First: *Was the note above mentioned secured by a mortgage?*

[1, 2] This question must be answered in the negative. A mortgage is a contract by which specific property is hypothecated for the performance of an act. (Section 2920, Civil Code.) In the present case the agreement executed by the parties did not fall within the foregoing definition of a mortgage. (See also Strickler Co. etc. v. Eisner et al., 5 Cal.App.2d 441, 442, 42 P.2d 1065; Johnston v. Murphy, 36 Cal.App. 469, 470, 172 P. 616.)

In the most favorable view to defendant the agreement of the parties constituted a security for the payment of the note, which security did not constitute a mortgage; therefore plaintiff was entitled to waive the security and sue upon the note. (Section 3268, Civil Code; Martin Music Co. v. Robb, 115 Cal.App. 414, 419 et seq., 1 P.2d 1000.)

Second: *Did the fact that the agreement between the parties provided that defendant was to repay the note from the money received from the sale of part of the property known as 2020 Coldwater Canyon Drive fix the time that the note was to be paid?*

[3] This question must likewise be answered in the negative. It appears clearly that the statement, "To secure the above $2400.00, the undersigned, Frances Muir, agrees to return said $2400.00 from the sale of the vacant south portion of 2020 Cold Water Canyon property," constituted merely a statement that any sum received from the sale of such property should constitute additional security for the note which defendant had executed in plaintiff's favor and was not a part of the note which on its face stated it to be due on demand. Likewise the statement, "This loan and agreement is secured by note of even date herewith" appearing in the agreement was merely a layman's manner of expressing the fact that the loan was evidenced by a note of even date, it being obvious that the note could not be security for the agreement in a transaction of the nature of the one here involved.

Third: *Did the trial court commit prejudicial error in failing to find that plaintiff was a duly licensed real estate broker at the time of the transaction mentioned in the complaint?*

[4] This question must also be answered in the negative. Section 10136 of the Business and Professions Code provides that an action cannot be maintained for the collection of a commission earned as a broker in the sale of real estate in the absence of an allegation and proof that plaintiff

was a duly licensed real estate broker or real estate salesman at the time the alleged cause of action arose. It is evident that the present action is not one for the purpose of recovering a broker's commission for the sale of real estate, but to recover a sum of money loaned and evidenced by a promissory note. Hence the allegation in the complaint that plaintiff was a duly licensed real estate broker was an immaterial allegation, and the denial thereof merely created an immaterial issue; therefore under the established rule that a failure to find upon an immaterial issue does not constitute prejudicial error, defendant has failed to present a valid ground for reversal of the judgment. (Bacon v. Bacon, 21 Cal.App.2d 540, 546, 69 P.2d 884; Luitwieler v. Luitwieler, 71 Cal.App. 50, 58, 234 P. 329. The order denying his motion for a new trial is dismissed.

The judgment is affirmed.

MOORE, Presiding Justice (concurring).

I concur. Appellant has presented her case upon a bifurcated theory (1) as though she had pleaded fraud in inducing her to execute the note and (2) as though the "contract" of even date with the note were a limitation upon the maker's liability to pay according to her written promise "on demand." With reference to the conversation given in testimony of defendant and her husband which implies that plaintiff had made oral promises to cause defendant to execute the note, no fraud is pleaded. The answer is merely a general denial. Under the pleading of plaintiff that there was no consideration for her written agreement to loan the $2400 to defendant or under the theory that parol testimony was admissible to explain the second writing, the court heard defendant's witnesses give copious testimony. Despite such proof, however, the court in the exercise of its judicial function found in accordance with the express terms of the note, that the agreement was executed as a security for the note, that such security was waived and that the note became due when demand for payment was made.

The writings required no testimonial proof of their meaning. They show that defendant owed plaintiff $900 for services and that such sum together with a $1500 commission earned by her sale of the Cold Water Canyon property to defendant was loaned to defendant as an accommodation. Nothing in the agreement eliminated the "demand" feature of the note. A reasonable construction of its language is that the $2400 should be payable out of the proceeds of the sale of the vacant south 50 feet of the canyon property, however soon such sale should occur and whether plaintiff should make demand or not; but the right to demand payment was not curtailed by plaintiff's right to collect out of the proceeds of such sale. If the parties had contemplated that the note should not be paid even though no sale should be made, they could and would have used words to deprive plaintiff of the sole power to determine the maturity date of the note. The only advantage to Mrs. Lederer from the contract was the prompt payment of the $2400 upon sale of the canyon property. She owned the money specified in the note, she loaned it to defendant and is entitled to be repaid according to the terms and tenor of the note unless she waived her right thereto by the contemporaneous writing. No such waiver appears there, but on the contrary only a definite agreement "to secure the above $2400 * * * from the sale of the vacant south portion of 2020 Cold Water Canyon property * * * for not less than $11,000."

A contract is not to be interpreted capriciously but according to the established rule that will give effect to every clause, phrase and word in it unless such construction is clearly repugnant to the intention of the parties or would lead to an absurdity. Also, it must be so construed as to make it definite and reasonable. (Cole v. Low, 81 Cal.App. 633, 637, 254 P. 676.)

Appellant cites authorities (Civil Code, sec. 1642; Spotton v. Dyer, 42 Cal.App. 585, 588, 184 P. 23; Goodwin v. Nickerson, 51 Cal. 166, 169; Mutual Building & Loan Association v. Beers, 117 Cal.App. 200, 204, 3 P.2d 565), to the effect that contracts relating to the same matters, between the same parties in one transaction are to be taken together. This is a fundamental rule and there is no indication that it was not observed by the court below. There is no provision in the agreement that the note should not mature prior to a sale of the canyon lot. It was executed as a security and having been waived, judgment on the note was imperative.

WILSON, Justice (dissenting).

I dissent.

(1) Although appellant expressly conceded in her opening brief that the agreement signed by her on February 14, 1945, did not create a mortgage and "could not * * * be construed as security for the note," respondent's brief contains a needless argument that the agreement was security for the note and that she waived the security in order to sue on the note. Since a defense on that ground was not made by appellant at the trial and is renounced on the appeal the discussion of the subject in Mr. Justice McComb's opinion is unnecessary and answers a nonexistent question.

(2) The promissory note sued on and the agreement were executed contemporaneously, were parts of the same transaction, and must be read and construed together as if they were one instrument. Appellant, while testifying under section 2055 of the Code of Civil Procedure, identified her signature on the promissory note and stated "but along with that was a contract which was attached to it at the time." Respondent's counsel then produced the agreement which was identified by appellant and received in evidence. Appellant was asked by respondent's counsel whether she had given respondent any money or agreed to pay her any money other than that represented by the promissory note. Appellant responded: "No, I didn't agree to give her any money. I didn't owe her any money until the lot was sold, which we entered into a business arrangement, an agreement. We were partners in a business agreement. And I owed her no money until she sold the lot." In answer to a question by the court appellant testified: "Mrs. Lederer knew that we were unable to buy the full three acres at 2020 Cold Water Canyon, and she told us she had a buyer for one acre, or one parcel of property, which would enable us to buy the remaining two acres and house, which we wanted. Well, the buyer never materialized, so we entered into a business arrangement whereby she would leave the commission, not take her commission out until such time as she had sold that lot that she had agreed to sell, and it was simply to remain in status quo until the lot was sold; and at such time as—and we had a written agreement to that effect—at such time as the lot was sold she was to have her $2400, which she would still be going to have if she had sold the lot. But the lot has not been sold. Nor—I believe there has been no effort to sell the lot."

Appellant's evidence was corroborated by that of her husband who testified concerning the conversations leading up to the signing of the promissory note and the agreement as follows: "Mrs. Lederer discussed the sale of her house and the possible buying of another one. I told Mrs. Lederer that I was perfectly willing to change houses if Mrs. Muir would be happier, providing I didn't have to invest one nickel, that I didn't have it. I also told her that I was a free lance actor and I didn't know when I would work again, whether tomorrow or or a year from tomorrow. * * * Under the circumstances, with no income, no employment, it is utterly ridiculous that you would have any deal or proposition by which I could pay the Lederers $2400 until I could sell this extra land. This was a $30,000 house which I could never afford until I acquired that $11,000 to help me out. I made that agreement very clear. And under no circumstances would we have entered into such a deal, regardless of anything that might appear in the writing in the contract. It is my fault, I suppose, by not getting an attorney and by having so much faith in Mrs. Lederer's integrity and intentions."

Respondent was not called as a witness in her own behalf. Her husband testified that he prepared the promissory note, filling in the blanks in a printed form, and that the agreement was dictated in his presence.

No evidence whatsoever was offered contradicting that of appellant and her husband. Patently the two instruments are a part of one transaction and must be so read. The note and the agreement are both dated February 14, 1945. The note provides: "As per written agreement of even date on demand after date, for value received, the undersigned" promises to pay, etc. The last sentence of the note, which follows the printed portion, was written by respondent's husband in her behalf and reads: "This note is given as security and agreement to repay the sum of $2400. cash loaned to Frances Muir by Mary Helena Lederer." The agreement, after reciting that respondent loaned the sum of $2400 to appellant, provides: "To secure the above $2,400.00, the undersigned, Frances Muir, agrees to return said $2400.00 from the sale of the vacant south portion of 2020 Cold Water Canyon property * * *. This loan and agreement is secured by Note of even date herewith." The quoted language of the agreement was not, as stated in each of the opinions of the majority, "additional security for the note." In fact there was no security for the payment of the note. The agreement placed a limitation on the payment, to wit, that payment was not to be made or required save from the sale of the property described. Emphasizing this view is the language of the note itself that it is to be paid "as per written agreement of even date," that is, from the sale of the property.

Each instrument refers to the other in such manner as to require them to be read as one document. The note is to be paid "as per written agreement of even date" and the agreement purports to be secured "by note of even date herewith." It is obvious, however, that the agreement was not secured by the note. Moreover, the oral evidence leading up to their execution, which was introduced not for the purpose of changing the terms of either instrument but of showing their interrelation, conclusively demonstrates that neither document would have been executed without the other. The note would not have been executed except for the agreement providing for its payment from the sale of the Cold Water Canyon property and the agreement would not have been signed except for the purpose of specifying the manner of payment of the note. The two documents and the uncontradicted evidence show that the intention of the parties was (1) that the note was not payable until after the property referred to in the agreement had been sold, and (2) that the note was not a demand note in the ordinary legal significance of that term but that it was payable on demand only "as per written agreement of even date," that is after the Cold Water Canyon property had been sold. The only reasonable and rational conclusion that can be placed upon the two documents is that demand for payment was not to be made except "as per written agreement of even date" which provided that appellant "agrees to return said $2,400 from the sale of" a portion of the Cold Water Canyon property.

Section 1642 of the Civil Code reads as follows: "Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together." Where there is a contemporaneous written contract affecting the terms of a promissory note the contract must be construed with the note and any lawful condition added to the note by such collateral agreement may be enforced. Goodwin v. Nickerson, 51 Cal. 166, 169; Spotton v. Dyer, 42 Cal.App. 585, 588, 184 P. 23; Mutual Building & Loan Ass'n v. Beers, 117 Cal.App. 200, 204, 3 P. 2d 565. Where an obligation is payable upon the happening of a contingency it does not mature until the contingency occurs and the payee of the obligation is not entitled to recover in the absence of proof of such happening. Clarey v. Security Portland Cement Co., 99 Cal.App. 783, 787, 279 P. 483; Lynch v. Keystone Consol. Mining Co., 163 Cal. 690, 698, 126 P. 968; Cantwell v. Gage, 111 Cal.App. 209, 212, 295 P. 375; Vatcher v. Grier, 50 Cal.App. 39, 41, 195 P. 75; Lind v. Huene, 205 Cal. 569, 576, 271 P. 1087.

In Rosenfeld v. Miller, 1 Cal.2d 206, 211, 33 P.2d 1013, it was held that a real estate broker was not entitled to recover his commission for the negotiation of a lease because certain conditions upon which the commission was to be payable had not been fulfilled. In Lindley v. Fay, 119 Cal. 239, 243, 51 P. 333, the agreement provided for the payment of commissions out of the first moneys received. No money having been received the court held that the broker was not entitled to his compensation although he had produced a purchaser ready, able and willing to purchase on the prescribed terms.

Where a contract limits the liability for payments to funds to be derived by the payor from a specified source, there can be no recovery in the absence of pleading and proof that the debtor had received funds from that source. Martin v. Martin, 5 Cal. App.2d 591, 593, 43 P.2d 314; Lynch v. Keystone Consol. Mining Co., supra, 163 Cal. at page 698, 126 P. at page 968; Flippen v. Abbey, 135 Cal.App. 666, 671, 27 P. 2d 792.

The proof is that the Cold Water Canyon property had not been sold at the time of the trial, hence there was no fund from which the loan made by respondent was payable, the note had not matured, and respondent's cause of action had not accrued.

(3) The complaint alleged that at the time of the transaction referred to respondent was a licensed real estate broker. This allegation, as were all other allegations in the complaint, was denied by a verified answer. No evidence was introduced upon said allegation and the court's failure to make a finding thereon was error. Bus. & Prof. Code, sec. 10136. Although the action is brought upon a promissory note executed by appellant, the accompanying agreement recites that the sum of $2400 loaned by respondent to appellant consisted of $900 commission due respondent upon the sale of appellant's property on San Ysidro Drive and $1500 derived from another source. The agreement recites that the sum of $900 is a commission due respondent as agent from the sale of the San Ysidro Drive property. If respondent was not a licensed real estate broker at the time of the sale she was not entitled to a commission from appellant and therefore had not earned the sum of $900 which she purported to loan to appellant. In that event the money agreed to be loaned to appellant was the latter's own property.

For all the reasons stated the judgment and the order denying a new trial should be reversed.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.

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79 Cal.App.2d 739

PALO & DODINI v. CITY OF OAKLAND et al.

No. 13401.

District Court of Appeal, First District, Division 1, California.

May 20, 1947.

Hearing Denied July 17, 1947.

1. Municipal corporations 🔑235

Persons submitting bids pursuant to advertisement by municipal corporation were charged with notice of the city's charter provisions. St.1911, pp. 1623-1625, §§ 125, 128; St.1943, p. 3318, § 126.

2. Municipal corporations 🔑239, 242

Where persons submitted bid in response to advertisement by city, but refused to enter into contract to do the work or to give bond as required by city charter, their contention that acceptance of their bid by city resulted in an enforceable contract could not be sustained. St.1911, pp. 1623–1625, §§ 125, 128; St.1943, p. 3318, § 126.

3. Municipal corporations 🔑235

Persons who submitted bid in response to advertisement by city during wartime were presumed to know that it would be necessary to obtain priorities in order to buy materials and that even with priorities, materials would be difficult to obtain, and that probably the last enterprise to which the priorities would be granted was one operating pleasure boats.

4. Municipal corporations 🔑242

Where persons submitted bid in response to advertisement by city, during wartime to operate pleasure boats, they could not refuse to enter into contract on ground that necessary priorities for materials could not be obtained, nor were they relieved of forfeiture of certified check accompanying bid by specifications which provided that there should be no obligation on part of contractor to perform work or to deliver supplies if prevented by act of God, commandeering of raw materials, etc., by city or military authority or by other case beyond the control of the contractor. St.1911, pp. 1623–1625, §§ 125, 128; St.1943, p. 3318, § 126.

5. Municipal corporations ⟹239, 242

Municipalities may lawfully require guaranty deposits to accompany bids and forfeit them in the event of the failure or refusal of the successful bidder to enter into the contract. St.1911, pp. 1623–1625, §§ 125, 128; St.1943, p. 3318, § 126.

6. Municipal corporations ⟹242

The section of the charter of the city of Oakland providing that, if bidder refuses to enter into contract, the certified check accompanying bid and the amount therein mentioned shall be forfeited to the city, and that neither the city council nor any board shall have the power to relieve from or remit such forfeiture, is mandatory and explicit, and prohibits any relief from forfeiture. St.1943, p. 3318, § 126.

7. Municipal corporations ⟹242

Bidders whose certified check had been forfeited because of failure to enter into contract had burden of pleading and proving matters entitling them to relief from such forfeiture. St.1943, p. 3318, § 126; Civ.Code, § 3275.

8. Municipal corporations ⟹242

Bidders whose certified check had been forfeited for failure to enter into contract with city were not entitled to relief from forfeiture, where they failed to offer to make full compensation to city, and merely showed that they were unable to obtain priorities or materials for performance of contract. St.1943, p. 3318, § 126; Civ.Code, § 3275.

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Appeal from Superior Court, Alameda County; Ezra W. Decoto, Judge.

Action by Palo & Dodini, a copartnership composed of Frank J. Palo and Alfred L. Dodini, against City of Oakland, a municipal corporation, and others to recover a $1,000 guaranty deposit which the defendants declared forfeited for failure of plaintiffs to enter into an awarded contract. From a judgment for defendants, the plaintiffs appeal.

Judgment affirmed.

T. L. Christianson, of Oakland, Everett H. Roan, of San Francisco, and J. S. Wallace, of Oakland, for appellants.

F. B. Fernhoff, City Atty., of Oakland, for respondents.

BRAY, Justice.

Plaintiffs appealed from a judgment for defendants in an action to recover a $1000 guarantee deposit which the defendants declared forfeited for failure of plaintiffs to enter into an awarded contract.

There is no dispute as to the facts. The defendant city of Oakland advertised for bids for the concession to operate electric boats upon Lake Merritt for the fiscal year 1945–1946. On April 5, 1945, pursuant to such call, plaintiffs filed their bid, and deposited with the Oakland Board of Playground Directors their certified check for $1000, as and for a guarantee that in the event they were the successful bidders and were awarded the contract, they would enter into a formal contract for the operation of the boats in accordance with their bid. After the bids were opened and it was seen that plaintiffs were the high bidders, and on two separate occasions, plaintiffs requested defendants to permit them to withdraw their bid. Defendants refused so to do. On April 19th the board passed its resolution awarding the contract to plaintiffs and directed the city attorney to prepare the contract. Thereafter plaintiffs notified defendants that due to war conditions, they were unable to perform the contract, and when a formal contract was tendered then they refused to sign it or to put up the required bond for faithful performance. The board then declared the guarantee deposit forfeited and readvertised for new bids. Plaintiffs brought this action to recover the moneys so forfeited. At the time of the trial the new bids called for by the board had not been received. Plaintiffs were unable to procure materials to build the necessary boats. The Office of Price Administration and the War Production Board refused to grant priorities.

The call for bids stated that sealed bids would be received "in accordance with the specifications adopted therefor * * *. Specifications * * * will be furnished by the Secretary of the Board * * *." Plaintiff's main contention is that the acceptance of their bid by defendants constituted an enforceable contract made up of their bid and the specifications furnished by defendants (even though it was contemplated that a formal contract would be executed and even though plaintiffs refused to sign the formal contract), and that performance by plaintiffs was excused by a certain clause in the specifications called the "Delivery Prevented" clause.

Plaintiffs also complain of the refusal of the court to admit the specifications in evidence. An examination of the record shows that due to a colloquy between counsel and a confusion between references to the specifications and the advertisement for bids, the court never ruled on the offer of the specifications, and plaintiffs never asked for a ruling. Apparently the case was considered in the court below as if the "Delivery Prevented" clause (the only part of the specifications pertinent to the questions involved on this appeal) had been admitted. In view of this circumstance and our decision here, it is not necessary to consider plaintiffs' contention that prejudicial error was committed by the court's failure to admit the specifications in evidence.

Did the Acceptance of the Bid Constitute an Enforceable Contract?

Plaintiffs have cited no California cases upon this subject, relying solely upon three cases from other jurisdictions. L. G. Arnold, Inc., v. City of Hudson, 215 Wis. 5, 254 N.W. 108; Pennington v. Town of Sumner, 222 Iowa 1005, 270 N.W. 629, 109 A.L.R. 355; and United States v. Purcell Envelope Co., 249 U.S. 313, 39 S.Ct. 300, 63 L.Ed. 620. The City of Hudson and the Town of Sumner cases are mainly based upon the holding in the Purcell Envelope case, which in turn is based upon the case of Garfielde v. United States, 93 U.S. 242, 23 L.Ed. 779. In the latter case, pursuant to an advertisement of the Postmaster General, one Garfielde bid to convey the mails between Port Townsend and Sitka, Alaska, for a certain sum "in safe and suitable steamboats, 'with celerity, certainty, and security.'" His bid was accepted. Before a formal contract could be prepared the Postmaster General awarded the contract to another person. Garfielde brought suit. The court held that "the proposal on the part of Garfielde, and the acceptance of the proposal by the department, created a contract of the same force and effect as if a formal contract had been written out and signed by the parties," but that as under the regulations of the Postmaster General regulating bids of this type it was provided that the Postmaster General could cancel a contract at any time, upon paying a one month's pro rata compensation, Garfielde could only recover a sum equal to one month's compensation. Practically, what the case holds is that when a bid is accepted, the acceptor is bound by that acceptance and such a contractual relationship immediately comes into being between the bidder and acceptor that the latter cannot withdraw without being liable under the terms of that contract.

In United States v. Purcell Envelope Co., supra, 249 U.S. 313, 39 S.Ct. 300, 63 L.Ed. 620, the envelope company was the successful bidder under an advertisement calling for bids to supply the Post Office Department with stamped envelopes and newspaper wrappers for the ensuing four year period. A contract was drawn up and signed by the envelope company, but, due to a change in Postmaster Generals, the company was notified that its contract was cancelled. In the action brought for damages for breach of contract the court based its decision on the Garfielde case and held that a contract was consummated by the acceptance of the bid and gave judgment for a sum equal to the profit the envelope company would have made had the contract been carried out. It will be noted that again here the court is holding the government to its acceptance of the bid and is referring only to the obligation of the acceptor.

In L. G. Arnold, Inc., v. City of Hudson, supra, 215 Wis. 5, 254 N.W. 108, Arnold company was the successful bidder on certain paving for the city. Both specifications and a copy of the contract on file in the clerk's office were referred to in the bid. They provided that the gravel to be used should come from a nearby gravel pit. After acceptance of the bid a new contract was drawn providing that the gravel should be obtained from a source seventy-five miles away. Arnold company signed the contract but sent a letter with it to the city, that it expected the city to reimburse in for the increased cost. The city did not sign the contract. Arnold company proceeded with and finished the work. It then sued the city for the increased cost of procuring this gravel. Based principally upon the Garfielde and Purcell Envelope cases the court held that the acceptance of the bid by the city constituted a contract, and that Arnold company should have stood on its rights and insisted that the city enter into the formal contract referred to in the call for bids which provided the close-in source of gravel; that the city was not obligated to pay for a variation from that contract.

In Pennington v. Town of Sumner, supra, 222 Iowa 1005, 270 N.W. 629, 109 A.L.R. 355, in discussing a clause in the contract as entered into between the successful bidder and the town, which required a different pumping test than was required in the original specifications as referred to in the call for bids, the court stated that the acceptance of the bid constituted a binding agreement which could be enforced by the town, even though no formal contract had been signed, basing its decision mainly on the three cases above discussed.

In none of the cases cited by plaintiffs was there a situation where the bidder had refused to sign up or to proceed with his contract, or to put up the required bond; nor where a forfeit of his guarantee had been declared. They were either situations in which the acceptor was trying to get out of his bargain, or the successful bidder was trying to enforce conditions not contemplated in the original bid.

In State v. Howell, 3 Boyce, Del., 387, 84 A. 871, the distinction between the situation in the cases cited by plaintiffs and the case at bar is shown. There the court refers to the rule above mentioned and holds that that rule does not apply where a deposit is required to be made to guarantee the entry into a contract by the successful bidder, for, says the court (84 A. at page 876): "The provision in the ordinance requiring that the bidder shall furnish a certified check for two hundred dollars to guarantee the execution of the contract *could have no purpose or meaning if a written contract was not required.* It will be observed that such check is not demanded to guarantee the *performance* of the contract. A bond must be given for that purpose. The expressed purpose of the check is to secure the *execution* of the contract." (First emphasis added.)

Plaintiffs have cited no case in which, as here, charter provisions requiring a formal contract are discussed.

The Oakland city charter provides (sec. 126, Stats. 1911, p. 1623, as amended by Stats. 1943, p. 3318): "The check accompanying the accepted bid shall be held by the City Clerk until the contract, as hereinafter provided, has been entered into, and the bond accompanying the same, as hereinafter provided, is approved and filed, whereupon said certified check shall be returned to said bidder.

"If said bidder fails or refuses to enter into the contract, as hereinafter provided, then the certified check accompanying his bid, and the amount therein mentioned, shall be forfeited to the City, and shall be collected and paid into the General Fund. *Neither the City Council nor any Board shall have the power to relieve from or remit such forfeiture.*" (Emphasis added.)

Section 125 (Stats. 1911, p. 1623) provides: "All contracts shall be drawn under the supervision of the city attorney. *All contracts must be in writing,* executed in the name of the city of Oakland by an officer or officers authorized to sign the same, and must be countersigned by the Auditor, who shall number and register the same in a book kept for that purpose." (Emphasis added.)

And section 128 (Stats. 1911, pp. 1624, 1625) provides: "All contracts shall be signed in triplicate * * *

"At the same time with the execution of the contract the contractor shall execute to the city and deliver to the auditor a bond * * * for the faithful performance of the contract."

[1] Plaintiffs are charged with notice of the city's charter provisions.

In Times Publishing Co. v. Weatherby, 139 Cal. 618, 73 P. 465, plaintiff's bid for printing was accepted by the council of the city of Eureka. Although no formal contract was entered into, plaintiff did the work, but payment for it was refused by the city treasurer on the ground that no contract had been entered into as required by the city charter. A section of the charter provided: "The city of Eureka shall not be, and is not, bound by any contract, or in any way liable thereon unless the same is made in writing * * * and * * * signed by the mayor * * *." The court in holding that the city was not liable stated (139 Cal. at page 619, 73 P. at page 466): "* * * we see no way to protect appellant from the harsh consequences which follow the neglect to have the contract executed as required by the charter."

In Frick v. City of Los Angeles, 115 Cal. 512, 47 P. 250, for some reason which does not appear, the mayor of Los Angeles failed to sign the contract awarded to Frick. The charter had a provision similar to the one in the Eureka charter above mentioned. Frick contended, first, that in equity the contract must be regarded as if the mayor had signed, and secondly, that such a charter provision is in conflict with the general law of the state concerning the manner of creating contracts and therefore unconstitutional. The court held the charter provision constitutional and that equity could not interfere as the charter provided the only mode in which the city could become bound.

In Milligan v. City of Alhambra, 110 Cal. App. 523, at page 525, 294 P. 404, 405, applying the principle that the charter provisions must be followed, the court said: "The charters of municipal corporations generally provide the manner in which contracts of the municipality may be made and the charter of the city of Alhambra so provided. Stats.1915, p. 1740. It is generally held that, where the mode of making municipal contracts is prescribed and limited by law, such mode is exclusive, and the municipality can make a contract only in the manner provided." Citing McQuillin on Municipal Corporations, 2d ed., sec. 1281, and cases.

In Fountain v. City of Sacramento, 1 Cal. App. 461, at page 467, 82 P. 637, 639, the court stated: "There may be an apparent injustice in some cases in adhering strictly to charter provisions. Individuals may suffer, but it is better so than that entire communities should be deprived of the protection given them against infractions of the law by which they are governed, especially where the loss falls upon one who has knowingly taken upon himself the risk of loss."

[2] It would be a most unusual situation if the court should hold that parties who refuse to enter into a contract or to proceed with the work which under their bid they were required to do, could claim that the city was bound to them while they refused to be bound to it. Particularly is this so as they have refused to put up the required bond for faithful performance.

Even assuming that there was a contract as claimed by plaintiffs, the "Delivery Prevented" clause would not excuse plaintiffs' nonperformance. It reads as follows: "There shall be no obligation on the part of the contractor to perform work or deliver supplies and materials called for in the specifications, if prevented or hindered by act of God, fire, strike, look-out, commandeering of raw materials, products or facilities by civil or military authority, or by other cause beyond the control of the contractor."

In support of his contention on that point plaintiffs cite Ranney-Davis Mercantile Co. v. Shawano Canning Co., 111 Kan. 68, 206 P. 337, where a portion of defendant's crop was commandeered by the United States government *after the contract was entered into.*

[3, 4] Plaintiffs were presumed to know at the time they filed their bid that it was necessary to obtain priorities in order to be able to buy materials, and that even with priorities, materials were difficult to obtain, and that probably the last enterprise to which priorities would be granted in war time was one operating pleasure boats. This condition had existed for practically three years. While it is true that the defendant city also knew of this situation, it probably believed that there might be concerns who owned the necessary equipment (the concern currently operating the con-

cession was one which actually did), and who would not need to apply for priorities or for materials. Plaintiffs could not bid for the concession to provide electrically operated pleasure boats and then refuse to enter into a contract on the ground that what had happened was what they should have known would happen—they would be denied priorities. Krulewitch v. National Importing & Trading Co., 195 App.Div. 544, 186 N.Y.S. 838; Cameron-Hawn Realty Co. v. City of Albany, 207 N.Y. 377, 101 N.E. 162; Richards & Co. Inc. v. Wreschner, 174 App.Div. 484, 156 N.Y.S. 1054, 158 N.Y.S. 1129. In Krulewitch v. National Importing & Trading Co., supra, the court says at page 840 of 186 N.Y.S.: "The contract was not entered into before the commencement of the war. The World War had been raging for nearly four years. Interference with the commerce of the world and the ordinary facilities of obtaining and transporting merchandise was well known. Nevertheless the defendant bound itself to sell and deliver this particular merchandise during a limited period, and did not shield itself by proper conditions or qualifications from the effects of that war upon its engagement. * * *

"'There are many extrinsic facts surrounding every business transaction, which have an important bearing and influence upon its results. Some of them are generally unknown to one or both of the parties, and, if known, might have prevented the transaction. In such cases, if a court of equity could intervene and grant relief, because a party was mistaken as to such a fact, which would have prevented him from entering into the transaction, if he had known the truth, there would be such uncertainty and instability in contracts as to lead to much embarrassment. As to all such facts, a party must rely upon his own circumspection, examination, and inquiry; and, if not imposed upon or defrauded, he must be held to his contracts. In such cases, equity will not stretch out its arm to protect those who suffer for the want of vigilance.' Dambmann v. Schulting, 75 N.Y. 55, 64."

Plaintiffs' last point is that the forfeiting of the deposit here improperly exacted a penalty or liquidated damages, and relies on Fox Chicago R. Corporation v. Zukor's, 50 Cal.App.2d 129, 122 P.2d 705, in which the court held invalid in the modification of of a lease reducing the rental from that in the original lease, a clause to the effect that in the event of default, lessee would be obligated to pay the higher rental stated in the original lease. This was a penalty or liquidated damages which did not come under the exception "when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage." Civil Code, sec. 1671. That was a suit to enforce the forfeiture, and not, as here, for relief from forfeiture.

[5] The right of municipalities to require guarantee deposits to accompany bids, and to forfeit them in the event of the failure or refusal of the successful bidder to enter into the contract, has long been upheld. 44 C.J. p. 337, sec. 2505, and cases there cited, including Mill Valley v. Bonding etc. Co., 68 Cal.App. 372, 229 P. 891.

Plaintiffs argue that defendants here presented no evidence showing that they were damaged in any way and allege that the retention of the deposit was unlawful and unjust enrichment.

In Booth v. County of Los Angeles, 124 Cal.App. 259, 12 P.2d 72, 73, cited on this point, property was deeded to the defendant for use as a road, to revert to the grantor or his heirs if not so used. In refusing to quiet title in plaintiff, since the property was found to be used for the purpose for which it was granted, the court said: "The established rule is that, where the right to a forfeiture is created by contract or by law, it has always been considered that it was necessary to restrain it to the most technical limits of the terms and conditions upon which the right is to be exercised."

[6] It would seem that even restricting section 126 of the Oakland city charter to its most technical limits here, a forfeiture would be permitted. The terms are mandatory and explicit and prohibit any relief from forfeiture.

Ballard v. MacCallum, 15 Cal.2d 439, 101 P.2d 692, 695, the other case cited by plaintiffs, involved a trust whereby the beneficiary was required to make payments to the trustor and on failure to make them promptly, would forfeit her interest. She failed to make one payment on time. The court adopted a construction of the contract which avoided a forfeiture, saying, though not relying thereon, that "* * * equity will relieve even against an express provision for forfeiture."

Finally, plaintiffs quote 12 Cal.Jur. p. 633, to this effect: "Forfeitures are never favored by courts of law or equity, and are never enforced if they are couched in ambiguous terms. Statutes and contracts are construed strictly against forfeitures or as liberally as possible to prevent them. A statute declaring a forfeiture is not to be extended beyond its direct meaning by implication, unless such implication is imperatively necessary by reason of the subject matter or terms of the statute. A forfeiture for breach of a condition in a contract is enforced only when there is such a breach shown as it was the clear and manifest intention of the parties to provide for."

The latter would not seem to apply to section 126 of the Oakland charter. Its terms are not ambiguous and its meaning is clear and direct.

[7] As pointed out by defendants, the case here is not one brought to enforce a forfeiture but to relieve against a forfeiture, and the burden of proof is on plaintiffs to plead and prove matters entitling them to equitable relief from such forfeiture, which they have not done.

Parsons v. Smilie, 97 Cal. 647, 32 P. 702, covers the cases in which equity will intervene and the pleadings and proof necessary to justify relief from forfeiture. Property was deeded with a condition subsequent that it be used as a lumberyard for five years. It was held forfeited because it was so used for less than a year. The court stated (97 Cal. at pages 652, 653, 654, 32 P. at page 703): "I do not in the least controvert the general doctrine that equity will not render its aid to *enforce* a forfeiture for breach of condition subsequent in a deed, but the question presented is how far equity shall interfere *to defeat* a forfeiture for the violation of such condition. * * * The general doctrine is that equity will relieve where the thing may be done afterwards, or compensation can be made for it, but that unless a full compensation can be given, so as to put the party in precisely the same situation, a court of equity will not interfere, for such jurisdiction would be arbitrary. Washburn (2 Real Property, p. 23) says: 'And the only cases where equity interposes as to such conditions are where the failure of performance has been the effect of accident, and the injury is capable of compensation in damages which the court has the means of measuring, and where the grantor can be made perfectly secure and indemnified, and can be placed in the same situation as if the occurrence had not happened. This applies to cases where the condition is for the payment of money at a particular time, and compensation for the delay can be measured by the interest during that time. But where the condition is for the performance of a collateral act the rule is different, as the court has no standard by which to measure damages.' * * * The same author again says (p. 23): 'But if the act be willfully done, or one for which the court has no certain rule by which to measure the damages, beyond their own arbitrary judgment in the matter, equity will not relieve."

12 Cal.Jur. p. 638 states: "There can be no leaning of the court against a forfeiture which is intended to secure the construction of a work in which the public is interested, where compensation cannot be made for the default of the party; nor where the forfeiture is imposed by positive law. To refuse a forfeiture in the latter case would be a direct contravention of the legislative will."

[8] An examination of plaintiffs' complaint leaves considerable doubt as to on just what theory plaintiffs are proceeding. They nowhere allege facts upon which they might ask for relief from forfeiture nor do they offer to make "full compensation to the other party" as required by section 3275 of the Civil Code for relief in case of forfeiture. The complaint does not allege that the acceptance of their bid constituted a contract between plaintiffs and the defendants. It apparently proceeds on the theory

that defendant should have permitted the withdrawal of plaintiffs' bid as requested. They say (paragraph VIII of the complaint): "That despite the declaration of plaintiffs made to said Board of Playground Directors of plaintiffs inability to fulfill the conditions pertaining to said contract, due to the prevailing war conditions, the said Board declared that the plaintiffs bid had been accepted; that they were in default by reason of their failure to execute said Concession Agreement * * *." Apparently, the lower court, in spite of the allegations of the complaint, treated the case as an action for relief from a forfeiture. Plaintiffs' failure to offer to comply with section 3275 of the Civil Code would bar any right to recovery. Christin v. Story, 119 Cal.App. 326, 333, 6 P.2d 301.

It would be very difficult to fix the money value of the city's loss. Among the factors involved are the following: First, of course, would be the cost of readvertising (and even this amount plaintiffs have not offered to pay); secondly, there would be the delay in getting a new contract; thirdly, the lower returns the city would probably receive under a new contract, now that the highest bidder had been eliminated; fourthly, the fact that possibly in view of their experience at the first bidding, the other bidders would not bid at all.

Provisions requiring a deposit accompanying a bid for city contracts, or for forfeiture thereof, are necessary as a matter of public policy to protect the public interests. If, as here, a bidder were allowed without loss to himself to withdraw his bid after the bids have been publicly opened, fraudulent practices would develop. The body awarding contracts could agree to release a favored contractor if it turned out that his proposal was low as compared to other bids. Moreover, any bidder who found that in comparison with the other bidders, his bid was quite low, could withdraw his bid, and the city would thereby lose the value of competitive bidding and be forced to pay the prices of higher bidders with no compensation to itself for the loss sustained.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concur.

Hearing denied; SCHAUER, J., dissenting.

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79 Cal.App.2d 651

Ex parte PLUMMER.

Cr. 2475.

District Court of Appeal, First District, Division 1, California.

May 15, 1947.

1. Criminal law 🔑317

On preliminary hearing, magistrate who held defendant to answer for trial could consider defendant's failure during hearing to explain or deny by his testimony any evidence against defendant in determining existence of sufficient cause to believe defendant guilty. Pen. Code, §§ 871, 872; Const. art. 1, § 13.

2. Criminal law 🔑238

Failure of defendant on preliminary hearing before magistrate to testify because of advice of counsel not to make any statement did not constitute reasonable or probable cause to hold defendant to answer for trial in Superior Court for murder. Pen. Code, §§ 858, 871, 872.

3. Criminal law 🔑238

Evidence before a magistrate at a preliminary examination need not be such as would require a conviction. Pen. Code, §§ 872, 1487(7).

4. Criminal law 238

Statement of a codefendant to police inspector that codefendant fought with deceased and that codefendant was so busy that he didn't know in what part of the fight defendant had participated and that defendant and codefendant were together at the time of the fight, constituted "sufficient cause" to believe defendant guilty of the homicide allegedly resulting from the fight to require magistrate to hold defendant for trial for murder. Pen. Code, §§ 871, 872, 1487(7).

See Words and Phrases, Permanent Edition, for all other definitions of "Sufficient Cause".

5. Criminal law 🔑238

"Sufficient cause" within meaning of statute requiring magistrate to hold defendant to answer for trial for alleged public offense if preliminary examination shows commission of a public offense and there is sufficient cause to believe defendant guilty of the offense, means reasonable or probable cause. Pen. Code, §§ 872, 1487(7).

6. Criminal law 🔑238

Under rule that "sufficient cause" within meaning of statute requiring magistrate to hold defendant to answer for trial for alleged public offense if preliminary examination shows commission of a public offense and sufficient cause to believe defendant guilty of the offense means "reasonable or probable cause," reasonable or probable cause means such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion. Pen. Code, §§ 872, 1487(7).

See Words and Phrases, Permanent Edition, for all other definitions of "Reasonable or Probable Cause".

7. Criminal law 🔑698(1)

A rule of evidence not invoked is waived.

8. Criminal law 🔑696(2)

Where the inadmissibility of evidence is not discoverable in the question but appears in the answer, a motion to strike out the answer should be made.

9. Habeas corpus 🔑30(1)

Defendant who on preliminary examination did not object to admission in evidence of hearsay statement could not in habeas corpus proceeding after being held for trial for murder object that the hearsay statement was incompetent to establish sufficient cause for the order holding defendant to answer. Pen. Code, §§ 872, 1487(7).

10. Criminal law 🔑234, 245

The admissibility of evidence on preliminary examination is governed by the same rules as those governing admissibility at the trial, and proper objections should be made since, should occasion arise thereafter to test the sufficiency of the evidence to sustain an order holding defendant to answer, evidence received without objection will be considered even though, had objection been made, evidence should have been excluded by the magistrate.

11. Criminal law 🔑245

Defendant, by cross-examining police inspector on preliminary examination relative to statement which implicated defendant and testified by officer on direct examination, to have been made to officer by a codefendant, waived objection that the statement was hearsay. Pen. Code, §§ 872, 1487(7).

12. Habeas corpus 🔑3

Contention that district attorney's statement made to magistrate after evidence was admitted in preliminary hearing that defendant, who was subsequently held to answer, would never be convicted under the evidence was not ground for granting a writ of habeas corpus, since if the district attorney still held that opinion, a dismissal could be urged to trial judge by direct motion. Pen. Code, §§ 872, 1487(7).

13. Criminal law 🔑695(2)

Rule that if an objection to testimony is such that all parties understood the objection the objection does not fail as being insufficiently specific is not applicable where no reference to character of the testimony is made nor any motion made to strike the statement from the record.

14. Habeas corpus 🔑30(1)

Defendant's motion to dismiss preliminary hearing made in view of statement of district attorney to magistrate to effect that under the evidence defendant would not be convicted was not construable as an objection to hearsay testimony admitted into evidence so as to entitle defendant to claim in habeas corpus proceeding that the evidence was incompetent. Pen.Code, §§ 872, 1487(7).

15. Habeas corpus 🔑96

Introduction of hearsay evidence on preliminary examination before magistrate would not be reviewed in habeas corpus proceeding where no motion to strike the evidence from the record was made in magistrate's court. Pen. Code, §§ 872, 1487(7).

16. Criminal law 🔑1170(1)

Ruling, excluding testimony, will be sustained if its introduction was improper, although counsel do not state the correct grounds of objection, provided the correct grounds could not have been obviated.

17. Criminal law ⚿=238

Ruling of magistrate on preliminary hearing that evidence was sufficient to hold defendant to answer for trial for murder was required to be sustained where the evidence was sufficient even though the reason assigned was erroneous. Pen. Code, §§ 872, 1487(7).

◆

Proceeding in the matter of the application of Dave Plummer for a writ of habeas corpus.

Writ discharged.

Joseph I. McNamara, of San Francisco, for petitioner.

Fred N. Howser, Atty. Gen., and Clarence A. Linn, Deputy Atty. Gen., for respondent.

WARD, Justice.

This is a petition for a writ of habeas corpus on the ground that there was no competent evidence submitted to the committing magistrate sufficient to constitute cause to hold petitioner to answer (Penal Code, secs. 871, 872) for trial in the superior court on a charge of murder.

The petitioner herein did not testify at the preliminary hearing. The record discloses that the evidence adduced was (a) a statement made to a police inspector by a codefendant out of petitioner's presence, (b) petitioner's statement to the inspector that he was not guilty of murder, (c) petitioner's statement that he had been advised by his attorney not to answer any questions propounded by the police, and (d) the fact that petitioner and his codefendant lived together in a certain San Francisco hotel and both checked out of the hotel after the murder was committed.

The evidence of the autopsy surgeon showed that one George F. Erickson had received many lacerations and contusions on the face and head resulting in a swelling of the brain, followed by hemorrhages. Technically the cause of death was given as "concussion of the brain with multiple petechial hemorrhages of the brain system; in other words, death was due to hemorrhages which were secondary to physical violence." In brief, blows received by Erickson, according to the autopsy surgeon, caused his death on or about February 21, 1943.

The testimony of one of the investigating inspectors in the matter of Erickson's death revealed that when Erickson was found by the police in one of the city "squares" there was missing a wrist watch. The watch was located on January 26, 1947, shortly after it had been pawned in 1947. The recovery of the watch was followed by the apprehension of David Plummer, the petitioner herein, and Alfred A. Fox. The police authorities interviewed Fox who stated in substance that he and Plummer, about midnight on the date subsequently alleged in the complaint, had taken a cable car ride to the top of one of San Francisco's hills. Fox stated that Erickson approached them, asked for a match and made some gestures that indicated that Erickson was on the queer side. The police inspector testified that Fox "stated that the fight between he and the deceased was quite severe and that he was so busy he did not know as to what action or part of the fight Plummer had participated in. He stated that the following day his hand was quite swollen from striking the deceased. When they left the deceased was against the tree on the north pathway that runs east and west to Washington street. He stated that when he left the scene of the crime both he and Plummer ran out of the square on Gough street and he had with him the deceased's watch and that he had pawned that watch in San Pedro." After the murder Fox left San Francisco and "went to sea," whereas Plummer traveled to the State of Washington.

The police inspector testified: "I spoke to the defendant Plummer after he was brought back from Port Orchard, Washington, and he refused to either affirm or deny any participation in the crime, stating that it was upon advice of counsel that he did not wish to make any statement. He further stated that he had been living with Fox in the Padre Hotel here in San Francisco and he also refused to deny the fact that he was up in Layfayette Square on the night that this crime was committed, stating it was upon advice of counsel he was refusing to do so." On cross-examination by Plummer's counsel, the inspector, referring to Plummer, testified further: "He stated to me that he was not guilty of the murder."

[1] The committing magistrate concluded that petitioner "should explain his part of it." Although the committing magistrate was entitled to consider petitioner's failure during the preliminary hearing to explain or deny by his testimony any evidence of facts in the case against him (art. I, sec. 13, Const.Calif.), the question remains whether such failure to testify constitutes reasonable or probable cause to hold petitioner to answer for trial in the superior court for murder.

[2] This question may be resolved by a consideration of two sections of the Penal Code. Section 688 provides that "no person can be compelled, in a criminal action, to be a witness against himself." (Art. I, sec. 13, Const.Calif.) Section 858 provides that "when the defendant is brought before the magistrate upon an arrest, either with or without warrant, on a charge of having committed a public offense, the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings." The committing magistrate knew that petitioner had been advised by counsel not to make any statement. Petitioner's duty to "explain his part of it" is to be determined subject to the statutory rule that an attorney has the right to advise his client not to answer questions that may be asked him. An attorney may well conclude that silence will best serve an accused on the main accusation and on the many minor details upon which he may be interrogated and inadvertently give inconsistent answers. Unless the rule under our present procedure that an attorney's advice must be recognized and honored is continued, then the provision of Penal Code, sec. 858, that an accused is entitled to the advice of counsel in every stage of the proceeding would be a farcical administration of criminal law.

Furthermore, in People v. Simmons, 28 Cal.2d 699, 715, 172 P.2d 18, 27, it is recognized that "advice of counsel, admonition as to silence, warning against self-incrimination, a belief that the accused will serve his best interests by silence" are circumstances to be considered in determining whether "a reply is called for and the defendant is free to speak spontaneously."

[3-6] The next question is whether the statement made by Fox, the co-accused, to the police inspector is evidence sufficient to rule that there was reasonable and probable cause for an order holding petitioner to answer for a trial in the superior court. As said in People v. Nagle, 25 Cal.2d 216, 222, 153 P.2d 344, 347: "It must be remembered that the evidence before a committing magistrate at a preliminary examination need not be such as would require a conviction. Section 872 of the Penal Code provides that the defendant must be held to answer if 'it appears from the examination that a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof.' Section 1487 (7) of the Penal Code provides that a party is entitled to discharge upon habeas corpus proceedings where he has 'been committed on a criminal charge without reasonable or probable cause'; 'sufficient cause,' therefore, means no more than that. People v. Putnam, 20 Cal.2d 885, 129 P.2d 367; Cleugh v. Strakosch, 9 Cir., 109 F.2d 330; In re Martinez, 36 Cal.App.2d 687, 98 P.2d 528. 'Reasonable or probable cause' means such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion of the guilt of the accused." See opinion of Marshall, C. J., sitting as committing magistrate, United States v. Burr, 25 Fed.Cas. page 2, 3, 12, No. 14,692a. The foregoing question must be answered in the affirmative.

Petitioner argues that such evidence is hearsay. He urges that a commitment based thereon is unauthorized, citing In re Martinez, 36 Cal.App.2d 687, 98 P.2d 528. To this respondent replies that as the police inspector's testimony was admitted without objection, and as no motion was made to limit its effect to the defendant Fox, it is to be considered and given its natural probative effect as if it were in law admissible.

[7-10] It is generally recognized that "a rule of Evidence not invoked is waived." (I Wigmore, Evidence, 321; accord, 2 Cal. Jur., sec. 84, p. 267.) Where the inadmissibility of evidence is not discoverable in the question but appears in the answer, a motion to strike out the answer should be made. People v. Scalamiero, 143 Cal. 343, 76 P. 1098. Had Plummer been convicted of murder he could not question the sufficiency of hearsay statements admitted without objection to sustain his conviction. Powers v. Board of Public Works, 216 Cal. 546, 15 P.2d 156; Mercantile Trust Co. of San Francisco v. Sunset, etc., Co., 176 Cal. 458, 461, 168 P. 1036; Weiss v. Bank of America, 57 Cal.App.2d 892, 135 P.2d 584. It follows that he cannot now object that the statement made by Fox to the police inspector is incompetent to establish that there is sufficient cause for an order holding him to answer. As said in Fricke, California Criminal Procedure, 74: "The admissibility of evidence is governed by the same rules as those governing admissibility at the trial and proper objections should be made since, should occasion arise thereafter to test the sufficiency of the evidence to sustain an order holding the defendant to answer, evidence received without objection will be considered even though, had objection been made, the evidence should have been excluded by the magistrate." Respondent successfully distinguishes In re Martinez, supra, by pointing out that there timely objection was made to the admission of the hearsay evidence, such objection was sustained, and the testimony was limited to defendants other than Martinez.

[11] Petitioner argues that it was understood by all parties during the preliminary examination that the evidence in controversy was hearsay to be disregarded by the court. If there was such an understanding it does not appear in the record. On the contrary, the record supports the conclusion that Plummer waived the right to object to the hearsay statements of Fox, since his counsel cross-examined the police inspector as follows:

"Q. I believe you said that Fox told you when you interrogated him that he was so busy * * * that he doesn't recall what Plummer was doing? A. That is correct.

"Q. In other words, he didn't implicate Plummer in the actual fight at all, merely said he didn't know what he was doing? A. He stated that he didn't know whether or not Plummer had struck the deceased."

The effect of cross-examining one under whose examination hearsay statements were offered is considered in People v. Beltowski, 71 Cal.App.2d 18, 24, 162 P.2d 59, 62: "It is claimed that the admission in evidence of Castropil's statement was prejudicial error. The statement incriminated both the appellant and Swanson. It showed that Beltowski had the pistol and that Swanson took the money out of the cash register while Castropil stood in front of Lazootin 'so they wouldn't see the man was being held up from the street.' This, of course, was damaging to the appellant. Counsel who represented all three defendants objected to the introduction of the statement as to Swanson but not as to this appellant. When it was being offered the defense started to make a general objection, whereupon the prosecution interrupted with the suggestion that the defense had the right to cross-examine the inspector (under whose examination it was being identified and offered). Counsel adopted this suggestion and carried on a rather extensive preliminary cross-examination as to the circumstances under which the statement was obtained from Castropil. It was after this that the statement was read and introduced, and it went into evidence without any objection on behalf of the appellant. The corpus delicti had been proved at the very outset of the trial. As already stated, the appellant had not signed the statement, nor acceded to anything it contained, and he flatly denied participation in the robbery. Nevertheless, there was no objection and we see no error in its admission."

Not only did petitioner waive any objection to the hearsay evidence by cross-examination of the police inspector giving it, but after the introduction of the evidence no motion to strike it from the record, nor any reference to its being objectionable, was made. Petitioner's counsel merely said: "There is definitely nothing to hold Plummer in here."

[12] Petitioner argues that the district attorney conceded that the statement made by Fox to the police inspector was incompetent. He relies upon the district attorney's statement which was made four days after the evidence was admitted. It reads: "I might say, Your Honor, that there is no evidence in this record, other than the statement of one of the defendants, that Plummer, the defendant, was present. There is no evidence that he did anything at any time and I feel that it would be against the interest of justice to hold him. I don't think he would ever get to trial and I feel certain he would never be convicted." The gist of the district attorney's remarks is: "I feel certain he would never be convicted." If this opinion still prevails, it is an easy matter, not by means of habeas corpus, but by a direct motion, to urge a dismissal to the trial judge.

[13] Petitioner urges that although an objection should be sufficiently specific, if the objection is such that all parties understood the objection "it will not be said that the objection failed of its purpose." People v. Boggess, 194 Cal. 212, 232, 228 P. 448, 456. Petitioner relies upon People v. Bob, 29 Cal.2d 321, 175 P.2d 12 and People v. Darby, 64 Cal.App.2d 25, 148 P.2d 28. The difference between those cases and the present one is that there objections were made from which it might be construed that the objection referred to hearsay testimony. In this case after the presentation of the evidence no motion to strike Fox's statement from the record, nor any reference to its being objectionable, was made; furthermore, on resumption of the hearing four days later, petitioner still made no objection to the character of the testimony.

[14] After the district attorney made the statement before set forth, defendant's attorney stated: "In view of that, Your Honor, in view of the statement of the Assistant District Attorney, I will make a motion to dismiss as to Plummer." This was the first affirmative action of the defendant and is not in any way an objection to the evidence.

[15] Petitioner strongly urges that the committing magistrate did not consider hearsay evidence. In this matter we are bound by the record on file. That it was apparent that the court was considering the hearsay testimony is shown by the court's statement made thereafter: "They were in this together, whatever it was, they were together." The only basis for this statement was the hearsay evidence. The defendant was then and there put on notice that no matter what the district attorney had said, the hearsay evidence was being applied against him. He should have moved to strike it from the record, and, failing to do so, he cannot prevail in his claim that the evidence was incompetent.

[16, 17] Just as the ruling of a trial court, excluding testimony, will be sustained if its introduction was improper, although counsel do not state the correct grounds of objection, provided the correct grounds could not have been obviated (Spottiswood v. Weir, 80 Cal. 448, 22 P. 289; Miller v. Van Tassel, 24 Cal. 458, 459), so here the committing magistrate's conclusion that there is sufficient cause to believe the defendant guilty may be sustained although the reason assigned, namely, that Plummer "should explain his part of it," is erroneous (People v. Simmons, 28 Cal.2d 699, 172 P.2d 18), since the unobjected to hearsay evidence shows sufficient cause.

The writ heretofore issued is discharged.

PETERS, P. J., and BRAY, J., concur.

79 Cal.App.2d 562

MAHLSTEDT v. FUGIT.

Civ. 15692.

District Court of Appeal, Second District,
Division 2, California.
May 8, 1947.

1. Appeal and error 🔑1011(1)

District Court of Appeal would not disturb finding on conflicting evidence.

2. Good will 🔑6(1)

Where defendant sold to plaintiff all saleable goods, all tools and equipment used in the manufacture of orchard heaters, and all literature, plates, cuts and half tones used in advertising defendant's business, the good will adhered to the property sold and was transferred with it. Business and Professions Code, §§ 14100–14103.

3. Evidence 🔑65
Sales 🔑54

The law in force at time contract to sell a business was executed became a part of the contract and parties were presumed to have acted with knowledge of the law.

4. Good will 🔑6(1)

If contract for a sale of a business including good will under which seller agrees to refrain from carrying on a similar business is unrestricted as to territory or includes more territory than that provided by law, it will be construed to be operative within the county or portion thereof in which the business is located and if the contract is indeterminate, it will be construed to cover the time permitted by law. Business and Professions Code, §§ 16600, 16601.

5. Injunction 🔑61(2)

Under contract for sale of defendant's business to plaintiff which required defendant to refrain from entering into same business or acting as salesman for any other company engaged in same business but which did not state territory in which defendant was to refrain from competing with plaintiff, defendant was properly enjoined from competing in county in which defendant had carried on the business before the sale and in which plaintiff continued the business after the sale. Business and Professions Code, §§ 16600, 16601.

6. Injunction 🔑204

Where because of a contract of sale of a business under which seller agreed to refrain from entering into the same business or acting as salesman for any other company engaged in same business defendant seller was enjoined from competing with plaintiff's business in a specified county, that part of injunction restraining seller from using the seller's name in that county was surplusage and unobjectionable.

7. Trade-marks and trade-names and unfair competition 🔑35

Where contract for sale of a business including good will required seller to refrain from entering into the same business or from acting as representative of any other company engaged in same business but did not specifically transfer the right to use the seller's name in connection with the business, buyer did not acquire right to use seller's name, so that permission given by seller to another to use seller's name was not a violation of the sale agreement. Business and Professions Code, §§ 14100–14103.

◆

Appeal from Superior Court, Los Angeles County; Raymond McIntosh, Judge.

Suit by J. F. Mahlstedt against C. A. Fugit to restrain defendant from entering into or conducting any orchard heating business. From judgment granting an injunction, defendant appeals.

Judgment modified and affirmed.

Merriam, Rinehart & Merriam, of Pasadena, for appellant.

W. P. Smith, of Los Angeles, for respondent.

WILSON, Justice.

Defendant has appealed from a judgment granting an injunction restraining him for a period of ten years after May 6, 1941, in Los Angeles County, (1) from entering into or conducting any orchard heater business, either as manager or owner, and from soliciting or diverting any of plaintiff's orchard heater business or customers; (2) from acting as salesman or representative of any company or person other than California Orchard Heater Company, the fictitious name under which plaintiff was doing business; (3) from using or permitting the use of the name "C. A. Fugit", "Fugit", "Fugit Smokeless Orchard Heater Company" or "Fugit Smokeless Heater" in connection with the business of manufacturing or conducting any orchard heater business; (4) from advertising or causing to be advertised in any manner any of said names.

On May 6, 1941, appellant and respondent entered into an agreement in writing reading as follows:

"This agreement made this sixth day of May 1941 between C. A. Fugit, of Alhambra, Calif., hereinafter known as the 'Seller' and J. F. Mahlstedt, of Los Angeles, Calif., hereinafter known as the 'buyer' wherein both the buyer and the seller hereby agree to the hereinafter stipulated terms of this agreement wherein the seller agrees to sell and transfer to the buyer and the buyer agrees to accept the following items of property and for such transfer agrees to pay to the seller the sum of $5,000.00 as follows: $2,000.00 on the signing of this contract, and the balance of $3,000.00 at the rate of $1.00 per pipe line heater when sold whether it be a Fugit type or a California Orchard Heater type at the selling price established by the California Orchard Heater Company.

"On payment of the initial sum of $2,000.-00 the seller agrees to release and deliver to buyer free and clear of all incumbrances, the following articles:

"All salable goods an hand as of May 3, 1941 as used and sold by the seller in the carrying-on of the business known as the Fugit Smokeless Orchard Heater Company.

"All tools and equipment on hand as of May 4, 1941 as used for the manufacture and installation of pipe line orchard heater systems, including 1 tractor, 1 trailer for tractor, 1 pipe bending machine, 1 flaring machine and all miscellaneous tools, two generators, hose, gauges complete.

"All literature, plates, cuts and half tones used in advertising. Seller also agrees to assign to buyer all patents relative to the Fugit type of orchard heaters.

"Seller agrees to render to buyer a complete list of all persons for whom seller has installed pipe line orchard heaters.

"Seller agrees to refrain from entering into the orchard heater business as a manufacturer or owner in whole or in part, for a period of ten years or to act as a salesman or representative of any orchard heater company other than the California Orchard Heater Co.

"The Buyer hereby agrees that the seller shall act as agent for the sale of pipe line heaters and shall sell only at the list prices established by the buyer and on all sales made by the buyer and on all sales made he shall receive a commission of 30 cents, on each heater sold by him.

"Seller agrees to assume all liabilities of the Fugit Orchard Heater Co., and also agrees to release any and all claim he might have in plates, patterns, castings, dies or other stock now used or in the possession of the California Orchard Heater Co.

"This agreement made this sixth day of May 1941.

"This agreement consists of two pages."

The consideration provided for in the contract was paid by respondent and he took possession of the personal property described in the agreement. In August, 1945, appellant entered into an arrangement or association with one Wm. H. Fabry who was preparing to manufacture orchard heaters in Los Angeles County and to market them throughout the citrus districts of California. Advertisements appeared in a magazine called California Citrograph published in August and September, 1945, and January, 1946, reciting that appellant was associated with the Fugit-Fabry Company and stating that the company was prepared to furnish replacement parts for orchard heating systems already installed or new systems. The magazine is extensively circulated in the citrus districts of California and is read by citrus growers and by merchants dealing in orchard heaters. Following the publication of said advertisements respondent brought this action resulting in the injunction above outlined.

[1] The court found that appellant sold all his property connected with his business and that the good will of the business was included in the sale of his assets. Appellant contends that this finding is not supported by the evidence. Appellant testified that while he and respondent were negotiating for the sale he placed a price of $7,000 on all the property used by him in his business; that respondent objected to the price and to satisfy the objections some of the property was eliminated from the sale and the sum of $5,000 was determined upon and the contract was executed. Respondent testified that he paid the price asked by appellant; that "there was no haggling" and that he received all salable property and merchandise that appellant possessed. Since the evidence is conflicting the finding in accord with respondent's testimony will not be disturbed.

[2] Appellant further contends that since the good will of appellant's business was not mentioned in the agreement it was not transferred and that appellant is entitled to continue in the business. "A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates." Civil Code, sec. 1647. When a person sells the contents of a store and agrees not to engage in the same business in the same city as long as the purchaser continues in business, the contract is construed as carrying with it the good will of the business. Shafer v. Sloan, 3 Cal.App. 335, 337, 85 P. 162; Streeter v. Rush, 25 Cal. 67, 72. If the property and business to which a good will adheres are transferred, the good will passes to the transferee as an incident although not specifically mentioned in the contract of sale. 38 C.J.S., Good Will, § 8, p. 955; 24 Am.Jur. p. 810, sec. 13. Since appellant sold to respondent all salable goods, all tools and equipment used in the manufacture of orchard heaters, and all literature, plates, cuts and half tones used in advertising, the good will adhered to the property sold and was transferred with it.

[3-5] The law in force at the time the contract was executed became a part of the contract and it is presumed that the parties contracted with knowledge of the law. On the date of the contract sections 1673 and 1674 of the Civil Code were in effect. These provisions with slight modifications are now sections 16600 and 16601 of the Business and Professions Code. As authorized by said sections of the Civil Code appellant, having transferred the good will of his business, agreed to refrain from carrying on a similar business for a period of ten years. He contends that that portion of his agreement was void because it did not, as required by section 1674, specify the territory within which he agreed not to carry on his business. If such a contract is indefinite as to time or territory the court will construe it in such manner as to make it valid. If the contract is unrestricted as to the territory in which the seller agreed to refrain from competition with the purchaser of his business, or if it includes more territory than that provided by law it will be construed to be operative within the county or portion thereof in which the business is located. City Carpet, etc., Works v. Jones, 102 Cal. 506, 512, 36 P. 841; Stephens v. Bean, 65 Cal.App. 779, 783, 224 P. 1022; General Paint Corp. v. Seymour, 124 Cal.App. 611, 614, 12 P.2d 990. And if the agreement is indeterminate as to the period of its operation, or is without time limit, the court will construe it to cover the time permitted by law. Gregory v. Spieker, 110 Cal. 150, 153, 42 P. 576, 52 Am.St.Rep. 70; Brown v. Kling, 101 Cal. 295, 298, 35 P. 995. In the instant case the contract did not specify the territory in which appellant agreed that he would not engage in business. Prior to the sale appellant's business had been carried on in Los Angeles County and after the sale respondent conducted his business in the same county. The court construed the contract to be limited to the territory in which the parties respectively had conducted their business and restrained appellant from infringing on respondent's business in Los Angeles County. We find no error in the restraint thus imposed on appellant.

[6] That part of the injunction restraining appellant from using the name Fugit in any form in the installation of orchard heaters is surplusage and unobjec-

tionable. Since he is restrained from doing any orchard heater business in Los Angeles County for the period prescribed in the contract he will obviously be unable to use his name in such business or to advertise in his own or any other name. Since the inhibition on the transaction of business and the use of appellant's name is limited to Los Angeles County he is free to engage in the same or a similar business in his own name anywhere outside the county.

After the signing of the contract appellant gave permission for the use of his name to Wm. H. Fabry in a similar business carried on by the latter. Respondent testified that when he purchased the business he especially desired to obtain the right to use the name of Fugit Orchard Heater because the name Fugit was valuable in connection with that business. The contract did not convey the right to use the name and there was no agreement that respondent should have such right or privilege or that appellant would not permit the name to be used by others.

At the date of the contract section 992 of the Civil Code read as follows: "The good-will of a business is the expectation of continued public patronage, but it does not include a right to use the name of any person from whom it was acquired"; and section 993 provided: "The good-will of a business is property, transferable like any other, and the person transferring it may transfer with it the right of using the name under which the business is conducted." These provisions are now in sections 14100 to 14103, inclusive, Business and Professions Code. Although appellant might have transferred the right to the use of his name (sec. 993) he did not do so, and as a result of the omission of such provision from the contract respondent did not acquire the right to use the name. Sec. 992.

[7] Since appellant did not transfer and respondent did not acquire the right to use the name, the permission given to Fabry was not in violation of the agreement. Fabry is not a party to this action, and since the question is not presented we express no opinion as to whether he is an agent or associate of appellant and as such is within the terms of the injunction.

The judgment is modified by adding the following to the last paragraph thereof: "provided that defendant is not enjoined from permitting the use of his name by other persons in the manufacture and distribution of orchard heaters on the condition that he shall not be connected, directly or indirectly, with the business in which his name is used and does not either solicit business for such persons or do any act that is injurious to respondent's business." As so modified the judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

PEOPLE v. ONE 1941 CHRYSLER 6 TOUR SEDAN, LICENSE NO. I N 974, ENGINE NO. C34-9458, et al.*

Civ. 13281.

District Court of Appeal, First District, Division 1, California.

May 19, 1947.

1. Appeal and error ⇐1056(1)

In proceeding to vacate default judgment forfeiting automobile allegedly used in narcotic offense, exclusion of driver's license showing automobile owner's changes of address long before he lived at address to which notice of the forfeiture proceeding was sent was not prejudicial to the state.

2. Judgment ⇐142

A proceeding for forfeiture of automobile used in narcotic offense does not involve issuance of "summons" so as to be within statute authorizing defense within one year after rendition of judgment, where "summons" has not been personally served. Code Civ.Proc. § 473a; Health and Safety Code, §§ 11610 et seq., 11613.

See Words and Phrases, Permanent Edition, for all other definitions of "Summons".

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* Subsequent opinion 183 P.2d 368.

3. Forfeitures ⚿5

A forfeiture proceeding is not an "action" but a special "in rem proceeding", equitable in nature, against the offending property. Health and Safety Code, § 11610 et seq.; Code Civ.Proc. §§ 22, 23, 363, 407, 473, 473a.

See Words and Phrases, Permanent Edition, for all other definitions of "Action" and "In Rem Proceeding".

4. Judgment ⚿142

A statutory proceeding for forfeiture of automobile used in narcotic offense is not within statute authorizing defense within one year after rendition of judgment in "action" wherein summons has not been personally served, but is a "special proceeding". Health and Safety Code, § 11610 et seq.; Code Civ.Proc. §§ 22, 23, 363, 407, 473, 473a.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Proceeding".

5. Judgment ⚿142

The automobile, and not its owner, is "defendant" in a proceeding for forfeiture of automobile used in narcotic offense, and hence the proceeding is not within statute authorizing defense within one year after judgment in which summons has not been personally served on "defendant." Code Civ.Proc. 473a; Health and Safety Code, § 11610 et seq.

6. Judgment ⚿142, 345

The statute authorizing relief from judgment, order, or other proceeding within six months, and not statute authorizing defense within one year after judgment, was applicable to judgment in proceeding for forfeiture of automobile used in narcotic offense. Code Civ.Proc. §§ 473, 473a, 1916.

7. Judgment ⚿142, 490(2)

The statute authorizing defense within one year after judgment in which summons was not personally served applies primarily where service was constructive, constructive service is permitted, and valid judgment is secured, but where service is invalid court never acquires jurisdiction, and judgment based thereon is void and may be attacked collaterally or otherwise at any time. Code Civ.Proc. § 473a.

8. Constitutional law ⚿319

Even though action of forfeiture is one in rem against vehicle, owner of vehicle must be give notice of proceedings and opportunity to be heard, under due process clause. Code Civ.Proc. § 473a; Health and Safety Code, § 11610 et seq.

9. Constitutional law ⚿309(2)

Where proceeding is in rem and in some other situations, statute may provide for substituted or constructive service, under due process clause.

10. Constitutional law ⚿309(1)

"Due process" requires that statutory notice make it reasonably probable that party proceeded against will be apprised of the proceedings.

11. Constitutional law ⚿309(1)
Process ⚿77

Generally and under due process clause, a statute providing alternative methods of substituted service does not empower complainant to select arbitrarily any one of the alternatives regardless of facts or regardless of his knowledge that selected method will be ineffectual, where he knows that one of the other permitted alternatives would give notice to the party proceeded against.

12. Forfeitures ⚿5

Under statute giving alternative methods of giving notice of proceeding to forfeit automobile used in narcotic offense, the alternative of sending notice to address on file with motor vehicle department is normally adequate; but where the state knows that owner's address as given on registration certificate is not his present address, and knows his present address, the alternative of notice to his last-known address should be used. Code Civ.Proc. § 473a; Health and Safety Code, § 11613.

13. Constitutional law ⚿309(1)

"Due process" is a variable concept, and whether it has been violated depends upon facts, but where alternatives are given it requires use of the alternative reasonably calculated to notify the person affected.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process".

14. Appeal and error ⟹931(1)

Reviewing court must consider as true the evidence most favorable to respondent.

15. Judgment ⟹162(4)

Evidence authorized setting aside default judgment of forfeiture of automobile allegedly used in narcotic offense, on ground that in following statutory alternative method of giving notice, by mailing notice to address given on registration certificate, state officers knew that automobile owner had moved and knew his present address, so that they should have followed statutory alternative of sending to last-known address. Code Civ.Proc. § 473a; Health and Safety Code, § 11613.

16. Judgment ⟹162(4)

Evidence did not establish that owner had actual knowledge of proceedings to forfeit automobile for alleged use in narcotic offense, and hence he was not barred by laches from vacating default judgment of forfeiture. Code Civ.Proc. § 473a; Health and Safety Code, § 11613.

◆

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Proceeding by the People of the State of California against one 1941 Chrysler 6 Tour Sedan, License No. 1 N 974, Engine No. C34—9458, for forfeiture of automobile allegedly used in a narcotic offense, wherein default judgment was secured and John B. Treadwell, claimant, moved to vacate the judgment. From an order vacating the judgment, the People appeal.

Affirmed.

Robert W. Kenny, Atty. Gen., and Ralph W. Scott, Deputy Atty. Gen., for appellant.

Alfred J. Hennesy, of San Francisco, for respondent.

PETERS, Presiding Justice.

The State, based upon constructive service, secured a default judgment forfeiting the interests of the legal and registered owners in a certain automobile alleged to have been used by the registered owner in a narcotic offense. After that judgment became final the registered owner, Treadwell, purporting to act under § 473a of the Code of Civil Procedure, moved to vacate the judgment on the ground that he had not been personally served and had a good defense to the action on its merits. The lower court not only permitted the parties to file affidavits on the issues presented, but also held a hearing and witness testimony was introduced. Thereafter, the trial court vacated the default judgment of forfeiture. From the order vacating the judgment the State appeals.

The vehicle in question, of which Treadwell is the registered owner, was seized by inspectors of the division of narcotic enforcement on December 8, 1944. Thereafter, the State instituted forfeiture proceedings pursuant to § 11610 et seq. of the Health and Safety Code. A notice of seizure and intended forfeiture was filed in the Superior Court on January 9, 1945, and was served on the registered and legal owners by registered mail on the same day. So far as Treadwell is concerned, and he is the one who is involved in the present proceeding, the notice was mailed to him at 3152 San Fernando Road, Glendale, Los Angeles County. This address was the one that appeared as his home address on the certificate of registration of the vehicle in question. Neither owner appeared or contested the proceeding, and on February 20, 1945, their defaults were taken, and on the same date a judgment forfeiting the vehicle to the State was entered.

On February 18, 1946, Treadwell filed a notice of motion, purporting to act under § 473a of the Code of Civil Procedure, requesting the vacation of the default judgment and permission to file an answer in the original forfeiture proceedings. The motion was based on the ground that Treadwell had never been served with the notice of seizure and intended forfeiture as required by § 11613 of the Health and Safety Code, and on the further ground that he had a valid defense to the action on the merits. The verified motion alleges that

Treadwell was arrested and jailed in San Francisco on December 8, 1944, and that he remained incarcerated until January 16, 1945; that although the state authorities knew these facts they mailed the notice of intended forfeiture on January 9, 1945, to the Glendale address; that subsequently the unopened letter was returned to the state authorities and they failed to deliver it to him in jail or otherwise.

[1] Affidavits and counter-affidavits were introduced by both sides in an effort to support their respective positions. A hearing was held at which most of the affiants were called as witnesses. F. J. O'Ferrall, chief of the division of narcotic enforcement, averred that Treadwell was informed at the time of his arrest on December 8, 1944, by affiant and inspectors Misterly and Fennell that the automobile would be the subject of forfeiture proceedings, and Treadwell was directed by the officers to remove all of his personal effects from the car. He also averred that he did not know when Treadwell was released from jail and that it was not his practice to keep informed as to the times when persons arrested for narcotic offenses are released. At the hearing O'Ferrall produced a butane permit which had been taken from Treadwell by the narcotic officers at the time of his arrest, and which had been retained by the officers. This document is dated July 5, 1944, and gives Treadwell's address as 747 Larch Street, San Francisco. O'Ferrall likewise produced Treadwell's driver's license which had been taken from the prisoner at the time of his arrest. It had been issued November 25, 1941, and gave Treadwell's address as 1401 South Hill Street, Los Angeles. There were two changes of address officially noted on the card, one, dated July 5, 1942, giving the address of 1022 South Hill Street, Los Angeles, and the last address, dated October 19, 1942, was listed as 1328 South Hope Street, Los Angeles. Treadwell's counsel refused to offer this document in evidence and when the State offered it, the trial court sustained an objection. While the State now objects to this ruling, and while the court might well have permitted the driver's license to be admitted, its exclusion could not have been prejudicial to the State. It was dated long before the butane permit and the certificate of registration and at most would have shown that Treadwell frequently changed his residence.

O'Ferrall testified that it was the duty of the attorney general's office to file and to serve the notice of seizure. He also testified that he did not take fromTreadwell his two draft cards, and that he has no recollection of ever seeing them. Both cards gave Treadwell's then address as 747 Larch Street, San Francisco.

While O'Ferrall was on the stand the State introduced the certificate of registration and ownership of the automobile in question. It was dated June 23, 1944, showed Treadwell as the registered owner and gave his address as 3152 San Fernando Road, Glendale. That is the address to which the notice in question was sent. O'Ferrall testified that when Treadwell was arrested he told the prisoner that the officers intended to impound the car, awaiting confiscation proceedings; that he told Treadwell he would hear from the attorney general's office and be notified of the proceedings and that at that time he should take the matter up with his attorney. An envelope addressed to Treadwell dated March 23, 1944, and giving his address as 3152 San Fernando Road, Los Angeles (not Glendale), was then introduced into evidence after being identified as one of the papers taken from Treadwell at the time of his arrest. O'Ferrall stated that when arrested Treadwell told the arresting officers that the address on the certificate of registration was his.

By affidavit Marshall Burnett, a state narcotic inspector, averred that about October 1, 1945, Treadwell called on affiant and requested the return of certain documents including the butane permit, stating to affiant that, while he knew his car had been forfeited, he could make other use of the permit.

The two inspectors that arrested Treadwell, John Misterly and John Fennell, averred that they did not know when

Treadwell had been released on bail; that they did not know his San Francisco address or that he was a resident of San Francisco; that at the time of his arrest Treadwell stated that he was a resident of Los Angeles and was enroute there when arrested. At the hearing Misterly testified that he told Treadwell at the time of his arrest that the automobile was going to be held until confiscation proceedings were instituted; that Treadwell told the witness that his address was Terrace Hotel, at 1200 West 6th Street, Los Angeles; that he, the witness, saw the butane permit with the Larch Street address but that Treadwell stated that that address was that of his brother; that he did not know how long Treadwell was in jail; that he did not know whether the butane permit had been turned over to the attorney general's office; that he had never called at the Larch Street address.

Ralph Scott, the deputy attorney general who handled the forfeiture proceeding, averred that the notice of intended forfeiture was mailed to Treadwell at 3152 San Fernando Road, Glendale, on January 9, 1945; that the notice, unopened, was returned to his office January 23, 1945, with a notation that the addressee had moved without leaving a forwarding address. The envelope was introduced into evidence and it shows no reason checked why it was returned to the sender. He testified that in June or early July, 1945, he informed the attorney for Treadwell that the automobile had been forfeited by a judgment in favor of the State.

Treadwell, by counter-affidavit, denied that O'Ferrall, Misterly or Fennell ever informed him that the automobile was subject to forfeiture, and denied the material portions of their affidavit and testimony. He averred that Misterly and Fennell were in court on January 14, 1945, when his motion to reduce bail was heard. He denied telling the officers at the time of his arrest, or at any other time, that he was a resident of Los Angeles, and also denied the averments in Burnett's affidavit.

Bernice Treadwell, sister-in-law of Treadwell, averred that since November, 1942, she had lived at 747 Larch Street, San Francisco, and was living there on February 1, 1945; that on February 1, 1945, Treadwell likewise resided at that address and continued to so reside until September, 1945, when the whole family moved to another San Francisco address; that during his residence at Larch Street Treadwell received his mail at that address; that on February 1, 1945, and again a week later, officer Misterly called at the Larch Street address and inquired for Treadwell but he was not then at home. At the hearing she testified that Treadwell first came to live at her home on Larch Street in the fall of 1943 and thereafter lived there off and on; that some time during 1943 or 1944 Treadwell went to Los Angeles for four or five months, but still kept his room at the Larch Street home and received his mail there; that Treadwell continued to live with them on Larch Street until September, 1945; that he was living on Larch Street in December, 1944, when he was arrested; that Treadwell had told her that his car had been seized.

The attorney for Treadwell denied having been told by Scott that the car had been seized, and averred that as Treadwell's attorney, on January 14, 1945, he moved for a reduction in amount of bail; that Misterly and Fennell were in the courtroom that day ready to prosecute Treadwell; that at that time Treadwell was in custody.

This fairly summarizes the evidence before the trial court. That court entered its order that the judgment of forfeiture of February 20, 1945 "be and the same is hereby vacated and set aside as of the 19th day of February, 1946." From this order the State has taken this appeal.

The State makes three main contentions: (1) That the court had no power to grant the relief requested under § 473a of the Code of Civil Procedure; (2) that service on Treadwell of the notice of seizure and intended forfeiture was made in exact compliance with the provisions of the Health and Safety Code; and (3) that, in any event, any relief the court could have granted to Treadwell was barred by his laches.

[2] It is probably true that the provisions of § 473a of the Code of Civil Procedure do not apply to the type of proceeding here involved. That section provides that: "When from any cause the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representatives, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action." The three key words are "summons," "action" and "defendant." None of these words applies to the specialized type of proceeding here involved. In the first place, there is no provision in the law in this type of case for the issuance of a "summons." The information that need be contained in the notice of seizure is not the same or as complete as that required for a summons. Compare § 407 of the Code of Civil Procedure, setting forth what a summons must contain, with the holding in People v. One 1933 Plymouth Auto, 13 Cal.2d 565, 569, 90 P.2d 799, discussing what the notice of seizure must contain.

[3, 4] In the second place, a forfeiture proceeding is not an "action" but a special *in rem* proceeding, equitable in nature, against the offending property. People v. One 1941 Mercury Sedan, 74 Cal.App.2d 199, 202, 168 P.2d 443; Traffic Truck Sales Co. of California v. Justice's Court, 192 Cal. 377, 384, 220 P. 306. This type of proceeeding clearly is not an "action" but a "special proceeding," as those terms are normally used. Section 22 of the Code of Civil Procedure defines an "action" as "an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." Section 23 of that code provides: "Every other remedy is a special proceeding." It is true that § 363 of the Code of Civil Procedure provides that "The word 'action' *as used in this title* is to be construed, whenever it is necessary so to do, as including a special proceeding of a civil nature." (Italics added.) But it should be noted that by statutory limitation this interpretation is be given only where the word "action" appears "in this title." Section 363 is in Title II of the code entitled "Time of Commencing Civil Actions." Section 473a is in Title VI, entitled "Pleadings in Civil Actions." See for a general discussion 1 Cal.Jur. p. 325, § 16. Obviously, the rule of construction set forth in § 363 has no application to § 473a.

[5] In the third place, § 473a by its terms is limited to actions in which the summons has not been personally served on a "defendant." The automobile and not the owner is the "defendant" in a forfeiture proceeding.

[6] The view that § 473a has no application to special proceedings is strengthened when the language of § 473 is considered. Originally the two sections were part of the same section, but were separated in 1933. Section 473 gives the court the power to relieve a "party" from "a judgment, order, or other proceeding taken against him through his mistake" etc. The time within which the court can act is six months. That language is much broader than the language of § 473a which is limited to cases where "summons" in an "action" has not been served on a "defendant." For these reasons, it would seem to follow that § 473, with its six-month limitation, is applicable to the present case and that § 473a is not applicable.

[7] But such determination does not of itself require a reversal of the order vacating the judgment. It still remains to be determined whether there was a sufficient service in this case to satisfy the requirements of due process. Section 473a applies primarily to cases where the service was constructive, and constructive service is permitted, and a valid judgment is secured, but the court relieves from the valid judgment because the defendant was not personally served. Fox v. Townsend, 149 Cal. 659, 661, 87 P. 82; Gray v. Lawlor, 151 Cal. 352, 354, 90 P. 691, 12 Ann.Cas. 990; Penland v. Goodman, 44 Cal.App.2d 14, 111 P.2d 913. But where the service made is an invalid service the court never acquires jurisdiction, the judgment based on such service is void, and may be collaterally or

otherwise attacked at any time. See discussion and cases collected 1 Freeman on Judgments, p. 685, § 340; 15 Cal.Jur. p. 52, § 141; 7 Cal.Jur. (Ten Yr.Supp.) p. 348, § 141; 31 Am.Jur. p. 193, § 597; In re Culp, 2 Cal.App. 70, 83 P. 89; § 1916, Code of Civil Procedure. Therefore, the real question in this case is whether the service here involved was a sufficient service as required by law.

[8, 9] Preliminarily, it should be noted that, although the action of forfeiture is one in rem against the vehicle, it is nevertheless necessary that the owner of the vehicle, under the due process clause, be given notice of the proceedings and an opportunity to be heard. That was the precise holding in People v. Broad, 216 Cal. 1, 12 P.2d 941, where the Supreme Court held that the then existing statute providing for a forfeiture of a vehicle involved in a narcotic offense was unconstitutional because it failed to provide for notice to the owner and an opportunity to be heard. See cases collected 31 Am.Jur. p. 195, § 598. Of course, this notice need not, in all cases, be personal notice. Where the proceeding is one in rem, and in some other situations, the statute may constitutionally provide for substituted or constructive service. See cases collected 12 Am.Jur. p. 292, § 597; 12 C.J. p. 1228, et seq. § 1006, et seq.; 16 C.J.S., Constitutional Law, § 619(c), p. 1252; 1 Freeman on Judgments, p. 705, et seq. § 347, et seq.

In the present case the State has seen fit to provide for constructive service in this type of case. Section 11612 of the Health and Safety Code provides that: "Notice of seizure and intended forfeiture proceeding shall be filed with the county clerk and shall be served on all owners." Section 11613 then provides:

"Notice shall be given to each owner according to one of the following methods:

"(a) Upon each owner whose right, title, or interest is of record in the Department of Motor Vehicles, by mailing a copy of the notice by registered mail to the address as given upon the records of the Department of Motor Vehicles.

"(b) Upon each owner whose name and address is known, to the last known address of the owner.

"(c) Upon all other owners, whose addresses are unknown, but who are believed to have an interest in the vehicle, by one publication in a newspaper of general circulation in the county where the seizure was made."

There are several things to be noted about this statute. In the first place, there is no mention of personal service at all, even if personal service is feasible, although there can be no doubt that if the owner were personally served such service would be a valid service. Most constructive service statutes provide that the constructive service is permitted only where personal service cannot reasonably be had. That is true of our general constructive service statute set forth in § 412 of the Code of Civil Procedure. But § 11613 of the Health and Safety Code contains no such express limitation on its operation. It provides three methods of constructive service, that provided in subdivision (c) to be used only when some address of the owner is unknown. Subdivisions (a) and (b) provide two methods of constructive service where some address of the owner is known to the State. In the instant case the State elected to act under subdivision (a) and sent the notice to the address given on the certificate of registration, dated June 23, 1944. This notice was mailed from the attorney general's office on January 9, 1945. The evidence most favorable to Treadwell, the respondent, shows that on that date the state officials knew or should have known the following facts:

1. That Treadwell was then in jail as a result of his arrest by the narcotic officials. He had been arrested on December 8, 1944, and was not released until January 16, 1945. On January 14, 1945, two of the state narcotic officers were present in court when a motion to reduce Treadwell's bail was made. On January 9, 1945, therefore, the state narcotic inspectors knew that the present address of the registered owner was the county jail, and that he was not then residing at the Glendale address.

2. That they had in their possession a document which showed that the latest address of the registered owner was on Larch Street in San Francisco. This was disclosed by the butane permit taken from Treadwell by the arresting officers at the time of his arrest and kept by the officers until the time of trial of the present proceeding. That document is dated July 5, 1944, while the Glendale address given on the certificate of registration appears on a document dated June 23, 1944.

[10, 11] In determining what the duties and responsibilities of the State were under the above circumstances, certain fundamental principles must be kept in mind. Substituted service is permitted in certain cases so that justice will not be delayed or thwarted because of the inability of the plaintiff to secure personal service. Due process requires, however, that the statutory type of notice provided must be of such a nature that it is reasonably probable that the party proceeded against will be apprised of the proceedings. This principle is elementary. Obviously, the legislature in drafting a constructive service statute cannot possibly foresee all of the various factual situations to which the statute may be applicable. Frequently, therefore, the legislature does what it did in § 11613 of the Health and Safety Code, that is, provide several alternative methods of substituted service. But where alternatives are thus given the statute does not empower the complainant to select arbitrarily any one of the alternatives regardless of the facts or regardless of his knowledge that such selected method will be ineffectual, where he knows that one of the other permitted alternatives would give the party proceeded against notice. There is a fundamental requirement of fair play which controls all of the constructive service statutes. This is not merely a general principle but is also based upon the due process clause. Where alternatives are given the complainant is under a constitutional duty to select that alternative that is reasonably calculated to notify the adverse party. Stated negatively, the complainant may not select an alternative that he knows will not notify the other party when he also knows that one of the other alternatives, if selected, would notify the adverse party.

In 16 C.J.S., Constitutional Law, § 619, p. 1259, it is stated: "The character of the notice required to constitute due process, however, varies with the nature of the proceeding and the circumstances of the case. Due process of law is satisfied if the notice given is sufficient to make it reasonably probable that the party proceeded against would be apprised of what is going on and given an opportunity to defend * * *."

In McDonald v. Mabee, 243 U.S. 90, 92, 37 S.Ct. 343, 344, 61 L.Ed. 608, L.R.A. 1917F, 458, Mr. Justice Holmes in discussing a Texas statute that permitted published service in personal actions against Texas citizens stated: "But it appears to us that an advertisement in a local newspaper is not sufficient notice to bind a person who has left a state, intending not to return. To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done."

The same problem in relation to personal actions was discussed by the Supreme Court of United States in Milliken v. Meyer, 311 U.S. 457, 462, 61 S.Ct. 339, 342, 85 L.Ed. 278, 132 A.L.R. 1357, where it was stated: "Substituted service in such cases has been quite uniformly upheld where the absent defendant was served at his usual place of abode in the state [citing cases] as well as where he was personally served without the state. * * * Its adequacy so far as due process is concerned is dependent on whether or not the form of substituted service provided for such cases and employed is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard."

[12] By analogy, the rule of these cases is applicable here. There can be no doubt that § 11613 provides several "reasonable" methods of apprising the owner of the offending vehicle of the pending proceedings against the car. Normally, notice sent to the address on file with the motor vehicle department, where no other address is known, is reasonably calculated to reach

him. It is then the best means available to notify the party in question, and if he does not receive the notice it is because he has failed to notify the motor vehicle department of his change of address. However, where the State knows the address given on the registration certificate is not the present address of the registered owner, and knows his present address, it is obvious that the alternative provided in subdivision "b"—notice to the "last known address"—is the method "best calculated" to notify the owner. In such a case subdivision (b) provides the method, to use the language of the Mabee case, supra, "that is most likely to reach the defendant," or, to use the language of the Milliken case, supra, subdivision (b) contains "the form * * * reasonably calculated to give him actual notice of the proceedings."

[13] Due process is a variable concept. Whether it has been violated depends upon the facts of the case. Where alternatives are given it requires that that alternative reasonably calculated to notify the person affected must be used.

[14] The application of these principles to the facts of the present case seems obvious. The evidence most favorable to respondent, and that is the evidence we must consider as true on this appeal, shows that the narcotic inspectors had in their possession not only the registration certificate but the butane permit. That permit was dated later than the registration permit. It showed the San Francisco address as the latest address of Treadwell. But of even greater importance, the narcotic inspectors knew that they had arrested Treadwell on December 8, 1944, knew he had been placed in jail, and, as late as January 14, 1945, they knew that he was still in jail. When the notice was mailed on January 9, 1945, they were chargeable with the knowledge that such notice could not possibly have reached Treadwell, he then being in jail at their instigation. When the notice was returned on January 23, 1945, unopened, no attempt of any kind was made to ascertain Treadwell's then address, and his default was entered on February 20, 1945. At that very time, according to the uncontradicted evidence, Treadwell then resided in San Francisco on Larch Street, and the inspectors knew or should have known that this was the latest address given by Treadwell on the butane permit.

[15] It is no answer to say that the deputy attorney general who prepared the notice did not have actual knowledge of all of these facts. By his own admission he made no effort of any kind to ascertain Treadwell's true address. He was content to send the notice to the address on the registration certificate without any inquiry. He knew that Treadwell had been arrested on December 8, 1944, because the notice recites that the offense forming the basis of the proposed forfeiture was committed on that day. Yet the deputy made no attempt on January 9, 1945, or at any other time, to ascertain if Treadwell was then incarcerated—a fact that could easily have been determined. The State is the one that seeks to forfeit the vehicle. The State through its duly authorized agents, the narcotic inspectors, knew the true facts. It was their duty to inform counsel for the State. Certainly, the State cannot escape the results that flow from the fact of knowledge by claiming that its officers, duly authorized to enforce the narcotic act, failed to notify the State's attorney of pertinent facts. It must be held that the legal and factual situation presented is one where the State knew on January 9, 1945, and thereafter, that Treadwell was in jail in San Francisco, where it knew his latest residence was on Larch Street, San Francisco, but nevertheless sent the notice to Glendale knowing that the notice so sent would not, in all probability, reach Treadwell, and where they knew that there were other addresses that would reach him. Certainly it cannot be held that such procedure satisfies elementary principles of fair play or of due process. Valuable property or constitutional rights cannot be taken away by such procedure. It follows, of course, that the State did not comply with the requirements of § 11613 of the Health and Safety Code as here interpreted, and for that reason the judgment of forfeiture was void and was properly set aside.

[16] The contention of the State that relief should be denied Treadwell because

of his alleged laches is based on the theory that several state witnesses testified Treadwell learned of the forfeiture in June or July, 1945, and did not institute this proceeding until February, 1946. The answer to this contention is that Treadwell and his attorney denied such knowledge and denied having the conversations in question. The trial court decided this and all other issues in favor of Treadwell. Therefore, even if knowledge gained several months after the forfeiture were a relevant factor to be considered, which we do not here decide, we must hold that no such knowledge here existed.

The order vacating the default judgment of forfeiture is affirmed.

WARD and BRAY, JJ., concur.

COPE v. DAVISON.

S. F. 17391.

Supreme Court of California, in Bank.

May 29, 1947.

As Modified on Denial of Rehearing June 26, 1947.

1. Automobiles 🔑181(1)

"Willful misconduct", within automobile guest statute, is the intentional doing of something with knowledge that serious injury is a probable as distinguished from possible result, or the intentional doing of an act with a wanton and reckless disregard of its possible result. Vehicle Code, § 403.

See Words and Phrases, Permanent Edition, for all other definitions of "Willful Misconduct".

2. Trial 🔑296(3)

The gap left in instruction by omission of the words "express or implied" when referring to defendant's knowledge in defining willful misconduct within automobile guest statute was bridged by giving of plaintiff's requested instruction authorizing jury to infer knowledge by defendant that serious injury to plaintiff probably would result from his conduct, if such inference could be reasonably drawn from the facts in the evidence, since word "inferred" was synonymous with "implied". Vehicle Code, § 403.

See Words and Phrases, Permanent Edition, for all other definitions of "Implied" and "Inferred".

3. Appeal and error 🔑928(5)

Jury is presumed to have considered the instructions as a whole.

4. Trial 🔑295(6)

In action against motorist for injuries sustained by guest, instructions defining "willful misconduct" as used in automobile guest statute, when read as a whole, sufficiently disclosed the intention necessary to prove willful misconduct, and they were neither misleading nor confusing. Vehicle Code, § 403.

5. Trial 🔑296(3)

Failure to include the word "or" between two types of willful misconduct in instruction defining willful misconduct as used in automobile guest statute was cured by other instructions which clearly distinguished between the kinds of conduct which fall within the statutory ban. Vehicle Code, § 403.

6. Evidence 🔑151(1)

The state of mind of a person, like the state or condition of the body, is a fact to be proved like any other fact when it is relevant to an issue in the case, and the person himself may testify directly thereto. Code Civ.Proc. § 1870.

7. Evidence 🔑109

Where knowledge of a fact has important bearing upon the issues, evidence is admissible which relates to the question of the existence or nonexistence of such knowledge and a wide range of proof is allowed. Code Civ.Proc. § 1870.

8. Automobiles 🔑181(1)

The presence of automobile driver's family or friends in automobile with him was a fact to be considered in determining his state of mind, as regards issue as to whether he was guilty of "willful misconduct" within automobile guest statute, but was not conclusive on the subject. Vehicle Code, § 403.

9. Automobiles 🔑181(1)

An intent to injure any one is not a necessary ingredient of "willful misconduct" within automobile guest statute. Vehicle Code, § 403.

10. Automobiles 🔑243(3)
Evidence 🔑151(1)

In action against motorist for injuries sustained by guest, questions asked motorist concerning his intention to cause injury to guest were relevant to issue of intent and knowledge, and were admissible to prove motorist's state of mind contemporaneously with the accident, notwithstanding that intent to injure was not a necessary element of "willful misconduct" within automobile guest statute. Vehicle Code, § 403; Code Civ.Proc. § 1870.

11. Appeal and error 🔑207

Since effect of counsel's misconduct can ordinarily be removed by instruction to jury to disregard it, it is generally essential, in order that such act be reviewed on appeal, that it shall first be called to attention of trial court at the time, and where action of trial court is not thus invoked, the alleged misconduct will not be considered on appeal, if an admonition to jury would remove the effect.

12. Appeal and error ⚿207

Where record showed no assignment of counsel's alleged misconduct and trial court was not asked to instruct jury to disregard challenged remarks, the alleged misconduct would not be considered on appeal, in absence of showing that an instruction, if given, would not have removed effect of the misconduct.

13. Appeal and error ⚿1008(1)

Trial judge's conclusion on asserted misconduct of counsel will not be disturbed unless, under all the circumstances, it is plainly wrong.

14. Appeal and error ⚿901

Where question as to alleged misconduct of defendant's counsel was presented to trial court in support of plaintiff's motion for new trial, and motion was denied, and no showing was made that trial court was plainly wrong, trial court's ruling would not be disturbed.

CARTER, J., dissenting.

Appeal by Superior Court, Alameda County; Leon E. Gray, Judge.

Action by J. Hallam Cope against Warren W. Davison for personal injuries sustained in an automobile accident. From a judgment for defendant, the plaintiff appeals.

Affirmed.

Prior opinion, 171 P.2d 965.

John Paul Jones, of Oakland, for appellants.

Hoge, Pelton & Gunther and Hauerken, Ames & St. Clair, all of San Francisco, for respondents.

William J. Palmer, of Los Angeles, amicus curiæ.

EDMONDS, Justice.

J. Hallam Cope sued to recover damages for personal injuries sustained in an automobile accident. In the complaint, Cope alleged that at the time he sustained the injuries, he was a guest of Warren W. Davison, who was operating the automobile in which they were traveling. The principal attack upon the judgment in favor of the driver concerns the definition of "wilful misconduct" stated in the instructions to the jury.

The evidence is conflicting. Davison and his wife, traveling by automobile, started on a hunting trip. Cope accompanied them as their guest. Davison was driving the car. Toward midnight, as a light rain was falling, the party approached a sharp turn in the highway. A sign at that point warned motorists to slow down to 25 miles per hour. Davison was familiar with the curve, having been over the road many times. He saw the sign and knew that the curve was ahead. He also knew that in rainy weather the road was slippery, either because the dust had become wet or on account of oil on the highway. According to his testimony, under such circumstances, the turn was dangerous if not driven around very slowly.

Cope's account of the accident was that as they approached this point, Davison drove at a speed of 45 miles per hour. About 60 to 80 feet from the curve the car skidded slightly and Davison, deciding that he could not make the turn, drove the car straight ahead through the fence and into a ditch. At no time before the accident did he slacken the speed of the car, according to Cope. Davison, on the other hand, testified that he slowed down to about 20 miles an hour as they approached the turn. He was traveling at "the normal safe speed to make a turn" when the car started to skid, according to Davison's testimony, and he "thought the safest thing to do, as long as * * * [the car was] * * * sliding this way, would be to go straight ahead."

Following a verdict for Davison and entry of judgment, Cope made a motion for a new trial. The grounds of this motion included irregularities in the proceedings of the court and errors in law occurring at the trial. The motion was denied.

The appellant contends that the instructions were erroneous because the jurors were not informed in regard to the kinds of knowledge as to the probability of injury which may constitute wilful misconduct within the meaning of section 403 of the Vehicle Code. Only rarely, says the appellant, does a defendant admit that he operated his automobile with actual knowledge of probable injury to the occupants of the vehicle. For that reason, the argument continues, ordinarily, a guest must prove his cause of action by showing facts from which knowledge of probable injury may be implied. In the present case, it is pointed out, the instructions did not define wilful misconduct as a wrongful act done with the knowledge, express, or to be implied from the circumstances, that injury might result.

As a further ground for the reversal of the judgment, Cope assigns as erroneous the ruling whereby Davison was allowed to testify, over objections, that he did not intend to have an accident, did not intend to injure Cope, and did not intend to injure any one, including his wife, who was in the car. A third point relied upon is that counsel for Davison was guilty of prejudicial misconduct which prevented a fair trial. The determination of the court upon each of these matters, Cope asserts, amounts to prejudicial error entitling him to a new trial.

The respondent insists that the instructions defining wilful misconduct are complete and accurate. There is no magic in the words "express or implied", he says, and the equivalent of these words was given in other instructions. The jurors might infer, they were told, that the driver had such knowledge, and presumably, they considered the instructions as a whole. Furthermore, it is argued, the courts have not invariably used the expression "express or implied" in regard to wilful misconduct and the equivalent of the so-called "external standard" was stated to the jury.

Upon the second issue, Davison takes the position that whenever evidence of the motive or intent with which an act is done is relevant, direct testimony of the party whose conduct is under attack is admissible, although not conclusive. Accordingly, he says, it is proper to interrogate one charged with wilful misconduct relative to his mental attitude, and knowledge of the probable consequence of his act, if this inquiry relates to the condition of mind prior to or simultaneously with the accident.

Davison's answer to the criticism in regard to the alleged misconduct of counsel is that no complaint was made during the trial concerning either statements or argument, and no instructions thereon were requested. Under these circumstances, it is said, the record as to the asserted misconduct is not subject to review, and the trial court's ruling in denying a motion for a new trial on this point will not be disturbed unless it is plainly wrong. Upon the merits of the question, it is asserted that counsel was not guilty of misconduct.

The jury was instructed as follows:

"'Wilful misconduct' is defined as intentionally doing something in the operation of a motor vehicle which should not be done or intentionally failing to do something which should be done under circumstances disclosing knowledge on the part of the driver that injury to his passenger will be a probable result of his conduct or under circumstances disclosing a wanton and reckless disregard of the possible injurious results of his conduct.

"The terms 'wilful misconduct' have a meaning in the law, additional to that which they have in common usage. If we were to use the words in their ordinary sense, they would mean simply the indulging in wrongful conduct by conscious choice. Such conduct might consist of doing something which ought not to be done, or in failing to do something that ought to be done. But in order to be a basis for liability to a guest under our law the misconduct must be something more than intentional and wrongful; it must be done under circumstances which show either knowledge that serious injury to the guest probably will result, or a wanton and reckless disregard of the possible results."

"Wilful misconduct means intentional wrongful conduct, done either with knowledge that serious injury to the guest probably will result, [or] with a wanton and reckless disregard of the possible results.

"Although wilful misconduct is a form of negligence, it is something more than negligence; more even than what might be called gross negligence. A guest may not recover against his host driver for negligence; however, it might be classified, unless that negligence amounted to wilful misconduct, then that means intentional, wrongful conduct, done either with knowledge that serious injury to the guest probably will result, or with a wanton and reckless disregard of the possible results.

"When there is a question whether a vehicle driver conducted himself with knowledge that serious injury to a guest probably would result from the conduct, proof of such knowledge does not have to be by direct evidence. The jury has a right to infer that the driver had such knowledge, if such an inference may reasonably be drawn from facts in evidence, and if the judgment of the jury so directs."

These instructions, it is said, built up in the minds of the jurors the requirement of actual knowledge and a specific intent in order to constitute wilful misconduct. The deficiency in the definition of the standard of care required of Davison was not cured by the statement that the jurors might infer knowledge on the part of the driver as it presented merely a rule of evidence for their guidance. The second instruction was confusing, and the third one erroneous, says the appellant, because it leaves out the important word "or" and thus fails to distinguish between the two types of wilful misconduct. The appellant contends that his proposed instructions, refused by the trial court, would have cured these errors.

Wilful misconduct has been defined in various ways. In People v. Young, 20 Cal. 2d 832, 836, 129 P.2d 353, 356 (quoting from Howard v. Howard, 132 Cal.App. 124, 129, 22 P.2d 279), it was said: "'Willful misconduct implies at least the intentional doing of something either with a knowledge that serious injury is a *probable* (as disguished from a possible) result, or the intentional doing of an act with a wanton and reckless disregard of its *possible* result.'" By two earlier decisions, Porter v. Hofman, 12 Cal.2d 445, 448, 85 P.2d 447, and Parsons v. Fuller, 8 Cal.2d 463, 468, 66 P.2d 430, 432, this court adopted the language of Helme v. Great Western Milling Co., 43 Cal.App. 416, 421, 185 P. 510, saying: "The term 'serious and willful misconduct' is described by the Supreme Judicial Court of Massachusetts as being something 'much more than mere negligence, or even gross or culpable negligence,' and as involving 'conduct of a quasi criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its possible consequences.' * * * To constitute 'willful misconduct' there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury." [8 Cal.2d 463, 66 P.2d 432.] In the Porter case, supra [12 Cal.2d 445, 85 P.2d 448], the court stated: "To this must be added the element included in the definition approved in Meek v. Fowler, 3 Cal.2d 420, 425, 45 P.2d 194, and cases following it, of actual knowledge or its equivalent that an injury to a guest will be a probable result." The Meek case followed Turner v. Standard Oil, 134 Cal.App. 622, 626, 25 P.2d 988, and defined wilful misconduct "* * * as intentionally doing something in the operation of a motor vehicle which should not be done or intentionally failing to do something which should be done under circumstances disclosing knowledge, express or to be implied, that an injury to a guest will be a probable result." [3 Cal.2d 420, 45 P. 2d 197.]

[1] A full discussion of these definitions is found in Van Fleet v. Heyler, 51 Cal.App.2d 719, 727, 125 P.2d 586, 590, where the court said: "But on consideration of the cases on the subject, and reconciling them as far as possible, we find them to divide 'wilful misconduct' into two distinct lines of action, either of which will render a driver liable to his guest for its results, as follows: first, 'the intentional doing of something * * * with a knowledge that serious injury is a *probable* (as distinguished from a possible) result'; and, second, 'the intentional doing of an act with a wanton and reckless disregard of its *possible* result.' Both of these statements are quoted from Howard v. Howard, 1933, 132 Cal.App. 124, 129, 22 P.2d 279, 281, * * *

and have been approved in the many later cases reviewed in People v. Nowell, supra, 45 Cal.App.Supp.2d [811], pages 815 and 816, 114 P.2d 81."

[2, 3] Measured by these definitions, the instructions in the present case were not erroneous. The most recent opinion of this court (People v. Young, supra) defining wilful misconduct entirely omits the words "express or implied" when referring to knowledge of the defendant. Furthermore, the last quoted instruction, which was offered by Cope, bridged the gap left by the omission of these words. As stated in this instruction, the jury might infer knowledge by the driver that serious injury to a guest probably would result from his conduct, if such an inference could reasonably be drawn from the facts in evidence. The courts have treated "inferred" as synonymous with "implied" (see Davis v. Hearst, 160 Cal. 143, 162, 116 P. 530; State v. Millain, 3 Nev. 409), and it is presumed that the jury considered the instructions as a whole. Douglas v. Southern Pacific Co., 203 Cal. 390, 396, 264 P. 237; Stroud v. Hansen, 48 Cal.App.2d 556, 562, 120 P.2d 102.

In the Van Fleet case, supra, it was said that, for the purposes of determining whether the circumstances in a given situation are sufficient to disclose implied knowledge of the probability of injury from an act or omission, an external standard is applied. Such a probability, it was concluded, using the language of Stacey v. Hayes, 31 Cal.App.2d 422, 426, 88 P.2d 165, " 'must have been an apparent consequence to a man of ordinary prudence and intelligence.' " Considering the present record, the last-quoted instruction advised the jury, in substance, that they could draw their own inferences, and could charge the driver with knowledge "if the judgment of the jury so directs." This instruction presented for determination as an issue of fact the question as to whether Davison had implied knowledge of the probable consequences of his conduct. It allowed the jurors to draw from the evidence the inference that a man of ordinary prudence and intelligence would have realized the probable consequences of his conduct even though Davison himself did not do so.

[4, 5] Read as a whole, the instructions to the jury correctly and sufficiently disclosed the intention necessary to prove wilful misconduct, and they were neither misleading, nor confusing. The failure to include the word "or" between the two types of wilful misconduct in one of the instructions was probably a typographical error. In any event, it was cured by the other instructions which clearly distinguished between the kinds of conduct which fall within the statutory ban.

[6, 7] The objections to the questions asked of Davison concerning his intention to cause injury were made upon the grounds that they were immaterial, constituted an invasion of the province of the jury, and were leading and suggestive. Cope insists that "an intent to have an accident or an intent to injure" any one is not an element of wilful misconduct, and, therefore, the questions were immaterial. The prejudicial effect of this testimony was increased, the appellant argues, by the definition of wilful misconduct given to the jury.

The state of mind of a person, like the state or condition of the body, is a fact to be proved like any other fact when it is relevant to an issue in the case, and the person himself may testify directly thereto. See 20 Am.Jur. 312. Whenever the motive or intent with which an act was done is relevant, direct testimony is admissible, although not conclusive. Harned v. Watson, 17 Cal.2d 396, 403, 110 P.2d 431; Gilmour v. North Pasadena Land, etc., Co., 178 Cal. 6, 9, 171 P. 1066; Horton v. Winbigler, 175 Cal. 149, 156, 165 P. 423; Karr v. Powell, 66 Cal.App.2d 28, 33, 151 P.2d 576; see Code Civ.Proc. sec. 1870; 1 Jones Commentaries on Evidence, sec. 170 et seq.; 10 Cal.Jur., Evidence, sec. 117; 20 Am.Jur., Evidence, sec. 338; 31 C.J.S., Evidence, § 178. Also, when knowledge of a fact has important bearing upon the issues, evidence is admissible which relates to the question of the existence or nonexistence of such knowledge and a wide range of proof is allowed. Katz v. Bedford, 77 Cal. 319, 323, 19 P. 523, 1 L.R.A. 826; Central H. Imp Co. v. Memorial Parks, 40 Cal.App.2d 591, 609, 105 P.2d 596; see Code Civ.Proc. sec. 1870; 10 Cal.Jur., Evidence, sec. 118; 20

Am.Jur., Evidence, sec. 336; 31 C.J.S., Evidence, § 178.

It was said in Porter v. Hofman, supra, 12 Cal.2d page 447, 85 P.2d 448, and Parsons v. Fuller, supra, 8 Cal.2d page 468, 66 P.2d 432 (quoting from Norton v. Puter, 138 Cal.App. 253, 32 P.2d 172) that wilful misconduct "necessarily involves deliberate, intentional or *wanton* conduct in doing or omitting to perform acts, with knowledge or appreciation of the fact, on the part of the culpable person, *that danger is likely to result therefrom.* * * *" And in Meek v. Fowler, supra, 3 Cal.2d page 425, 45 P.2d page 197, the following language appears: "'While the line between gross negligence and willful misconduct may not always be easy to draw, a distinction appears from the definition given in that gross negligence is merely such a lack of care as may be presumed to indicate a passive and indifferent attitude toward results, while willful misconduct involves a more positive intent actually to harm another or to do an act with a positive, active, and absolute disregard of its consequences. It seems clear that in excluding all forms of negligence as a basis for recovery in a guest case, the Legislature must have intended that to permit a recovery in such a case the thing done by a defendant must amount to misconduct as distinguished from negligence, and that this misconduct must be willful. While the word "willful" implies an intent, the intention referred to relates to the misconduct and not merely to the fact that some act was intentionally done. In ordinary negligence, and presumably more so in gross negligence, the element of intent to do the act is present and any negligence might be termed misconduct. But willful misconduct as used in this statute means neither the sort of misconduct involved in any negligence nor the mere intent to do the act which constitutes negligence. * * *'"

[8] In Van Fleet v. Heyler, supra, 51 Cal.App.2d page 729, 125 P.2d 592, when considering the extent of the knowledge of a driver necessary to charge him with wilful misconduct, the court said: "On the question of intent, defendant contends, quoting from Walker v. Bacon, 1933, 132 Cal.App. 625, 627, 23 P.2d 520, that 'Willful misconduct refers to intentional acts, that is, acts designed to bring about the result involved in the suit,' and argues further that because his own family was in the car he could not have had such an intent and was therefore not guilty of wilful misconduct. While the presence of a driver's family or friends in the car with him is a fact to be considered in determining his state of mind, is by no means conclusive on the subject. In many of the cases where drivers have been held guilty of wilful misconduct, family or friends, or both, have been among their guests. The statement quoted by defendant from Walker v. Bacon, supra, appears in the opinion of only one judge, not concurred in by the other two, who joined in the decision for other reasons, and is not a correct statement of the law. On the contrary, it is implicit in the authoritative definitions of 'wilful misconduct,' and is also now settled by positive holdings that an intent to injure anyone is not a necessary ingredient of wilful misconduct * * *." The same rule was stated in Hastings v. Serleto, 61 Cal.App.2d 672, 690, 143 P.2d 956, 965, where the court held that "Undoubtedly, it is proper to interrogate one accused of wilful misconduct relative to his mental attitude and knowledge of the probable consequences of his act, but such inquiry must be confined to his state of mind prior to or contemporaneously with the accident and not subsequent thereto."

[9, 10] Applying these principles to the present case, the evidence objected to was admissible. Although "an intent to injure anyone is not a necessary ingredient of wilful misconduct", "wilful misconduct involves a more positive intent actually to harm another" than gross negligence and could be established by proving such an intent. The questions were relevant to the issue of intent and knowledge, and were admissible to prove Davison's state of mind contemporaneously with the accident.

[11-14] Because the closing arguments of counsel were not reported, the appellant relies upon the affidavits filed in connection with the motion for a new trial to support his claim of misconduct. He declares that prejudice resulted when, over objection, he was referred to as being the "so-called"

friend of Davison. Other remarks of similar import are also relied upon as justifying relief.

It has been said that "As the effect of misconduct can ordinarily be removed by an instruction to the jury to disregard it, it is generally essential, in order that such act be reviewed on appeal, that it shall first be called to the attention of the trial court at the time, to give the court an opportunity to so act in the premises, if possible, to correct the error and avoid a mistrial. Where the action of the court is not thus invoked, the alleged misconduct will not be considered on appeal, if an admonition to the jury would remove the effect. It is only the most extreme case where an instruction to the jury, if given, would not remove the effect of improper remarks." Aydlott v. Key System Transit Co., 104 Cal.App. 621, 628, 286 P. 456, 459. The record in the present case shows no assignment of misconduct and the trial court was not asked to instruct the jury to disregard the challenged remarks. The point may not, therefore, be considered upon appeal. Furthermore, these matters were presented to the trial court in support of the motion for a new trial. The motion was denied. A trial judge is in a better position than an appellate court to determine whether a verdict resulted wholly, or in part, from the asserted misconduct of counsel and his conclusion in the matter will not be disturbed unless, under all the circumstances, it is plainly wrong. Lafargue v. United Railroads, 183 Cal. 720, 724, 192 P. 538; Hulburd v. Worthington, 57 Cal.App.2d 477, 479, 134 P.2d 832; Aydlott v. Key System Transit Co., supra, 104 Cal.App. page 628, 286 P. 456. The showing made by the appellant falls far short of meeting that requirement.

The judgment is affirmed.

SHENK and SPENCE, JJ., concur.

SCHAUER, J., concurs in the judgment.

CARTER, Justice.

I dissent.

The evidence would support the conclusion that defendant on a wet road, with the knowledge that it might be slippery and cause his car to skid, intentionally and deliberately drove his car toward the curve at 45 miles per hour, knowing that the curve was there and knowing that even on a dry pavement it was a dangerous curve unless approached very slowly.

Under the definition of wilful misconduct which has become standardized in this state this evidence was ample to support a finding of wilful misconduct.

Appellant proposed an instruction that:

"If you believe under the evidence in this case that the defendant Warren W. Davison intentionally did something or omitted to do something, in the operation of his automobile on the night in question, with knowledge express or implied, that injury to plaintiff was a probable consequence of his intentional act or failure to act, then I instruct you that defendant was guilty of wilful misconduct.

"I instruct you that in determining whether the said intentional act or omissions of said defendant, if such you find them to be, are sufficient to disclose implied knowledge of such probability of injury to plaintiff guest, an external standard is applied, and applying the 'external standard' the defendant Warren W. Davison is charged with knowledge of the probable consequences of his conduct, such consequence being apparent to any person of ordinary prudence of which you ladies and gentlemen of the jury are the exclusive judge."

The Court was also asked to give several instructions qualifying the necessary knowledge of probable injury to the guest by the participial adjectives "express or implied" and the words "express or implied" were stricken by the court. Another proposed instruction contained this language: "It is enough if at the time and place of the happening of this accident that he knew, or should have known, of circumstances which would bring home to the realization of the ordinary reasonable man the highly dangerous character of his conduct * * *." This instruction the court also refused to give. As a result, by the instructions given to them, the jury was informed that in order to find defendant guilty of wilful misconduct they must find that he had *actual* knowledge that the probable consequence of his intentional conduct would be an injury to plaintiff. This is contrary to the law. Hastings v. Serleto, 61 Cal.App.2d 672, 681, 687, 688, 143 P.2d 956; Van Fleet v. Heyler, 51 Cal.App.2d 719, 727-730, 125 P.2d 586, and review of authority therein; Rawlins v. Lory, 44 Cal.App.2d 20, 24, 25, 111 P.2d 973.

The jury's verdict was reached by a vote of 9 to 3. It is obvious that the jurors who voted for the defendant may have concluded that defendant intentionally approached this dangerous curve at 45 miles per hour but without the conscious realization or actual knowledge of the probability of injury to his guest. It is equally obvious under the facts that if properly instructed the same jurors might have found that such probability of injury would have been apparent to any person of ordinary prudence. The failure to instruct them that in determining whether defendant had implied knowledge of probable injury to his guest they should apply the external standard of what would be apparent to a person of ordinary prudence must be held to be prejudicial error.

This error was not cured by the giving of the following instruction: "When there is a question whether a vehicle driver conducted himself with knowledge that serious injury to a guest probably would result from the conduct, proof of such knowledge does not have to be by direct evidence. The jury has a right to infer that the driver had such knowledge, if such an inference may reasonably be drawn from facts in evidence, and if the judgment of the jury so directs."

To instruct the jury that defendant must have actual knowledge is an instruction on a substantive fact which they are told must be proved to establish plaintiff's right to recover. To further instruct them that this actual knowledge may be proved by circumstantial evidence does not change the fact that under the instructions they must still find actual knowledge, and is not in any sense the same thing as telling them that they need not find that the defendant had actual knowledge if they do find that a person of ordinary prudence would have had such knowledge.

In considering the prejudicial effect of the instructions given by the court to the jury it would be well to review the definition of wilful misconduct which has been consistently followed by this Court and the District Courts of Appeal. It is stated in Turner v. Standard Oil Company, 1933, 134 Cal.App. 622, 626, 25 P.2d 988, 990, as follows: "'Willful misconduct,' within the meaning of this statute, may be defined as intentionally doing something in the operation of a motor vehicle which should not be done or intentionally failing to do something which should be done under circumstances disclosing knowledge, *express or to be implied,* that an injury to a guest will be a probable result." [Emphasis added.]

Some of the many cases approving and adopting this definition are: Meek v. Fowler, 3 Cal.2d 420, 425, 45 P.2d 194; Hastings v. Serleto, 61 Cal.App.2d 672, 679, 143 P.2d 956; Van Fleet v. Heyler, 51 Cal.App.2d 719, 727, 125 P.2d 586; Haas v. Jones, 29 Cal.App.2d 650, 652, 85 P.2d 579; Wright v. Sellers, 25 Cal.App.2d 603, 608, 78 P.2d 209; Fisher v. Zimmerman, 23 Cal.App.2d 696, 699, 73 P.2d 1243; Gimenez v. Rissen, 12 Cal.App.2d 152, 157, 55 P.2d 292. From this definition it appears that two fundamental elements constitute "wilful misconduct", they are: (1) A wrongful act knowingly done; and (2) knowledge, either actual or to be implied from the circumstances, that an injury to a guest will be a probable result.

The actual distinction between the two types of acts constituting "wilful misconduct" have been recognized and pointed out by the courts in Van Fleet v. Heyler, supra, hearing denied in Supreme Court, and Hastings v. Serleto, supra.

Since defendants in wilful misconduct cases seldom admit actual knowledge of probable injury, the plaintiff usually proves the second element by showing "implied knowledge", within the rule stated in Turner v. Standard Oil Company, supra. It is of vital importance that the instructions on the subject recognize this most usual, and practically speaking, the only available method of proving the second element. The great importance of giving the plaintiff the full opportunity to prove his case by showing implied knowledge of probable injury is well stated in Wright v. Sellers, supra, 25 Cal.2d at page 613, 78 P.2d at page 215, as follows: "* * * this intentional act, or intentional failure to act, must be under circumstances disclosing a knowledge on the part of the driver that an injury to his guest would be a probable result, or under circumstances from which such knowledge on the part of the driver might be inferred. The consciousness must relate to the intentional act done, or to the intentional failure to act. The intent may be implied from the surrounding circumstances. An actual intent to injure is not a necessary element of which positive evidentiary proof must be produced. Such proof would rarely be possible. Few drivers would confess to the intent to injure a passenger. It is sufficient if the act, or the failure to act, be done or omitted under such circumstances as would justify the reasonable inference that the driver should have known that injury to his guest was a probable result, for again, positive evidentiary proof of such knowledge would be an impossibility in most cases. Jones v. Hathway, [22] Cal.App.2d [316], 70 P.2d 681."

The court gave as its instruction No. 4 the following: "'Wilful misconduct' is defined as intentionally doing something in the operation of a motor vehicle which should not be done or intentionally failing to do something which should be done under circumstances disclosing knowledge on the part of the driver that injury to his passenger will be a probable result of his conduct or under circumstances disclosing a wanton and reckless disregard of the possible injurious results of his conduct."

This instruction contained no recognition of the fact that an intentional wrongful act coupled with implied knowledge of probable injury also constitutes wilful misconduct. It lays down an absolute requirement of actual knowledge in order to constitute wilful misconduct. It virtually requires an actual intent to injure. Under the "implied knowledge" part of the definition of wilful misconduct, as stated in Turner v. Standard Oil Company, Wright v. Sellers, supra, and distinctly pointed out in Van Fleet v. Heyler, and Hastings v. Serleto, supra, it is clear that a defendant may be held liable if he commits a wrongful act under circumstances indicating that he should have known that his conduct would probably result in the injuries to his guests. The above-quoted instruction entirely omits this possibility. Nor is the distinction pointed out in any of the other of the court's instructions.

This instruction is based upon the erroneous assumption that if a defendant believes he can drive his car with safety, such belief will exonerate him regardless of the highly dangerous quality of his acts and whether or not a reasonable person in his position should have known of the probability of resulting injury.

It is safe to say that the automobile driver involved in every "wilful misconduct" case to be found in the books believed that he could drive his car in the particular manner charged without injuring any one. The reckless driver never intends, although he sometimes is apprehensive of, the disastrous results which occur. The defendant certainly should not be exonerated from the consequences of his misconduct as he was by this instruction because he might have thought that he could drive as he did with safety and did not as he stated intend the resulting injuries. If it were necessary to prove that a defendant driver believed that he could not drive as he did with safety and that he actually intended the accident, or was totally indifferent to possible results, or that he had actual knowledge that injury to his guest was probable, a plaintiff would have to prove in substance that the defendant driver was guilty of intent to commit murder or mayhem depending upon how lucky the guest was, and perhaps suicide as well, before a case of wilful misconduct could be made out. Under the cases already cited, this is not the law.

Further, after having allowed the defendant to testify that he didn't intend to have an accident, and that he didn't intend to injure plaintiff, his own wife, or any one else, in the light of this instruction the jury could well conclude that inasmuch as plaintiff didn't prove that defendant actually knew and actually intended that by his conduct he would have an accident and that injury was a probable result, the defendant having denied actual knowledge and a specific intent, therefore the plaintiff didn't sustain his burden of proof and defendant could not be guilty of wilful misconduct under such circumstances. Under the cases cited, this is not the law.

There is not a single reported decision in which an actual intent to injure has been found to exist. The requirement of an actual intent to injure and actual knowledge of probability of injury was laid down as law in Walker v. Bacon, 132 Cal.App. 625, 23 P.2d 520, which was specifically overruled in Van Fleet v. Heyler, supra, which held that an intent to injure is not a necessary element of wilful misconduct.

Indeed it is the absence of an intent to injure which distinguishes wilful misconduct from one of several serious crimes. This distinction is very clearly brought out in the Restatement of the Law of Torts, as follows: "Reckless misconduct differs from intentional wrongdoing in a very important particular. While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it. It is enough that he realizes or from facts which he knows should realize that there is a strong probability that harm may result, even though he hopes or even expects that his conduct will prove harmless. However, a strong probability is a different thing from the substantial certainty without which he cannot be said to intend the harm in which his acts results." Sec. 500f, p. 1296.

The language of the court in Wright v. Sellers, 1938, 25 Cal.App.2d 603, at page 613, 78 P.2d 209, 215, is too clear for argument: "It is sufficient if the act, or the failure to act, be done or omitted under such circumstances as would justify the reasonable inference that the driver should have known that injury to his guest was a probable result * * *."

In Rawlins v. Lory, 1941, 44 Cal.App.2d 20, at page 24, 111 P.2d 973, 975, the court states: "In determining whether the circumstances are sufficient to disclose implied knowledge of such probability, an external standard is applied. In Stacey v. Hayes, 31 Cal.App.2d 422, at page 426, 88 P.2d 165, one of the authorities relied on by defendants, the court said: 'The probability of injury to the guest from such act or omission must have been an apparent consequence to a man of ordinary prudence and intelligence.' "

In Jones v. Hathaway, 1937, 22 Cal.App.2d 316, at page 320 of its opinion, 70 P.2d 681, 683, the Court said: "With reference to a decision by this court on the issue which has been here presented, it is concluded that, as a presumably reasonable man, had he exercised due care, defendant must have known, or must have been conscious of and appreciated the fact that to drive an automobile at the place where, and under the atmospheric conditions which were shown to exist, over a wet and slippery pavement, and at the rate of speed at which, according to the findings of fact, he did drive it, was likely to result in injury to plaintiff."

The restatement of the Law of Torts, page 1293, sec. 500, specifically points out that an objective standard is to be applied in determining the question of implied knowledge of danger, as follows: "The actor's conduct is in reckless disregard of the safety of another if he intentionally does an act or fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize that the actor's conduct not only creates an unreasonable risk of bodily harm to the other but also involves a high degree of probability that substantial harm will result to him."

While the instruction points out the two different types of conducts constituting "wilful misconduct", they are so bound together in the instruction that it is difficult for the lawyer, let alone a layman juror to disintegrate and distinguish the two types through the maze of legal verbiage. Nowhere in the instructions given were they separately stated. Plaintiff, however, presented a detailed instruction setting forth in plain and concise language the two different types of conduct constituting wilful misconduct under the law. This was refused by the court.

Further, plaintiff at the trial presented a proper instruction defining wilful misconduct as laid down in Turner v. Standard Oil and as modified in Meek v. Fowler, supra. This likewise was refused.

The court also instructed the jury in part as follows: "But in order to be a basis for liability to a guest under our law *the mis-*

conduct must be something more than intentional and wrongful; it must be done under circumstances which show either knowledge that serious injury to the guest probably will result, or a wanton and reckless disregard of the possible results." [Emphasis added.] To my mind this instruction is clearly erroneous. In effect it tells the jury that even though the driver of an automobile may be guilty of wrongful and intentional misconduct which was the direct and proximate cause of an accident in which plaintiff was injured, plaintiff cannot recover unless he further proves that the driver had knowledge that such wrongful and intentional misconduct would probably cause such accident and result in injury to plaintiff. The statute makes no such requirement. Vehicle Code, sec. 403. The obvious result of holding such proof necessary, is placing a greater burden upon a plaintiff in a civil action than is required of the people in a criminal prosecution to prove the guilt of a defendant for a violation of section 505 of the Vehicle Code.

Moreover, this instruction again omits the rule that the driver is equally guilty of wilful misconduct whether he knew or from the circumstances should have known that injury would probably result from his misconduct. It can be seen from this instruction and the last one, that the court was building up in the minds of the jurors a persistently exaggerated and enlarged requirement of actual knowledge and a specific intent in this civil action for wilful misconduct. Each instruction seemed to add a greater burden to the plaintiff. Had this error occurred but once it would not have been so serious, but it was committed time after time until it was impressed upon the minds of the jury more forcefully than any other statement in the entire charge.

The court gave several more instructions (ten altogether) defining wilful misconduct. They all followed the same general pattern. Practically all of the ten instructions were taken from the book of California Jury Instructions. In the case of Hastings v. Serleto, supra, a case practically on all fours with the present case on the essential facts, the trial judge at the time of instructing the jury made the following statement regarding California Jury Instructions in a wilful misconduct case: "The court: Well, wilful misconduct is that which the Court tells the jury it is, and that is all that is necessary in this case, for them to follow the definition given by the Court and apply the facts to that particular definition. I am not going to give any of the instructions in the Instruction Book used by the Superior Court, here, with reference to the guest law for the reason that I think they are so impossible and so improper and so confusing that I will not use any of them. I will draw my own, and I have already drawn my own, and I am not going to instruct the jury at all as to gross negligence, and I think I might just as well make my position clear, here." Records of Supreme Court Vol. 9030, page 289, page 28 of Appellant's Opening Brief.

Thereafter, the court gave the following instructions it had prepared pertinent to the issue of wilful misconduct:

"Number 4: Under the laws of this state a guest in an automobile driven by another is not entitled to recover damages from the driver for injuries sustained as a proximate result of the act of the driver, if such act is occasioned merely by the failure to exercise ordinary care, which is negligence. For a guest to recover damages from the driver of the car for injuries sustained as a proximate result of the act of the driver the guest must show by a preponderance of the evidence that the act of the driver—which it is claimed resulted in the injury—was occasioned either by the driver's intoxication or by his wilful misconduct. In the case before us the plaintiff does not claim that her injury was the result of any intoxication on the part of the driver but she does claim that it resulted from his wilful misconduct. By the phrase 'wilful misconduct' as used in the law is meant such conduct by a driver as amounts either to the intentional doing of an act with knowledge on his part that, as a consequence thereof, injury is a Probable as distinguished from a Possible Result, or on the other hand, the intentional doing of an act with a wanton and reckless disregard for its possible result. In that connection, you are instructed that a driver is charged with knowledge of the probable consequence of his conduct, if such consequences would have been apparent to any person of ordinary prudence and intelligence.

"In considering the question as to whether the driver was or was not guilty of wilful misconduct you may take into consideration all the factors bearing on that question, such as, the width and surface of the highway; the extent it curved or angled; the presence or lack of traffic upon it; the time of night, the factor of visibility, the rate of speed with respect to the matters just narrated; and the intent of the driver as gathered from the surrounding circumstances and from the testimony with respect thereto.

"Number 5. In order that an actor's conduct may be classed as reckless, or wilful it is not necessary that he, himself, should recognize it as being extremely dangerous. His inability to realize the danger may be due to his own reckless temperament, or to the abnormally favorable results of previous conduct of the same sort. It is enough that he knows or has reason to know of circumstances which would bring home to the realization of the ordinary reasonable and prudent man, the highly dangerous character of his conduct.

"Number 10: The basic speed law of this State reads as follows:" (Quoted). "The fact, if it be a fact, that the injury to the plaintiff resulted because the car was driven at a speed greater than was reasonable or prudent does not in and of itself show that the driver was guilty of wilful misconduct. Whether he was or was not guilty of wilful misconduct is to be determined from the surrounding circumstances. The speed at which he traveled is one of such circumstances. If the speed under all the circumstances was so excessive as to make it evident to a reasonably prudent person that danger of injury to the guest was a real probability then such extreme speed alone would, without more, be wilful misconduct. Conversely, if the speed was not so excessive under all the circumstances as to make it evident to a reasonably prudent person that the danger of injury to the guest was a real probability then such speed would not, without more, be wilful misconduct.

"Number 7: The intent which is a necessary element of wilful misconduct, as referred to in other instructions is not a mere intent to commit an act, but the intent must go to the wilful misconduct.

"Number 7—(Continued): The word 'wilful' implies an intent and the intention referred to relates to the misconduct and not merely to the fact that some act was intentionally done." Records of Supreme Court, Volume 9030, pages 287 to 289, pages 25 to 28 of Appellant's Opening Brief.

The case of Hastings v. Serleto, 61 Cal. App.2d 672, 686, 143 P.2d 956, 963, in commenting upon the instructions given mentioned them all, and stated that they were complete, and that the court had no hesitancy in saying "that the jury was clearly, understandingly, and unerringly admonished, * * *."

However, in that case the court advised the jury what was meant by the term "intent", "which is a necessary element of wilful misconduct, * * * is not a mere intent to commit an act, but the intent must go to the misconduct." No such instruction, or any instruction comparable thereto was given the jury in the present case, although such instruction was requested. Further, in the instant case there was more reason for such an instruction than in the Hastings case, in that the defendant had been permitted to testify that he didn't intend to have an accident or injure Dr. Cope. He was permitted to testify, to a lack of intent to commit an act, the kind of intent which is not required. As to what was meant by the terms "intent" and "intentionally" the jury was left to speculate.

Further in the Hastings v. Serleto case the jury was instructed that "'a driver is charged with knowledge of the probable consequences of his conduct, if such consequences would have been apparent to any person of ordinary prudence and intelligence.'" In another instruction in the above case the jury was advised that "'in order that an actor's conduct may be classed as reckless or wilful, it is not necessary that he himself should recognize it as being extremely dangerous. His inability to recognize the danger may be due to his own reckless temperament, or to the abnormally favorable results of previous conduct of the same sort' ".

The court in commenting on these instructions said: "We fail to perceive wherein the challenged instructions constituted serious or any prejudicial error which militated against the substantial rights of the defendants. The latter apparently base their attack upon the quoted instructions on the ground that they measure the required standard of defendant driver's conduct on the basis of what would be apparent to the ordinary, careful and prudent driver. Appellants' claim in this regard cannot be sustained. For the same reason that the law prescribes a standard for measuring the conduct of people in determining whether they are guilty of ordinary negligence, there must be a standard to measure the conduct of a vehicle driver charged with wilful misconduct, to determine whether such conduct was of the character contemplated by section 503 of the Vehicle Code, St.1939, p. 1481. Of necessity that standard must consist of a comparison of the conduct of the driver in question with that of the average man, or to use the phrase so familiar to us, 'the ordinary, careful and prudent man' situated as the defendant driver was, seeing what he saw and knowing what he knew. Instead of misleading the jury as to the character and quantum of evidence required to support a charge of wilful misconduct, the questioned instructions merely gave the jury the universally applied standard from and by which they were to determine whether the actions and conduct of defendant driver amounted only to ordinary or gross negligence, or when viewed in the light of what, under the existent circumstances, ordinary prudence and care would dictate, amounted to such recklessness, wantonness, and wilfulness as to approach that wilful misconduct contemplated by the Code section upon which this action was predicated. It is noteworthy that appellants do not venture to suggest any different standard by which to measure the conduct of defendant driver than that contained in the challenged instructions. Manifestly, it cannot be said that the conduct of defendant driver should be measured by the actions or behavior of a careless, and imprudent man, an intoxicated man or one who is an incompetent vehicle driver."

The foregoing case is very much like the present case, in that the driver knew the road over which he was traveling, knew it was a winding, narrow, mountain road, and notwithstanding such knowledge at the time of the accident the speedometer needle was stuck at 65 miles per hour. The court stated (page 684 of 61 Cal.App.2d, at page 961 of 143 P.2d): "We are persuaded that the jury was justified in concluding, as apparently it did, that notwithstanding defendant driver's knowledge of the road over which he was traveling, and its hazards, he knowingly, deliberately and intentionally flirted with danger. The jury, we feel, were also authorized to conclude that any reasonable person knowing what the defendant driver knew and seeing what he saw, and confronted with the conditions which confronted him, would have realized that such wanton and reckless driving could result only in injury to those who were riding in the automobile, and certainly the jury was authorized, under the facts here present, to conclude that defendant driver was charged with the implied knowledge of not only the possible but the probable results of such conduct."

From the foregoing statement of the court in commenting upon the evidence and law in the case, it is apparent how much importance it placed upon the yardstick of care required by the defendant as given in the charge to the jury. It further illustrates the importance of a proper instruction on the question of intent.

There is nothing in the case of People v. Young, 20 Cal.2d 832, 129 P.2d 353, which can be said to support the position of respondent in this case as that case did not involve section 403 of the Vehicle Code but was a prosecution under section 500 of said code, St.1941, p. 1414, which at that time read in part as follows: "When the death of any person ensues within one year as the proximate result of injuries caused by the driving of any vehicle with reckless disregard of, or wilful indifference to, the safety of others, the person so operating such vehicle shall be guilty of negligent homicide, * * *". The case did not involve an alleged erroneous instruction to the jury as it was tried before the court without a jury. Reference in the opinion in that case to wilful misconduct is contained in a quotation from the case of Howard v. Howard, supra, and has been mentioned in the foregoing discussion.

I am convinced from a study of the record in the case at bar that a miscarriage of justice has resulted, and in view of the error in the instructions given by the court to the jury in defining wilful misconduct, a new trial should be granted.

For the reasons above stated I would reverse the judgment.

30 Cal.2d 162

SPENCER v. NELSON et al.

S. F. 17439.

Supreme Court of California, in Bank.

May 27, 1947.

1. **Appeal and error 🔑151(5)**

Any party aggrieved by an appealable order has a right to appeal therefrom, even though the order is in form apparently favorable to him. Code Civ.Proc. § 938; Rules on Appeal, Rule 3(a) (2).

2. **Appeal and error 🔑151(5)**

Plaintiff aggrieved by order granting plaintiff a new trial as to only one issue could appeal therefrom although the order was in form apparently favorable to plaintiff. Code Civ.Proc. §§ 938, 963; Rules on Appeal, Rule 3(a) (2).

3. **Appeal and error 🔑438**
New trial 🔑163(2)

An order granting a new trial vacates the judgment but when an appeal is taken from such an order the vacating effect is suspended, and the judgment remains effective for the purpose of an appeal from the judgment.

4. **Appeal and error 🔑790(3)**

Where plaintiff appealed from order granting plaintiff only a limited new trial rather than a general new trial and from judgment for defendants, and defendants did not appeal from the order granting limited new trial but instead moved to dismiss the appeals, the decision would sustain the order in one form or the other so that the judgment would inevitably be vacated and appeal from the vacated judgment could be dismissed.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Glenn H. Spencer against Ted Nelson and Alice M. Nelson for declaratory relief to ascertain the validity and effect of a written agreement. On defendants' motions to dismiss two appeals taken by plaintiff from an order granting a new trial and from the judgment.

Motion to dismiss appeal from order granting a new trial denied, and motion to dismiss the appeal from the judgment granted.

James R. Agee and Harold C. Holmes, Jr., both of Oakland, for appellant.

B. H. Muldary and Norman Elkington, both of San Francisco, for respondents.

TRAYNOR, Justice.

Defendants and respondents have filed motions to dismiss two appeals, both taken by plaintiff and appellant, from an order granting a new trial and from the judgment.

The action was brought for declaratory relief to ascertain the validity and effect of a written agreement. After trial by the court, judgment was entered in favor of defendants, determining that the instrument was invalid. Plaintiff sought to attack this adverse judgment both by motion for new trial and by appeal, as hereinafter appears.

Plaintiff's motion for new trial was in the usual form, and one of the grounds set forth was that the trial court failed to make a finding on the material issue of ratification. The trial court's ruling was that "plaintiff's motion for a new trial be and the same is hereby granted on the issue of ratification." Eight days later, on stipulation of counsel, it restated the order but added the words "that the judgment hereinbefore entered is vacated."

Plaintiff's first appeal is from the order granting a new trial. It was taken on the theory that the issues of the case are not severable, that he was seriously prejudiced by the limitation of the new trial to the single issue of ratification, and that the only proper order would be one granting a new trial on all of the issues. Thus, his sole grievance, and the primary reason for this appeal, is the limited form of the court's order; and, by the appeal, he asserts that the trial court abused its discretion in making the limited order, and seeks a reversal thereof with directions to grant a general, unlimited new trial.

Plaintiff's appeal from the judgment is subsidiary and purely precautionary. It was filed to take care of the situation that might arise (1) if the court's order were held to be in substance a denial of a new trial rather than a granting thereof (in which case it would be nonappealable); or (2) if it were held that the plaintiff was not aggrieved by the granting of his own motion for a new trial. A serious problem of timeliness is raised in connection with the appeal from the judgment, but it is irrelevant in view of the holding we now make as to the propriety of the appeal from the order granting a new trial.

[1, 2] The basic contention of appellant is that he cannot have genuine relief from the adverse judgment by a new trial limited to a single issue, which, he asserts, is not severable from other issues; and that, in view of the pleadings and evidence, it can be shown that the trial court abused its discretion in making the order in the form it did. Thus appellant has established the two conditions for his appeal: (1) the order granting a new trial is appealable (Code Civ.Proc. sec. 963); and (2) appellant was aggrieved by the order. The circumstance that this case is unusual in its facts, in that normally the party against whom the new trial is granted is the one who appeals, is immaterial; any party aggrieved by an appealable order has a right to appeal therefrom, even though the order is in form apparently favorable to him. See Code Civ.Proc. sec. 938; Mountain Tunnel Gravel Min. Co. v. Bryan, 111 Cal. 36, 43 P. 410; Quint v. McMullen, 103 Cal. 381, 383, 37 P. 381.

[3, 4] As to the appeal from the judgment: One effect of an order granting a new trial is, of course, to vacate the judgment; however, when an appeal is taken from such an order the vacating effect is suspended, and the judgment remains effective for the purpose of an appeal from the judgment. Jackson v. Dolan, 202 Cal. 468, 261 P. 706; Puckhaber v. Henry, 147 Cal. 424, 81 P. 1105. In the normal situation, the appeal from the order granting a new trial is filed by the party successful at the trial, and a cross-appeal from the judgment is filed by the party unsuccessful at the trial to protect himself in the event that the order granting him a new trial is reversed. See Rules on Appeal, Rule 3(a)(2). Here the situation is different, for plaintiff has filed both the appeals, and defendants, the successful parties at the trial, are satisfied with the order granting the limited new trial and not only have not appealed therefrom but are actually seeking to dismiss plaintiff's appeal therefrom. In this situation, with neither party opposing the granting of a new trial, one seeking it in general form, the other in limited form, it is plain that the decision on this appeal will be to sustain the order granting a new trial in one form or another. This being so, the judgment will inevitably be vacated, and the ordinary provisional effect of such vacation pending appeal from the order granting new trial may be disregarded. The appeal from such vacated judgment may therefore be properly dismissed.

The motion to dismiss the appeal from the order granting a new trial is denied, and the motion to dismiss the appeal from the judgment is granted.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concur.

30 Cal.2d 144

AUTRY v. REPUBLIC PRODUCTIONS, Inc.

L. A. 19381.

Supreme Court of California, in Bank.

May 23, 1947.

1. Contracts 🔑309(1)

Although the doctrines of "frustration" and "impossibility" as excuse for non-performance of a contract are akin, frustration is not a form of impossibility of performance and more properly relates to consideration for performance.

See Words and Phrases, Permanent Edition, for all other definitions of "Frustration".

2. Contracts 🔑309(1)

Under the doctrine of frustration as an excuse for non-performance of a contract, performance remains possible, but is excused whenever a fortuitous event supervenes to cause a failure of the consideration or a practically total destruction of the expected value of the performance.

3. Contracts 🔑1

The purpose of contracts is to place the risks of performance upon the promisor.

4. Contracts 🔑309(1)

Motion picture actor who enlisted in the army could not rely on doctrine of frustration as an excuse for non-performance of the unperformed portion of contract of employment. Labor Code, § 2855; Selective Training and Service Act of 1940, § 1 et seq., § 8, as amended, 50 U.S.C.A.Appendix, § 301 et seq., § 308.

5. Contracts 🔑309(1)
War 🔑10(1)

Parties who have negotiated employment contract with reference to a state of war or have contemplated the risks arising from it may not invoke the doctrine of frustration as an excuse for non-performance. Labor Code, § 2855; Selective Training and Service Act of 1940, § 1 et seq., § 8, as amended, 50 U.S.C.A. § 301 et seq., § 308.

6. Contracts 🔑309(1)

"Impossibility" as excuse for non-performance of a contract is not only strict impossibility but includes impracticability because of extreme and unreasonable difficulty, expense, injury, or loss involved.

See Words and Phrases, Permanent Edition, for all other definitions of "Impossibility".

7. Contracts 🔑309(1)

Temporary impossibility of the character which, if it should become permanent, would discharge a promisor's entire contractual duty, operates as a permanent discharge if performance after impossibility ceases would impose a substantially greater burden upon promisor, but otherwise the duty is suspended only while the impossibility exists.

8. Contracts 🔑215(1)

Employment contract giving motion picture producer the right to suspend contract if actor by reason of mental or physical "disability" or otherwise should be incapacitated from fully performing related to illness resulting in physical or mental disability and did not include inability to perform due to military service.

See Words and Phrases, Permanent Edition. for all other definitions of "Disability".

9. Contracts 🔑215(1)

Motion picture actor's enlistment in army during time of war was not a voluntary "failure, refusal or neglect to perform" within contemplation of provision in employment contract permitting producer to terminate or extend term of contract for a period equivalent to period of failure, refusal or neglect to perform.

See Words and Phrases, Permanent Edition, for all other definitions of "Failure, Refusal or Neglect to Perform".

10. Contracts 🔑246

Where 1942 employment agreement between producer and motion picture actor was amendatory of and supplementary to 1938 agreement, and contained specific provision referring to possibility that actor might be required to serve in the armed forces, the specific provision governed the parties' rights on the happening of the contingency and was controlling over any general provision from which producer might have inferred some inconsistent right or privilege.

11. Contracts ⟹25

An agreement to agree in the future cannot be made the basis of a cause of action, and neither law nor equity provides a remedy for breach of such an agreement.

12. Contracts ⟹25

The court may not imply what the parties will agree upon.

13. Contracts ⟹25

A provision in motion picture actor's employment contract with producer that in the event actor should be required to serve in the armed forces pursuant to the Selective Service Act or should volunteer for such service, the parties would agree upon their mutual rights and obligations under the contract in view of such military service, was not a naked agreement to agree, and would be given the meaning and effect which words and conduct of parties plainly indicated. Selective Training and Service Act of 1940, § 1 et seq., § 8, as amended, 50 U.S.C.A.Appendix, § 301 et seq., § 308.

14. Contracts ⟹226

Provision in motion picture actor's employment contract with producer that in event actor should be required to serve in the armed forces, the parties would agree upon their mutual rights and obligations had effect of abrogating existing terms and substituting terms to be agreed upon in event of military service, and mere failure to come to agreement did not restore or revive original terms which were abrogated. Civ.Code, § 1511, subd. 2.

15. Evidence ⟹18

The court in 1947 could take notice of great decrease in purchasing power of the dollar, in construing employment contract executed in 1942.

16. War ⟹10(1)

The doctrine of revival of contracts suspended during the war is one based on considerations of equity and justice, and cannot be invoked to restore a contract which it would be unjust or inequitable to revive.

17. War ⟹10(1)

Equitable considerations should apply to the revival of personal service contracts interrupted by war where not otherwise governed by statutory provisions.

18. Contracts ⟹309(1), 323(1)

Assuming that terms of motion picture actor's employment contract with producer were merely suspended during period of actor's military service, the element of time in relation to special nature of services to be performed by actor and as affected by economic changes consequent upon the war, had a bearing on question whether delayed performance would impose a substantially greater burden upon actor, and although probative facts were found by trial court, whether those facts supported its ultimate finding and conclusion that there would be no such burden was a question of law, as was the question of impossibility of performance.

19. Contracts ⟹25

Where motion picture actor's employment contract with producer provided that in the event actor should be required to serve in the armed forces, the parties would agree upon their mutual rights and obligations under the contract in view of such military service, there was no duty upon actor to perform services for producer after his discharge from military service, in absence of a new agreement to continue the relationship.

◆

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Gene Autry against Republic Productions, Inc., for a declaration of the rights and obligations of the parties under a contract of employment. From an adverse judgment, the plaintiff appeals.

Reversed.

Prior opinion, 170 P.2d 977.

Gang, Kopp & Tyre, of Los Angeles, Samuel Williston, of Cambridge, Mass., and Martin Gang, of Los Angeles, for appellant.

Finlayson, Bennett & Morrow, Loeb and Loeb, Hubert T. Morrow, Milton H. Schwartz, John C. Morrow and Herman F. Selvin, all of Los Angeles, for respondent.

SHENK, Justice.

This is an appeal by the plaintiff from a judgment declaring the rights and obligations of the parties under contracts between them and in effect at the time of the plaintiff's enlistment in the United States Army in 1942.

Prior to his enlistment the plaintiff, Gene Autry, was a motion picture actor dramatizing western or cowboy roles. The defendant, Republic Productions, Inc., was a producer of western photoplays.

On September 22, 1938, the parties entered into a written agreement by which the defendant engaged the plaintiff's services as an actor in 10 photoplays during one year commencing July 1, 1938, the plaintiff to receive $6,000 for each of the first two, and $10,000 for each of the remaining eight. By paragraph 20 of the agreement four options were granted to the defendant, each of which, if exercised, would successively extend the contract for a year. Eight photoplays were to be produced each year. An annual increase of $1,000 per picture was also provided. Thus, in the year covered by the fourth option, the plaintiff's compensation for each photoplay would become $14,000.

In due time and prior to March 7, 1942, the defendant exercised the first three options which by written agreements brought the period for the expiration of employment under the third to March 6, 1943. On April 20, 1942, the plaintiff was ordered to report for physical examination under the Selective Training and Service Act, 50 U.S.C.A.Appendix, § 301 et seq., and was placed in Class 1-A. On May 11, 1942, the parties executed a further written agreement by which the defendant was granted an additional option for one year commencing upon the expiration of the last option of the 1938 agreement and during which eight plays were to be photographed for a compensation of $15,000 each. Included in that agreement was a paragraph numbered 24, providing: "In the event that the Artist [plaintiff] shall be required to serve in the armed forces of the United States pursuant to the Selective Service Act, or shall volunteer for such service, the parties hereto will agree upon their mutual rights and obligations hereunder in view of such military service."

The plaintiff enlisted in the Army on July 26, 1942. At that time there remained five plays to be photographed under the third option. The plaintiff rendered no service to the defendant after his enlistment.

Within the specified times the defendant exercised the fourth option of the 1938 agreement and the additional option of the 1942 agreement, which if not further extended would have brought the termination date of the employment to March 6, 1945. On March 3, 1944, the defendant notified the plaintiff that it elected to extent performance under the fourth option of the 1938 agreement for a period equal to that of the plaintiff's military service.

On June 17, 1944, the plaintiff served on the defendant a notice of termination of the agreements and employment thereunder by reason of military service. On June 27, 1944, while still serving in the armed forces, he filed the present action for a declaration of the rights and duties of the parties under their agreements. The trial court's decision was rendered in February, 1945, although not entered until March 20, 1945. The plaintiff's discharge from military service took place in July, 1945.

The judgment declares that the contracts between the parties had not been terminated; that the plaintiff's military service suspended performance for a time equal to the period of military service; that after his discharge from the Army the plaintiff would be bound to carry out the unperformed portion of the contracted employment by appearing in five and eight photoplays under the third and fourth options respectively of the 1938 agreement, and eight photoplays under the additional option of the 1942 agreement; and that no substantial burden would be placed upon the plaintiff by the completion of performance of the contracts following his discharge from military service. The court excluded from the force of the judgment the plaintiff's rights or privileges pursuant to section 2855 of the Labor Code limiting a contract of employment to a period of seven years. Also excluded from consideration herein is the possible obligation on the part of the defendant to re-employ the plaintiff as an ex-serviceman (Act of September 16, 1940, ch. 720, sec. 8, 54 Stat. 890, as amended, 50 U.S.C.A.Appendix, § 308).

The controversy presents the question of the effect of the plaintiff's military service on the rights of the parties under the contracts and their conduct thereunder.

The plaintiff places reliance in part on the doctrines of frustration and impossibility to sustain his contention that the court's conclusions and judgment are unsupported.

[1-5] This court has recently considered the history and nature of the doctrine of frustration as an excuse for non-performance. Lloyd v. Murphy, 25 Cal.2d 48, 153 P.2d 47. There it was pointed out (25 Cal.2d at page 53, 153 P.2d 47) that although the doctrines of frustration and impossibility are akin, frustration is not a form of impossibility of performance. It more properly relates to the consideration for performance. Under it performance remains possible, but is excused whenever a fortuitous event supervenes to cause a failure of the consideration or a practically total destruction of the expected value of the performance. See also 20th Century Lites, Inc., v. Goodman, 64 Cal.App.2d Supp. 938, 149 P.2d 88; Restatement of Contracts, section 288, discussion and cases cited. As stated in Lloyd v. Murphy, 25 Cal.2d at page 54, 153 P.2d 47, the purpose of contracts is to place the risks of performance upon the promisor. Without extended discussion, the foregoing authorities demonstrate that, strictly speaking, there is here not a failure of the consideration or the destruction of the value of performance in the sense contemplated by the doctrine of frustration. Furthermore, if the parties have contracted with reference to a state of war or have contemplated the risks arising from it they may not invoke the doctrine of frustration. Lloyd v. Murphy, supra, 25 Cal.2d at page 55, 153 P.2d 47, and cases cited.

[6, 7] "Impossibility" is defined in section 454 of the Restatement of Contracts, as not only strict impossibility but as impracticability because of extreme and unreasonable difficulty, expense, injury, or loss involved. Temporary impossibility of the character which, if it should become permanent, would discharge a promisor's entire contractual duty, operates as a permanent discharge if performance after the impossibility ceases would impose a substantially greater burden upon the promisor; otherwise the duty is suspended while the impossibility exists. (Section 462, Restatement of Contracts.) The trial court's judgment indicates that the controversy was resolved upon the theory of temporary impossibility and suspension due to military service.

At the time of the 1938 agreement the contingency of the entry of the United States into the second World War was not expressly contemplated by the parties. Looking at that agreement alone, the war and the plaintiff's military service were supervening fortuitous events which rendered performance impossible. Had the parties not entered into further agreement, and in the absence of a validly exercised extension of the 1938 agreement, the controversy between them might properly be resolved solely by a determination of the question of impossibility. In Havens v. Rochester Ropes, Inc., 267 App.Div. 394, 46 N.Y.S.2d 534; and Marshall v. Glanvill (1917) 2 K.B. 87 (see also Dacey v. Trust Funds, Inc., D.C., 66 F.Supp. 321, 322), it was indicated that entry into military service effected permanent discharge of an employment contract. The defendant cites no authority holding that military service results in a temporary impossibility. However, in view of our conclusions herein, it becomes unnecessary to treat more specifically the question whether the plaintiff's mere entry into military service resulted in a permanent discharge of the 1938 agreement.

The defendant contends that the notice of March 3, 1944, was in the exercise of certain privileges granted in the event of the plaintiff's failure to perform, and operated to extend the 1938 contract.

Paragraph 12 of that agreement provided that if the production of any photoplay in which the plaintiff was appearing or was scheduled to appear was necessarily prevented, suspended or postponed during the employment period by reason of fire, labor conditions, riot, war, act of God, or by the enactment of any law, municipal, state or federal, or other specified contingencies, the producer had the option to suspend the agreement during the continuance of such prevention, suspension or postponement without obligation to pay compensation during the period of suspension; but that if the period of suspension continued for four weeks, the plaintiff at his option might terminate the contract; or thereupon the producer might keep the agreement in force by electing to pay the plaintiff weekly at a rate specified.

Since there was no pretense of compliance with the terms of that paragraph, the defendant does not contend that the election to extend the period of performance was exercised pursuant to that provision.

[8] Paragraph 13 of the contract gave the defendant the right to suspend the contract, without payment of compensation during the suspension, if the plaintiff by reason of mental or physical disability or otherwise should be incapacitated from fully performing, or in the event he suffer facial or physical disfigurement, or material alteration or change in his facial or physical appearance, or any impairment of his voice, materially detracting from his appearance on the screen or interfering with his ability to perform.

This paragraph clearly relates to illness resulting in physical or mental disability to perform as an actor under the agreement, including any physical suffering of impairment which, although there be capacity to perform, might reduce the value of the performance. The words, "disability" and "incapacitated", are determinative. Inability, such as that due to military service, was not included within the subject matter of that provision. There is no contention that the plaintiff suffered any of the disability or incapacity which was contemplated by paragraph 13.

[9] Paragraph 14 stated the foundation for injunctive relief in the event of a breach of contract by the plaintiff, that is, in the event of the failure, refusal or neglect of the artist to perform or observe any of his obligations to the full limit of his ability or as instructed; or the defendant could terminate the agreement or the employment period, or extend the term of the agreement and all of its provisions for a period equivalent to the time during which such failure, refusal or neglect continued.

The right to injunctive relief in such event characterizes the failure, refusal or neglect encompassed within that paragraph as a voluntary failure, refusal or neglect on the part of the plaintiff, when otherwise he was in a position to perform services under his employment. It is no answer to say that the plaintiff enlisted, and that since his entry into the military service was in a sense voluntary, his "failure" likewise was voluntary. His enlistment when his country was engaged in war may not be declared to be the voluntary failure, refusal or neglect to perform intended by the provisions of paragraph 14. The fact is that the 1938 agreement did not deal with the contingency of the plaintiff's military service. Moreover, if paragraph 12 was intended to cover that contingency, then the defendant expressly refrained from proceeding thereunder, and the plaintiff's notice was an exercise of his right pursuant thereto.

[10] Furthermore, if it is reasonable to conclude, as is indicated below, that the 1942 agreement was amendatory of and supplementary to the 1938 agreement, it may be said that paragraph 24 of the later agreement controlled the question of the defendant's rights in the event of the

plaintiff's military service. That paragraph, being a specific provision governing the parties' rights on the happening of that contingency, is controlling over any general provision from which the defendant might have inferred some inconsistent right or privilege. Scudder v. Perce, 159 Cal. 429, 433, 114 P. 571; Restatement of Contracts, section 236(c).

The agreement of May 11, 1942, was a formal agreement with the same standard or general provisions as the 1938 agreement. By the later agreement the defendant was granted an additional option to be exercised by notice to the plaintiff 30 days prior to the expiration of the term of the last option of the earlier agreement. The later agreement contained the special provision (paragraph 24) that, in the event of military service by the plaintiff, the parties "will agree upon their mutual rights and obligations hereunder in view of such military service."

It is the plaintiff's position that upon the happening of the contingency dealt with in paragraph 24, and in the absence of a new agreement concerning the parties' mutual rights and obligations, their relationship terminated. The defendant contends that the provision of that paragraph is meaningless and of no effect.

[11-13] There is no dispute that neither law nor equity provides a remedy for breach of an agreement to agree in the future. Such a contract cannot be made the basis of a cause of action. Klein v. Markarian, 175 Cal. 37, 165 P. 3; Los Angeles Immigration & Land Co-operative Ass'n v. Phillips, 56 Cal. 539; Dillingham v. Dahlgren, 52 Cal.App. 322, 198 P. 832 and cases cited. The court may not imply what the parties will agree upon. Kerr Glass Mfg. Corporation v. Elizabeth Arden Sales Corporation, 61 Cal.App.2d 55, 141 P.2d 938. But it does not follow that the provision of paragraph 24 has no meaning, nor any effect upon the parties' mutual rights and obligations. That provision is not a naked agreement to agree. Being part of an undisputed contract between the parties, it must be given the meaning and effect which the written words and the conduct of the parties plainly indicate.

Prior to the execution of the 1942 agreement the parties conferred concerning their mutual rights and obligations in the event that the plaintiff entered the armed forces. At that time the plaintiff requested the inclusion of a clause that, in such event, the agreements and the employment contemplated thereby should terminate. The defendant rejected the proposal, and the provision which was included as paragraph 24 was accepted as a compromise, namely, that in the event the plaintiff entered military service the parties would leave for future agreement their mutual rights and obligations "in view of such military service." That the provision had meaning is disclosed by the conduct of the parties thereunder. Conferences were conducted in Chicago, and some preparations were undertaken looking toward photographing three plays after the plaintiff's entry into the armed forces. There is evidence that permission of the Army was obtained, although the compensation was required to go into the Army Relief Fund. The defendant offered to remunerate the plaintiff's wife for rental of horses and equipment, but the final outcome was a failure to agree and the pictures were not made. Subsequently there were unsuccessful attempts to negotiate a new contract between the parties to replace the outstanding agreements in the event of the plaintiff's discharge from the service. These attempts persisted until the filing of the present action.

It may be that the parties intended their agreements to remain in force during the period of military service. The language of paragraph 24 so indicates. Their conduct substantiates that mutual understanding. For instance, the request for a termination clause in the event of military service was based on the opinion of the plaintiff's attorney that military service would terminate the existing contract in any event. The compromise was reached in order "to leave the question open." The parties apparently intended paragraph 24 to bear upon their mutual rights and obligations under the 1938 contract as well. In fact their attempt to agree on the photographing of three plays during military service was concerned with three of the photoplays under the 1938 contract. The trial court found that by reason of their acts and conduct both the plaintiff and the defendant recognized and acquiesced in the continuance of their contracts after the plaintiff's entry in the armed service, and at all times treated the contracts as valid, binding and subsisting. The findings in this respect, viewed in relation to paragraph 24 and the parties' conduct, are consistent with conclusions that the 1942 agreement was amendatory of the earlier agreement; that the agreements were in force (that is, not suspended) during military service; that the term of each option period expired or would expire in accordance with the express provisions; therefore, that the period of performance terminated on March 6, 1945. Such conclusions would be harmonious with the rule that where the parties have foreseen the happening of a possible future contingency and have expressly contracted with regard to it, the subsequent event is not fortuitous within the meaning of the rule. (Subd. 2, section 1511, Civil Code.) Here the parties expressly contracted with regard to the event of the plaintiff's military service. They did not thereby contemplate a postponement of performance. It was a special agreement that their mutual obligations should continue during the period of military service, but that they would make a new agreement concerning their rights and obligations. It does not follow from their failure to agree that there was no performance in legal contemplation.

[14] However, assuming, as the trial court concluded, that the plaintiff's military service constituted a temporary impossibility of performance, then it becomes necessary to determine the effect of paragraph 24 upon the rights and obligations of the parties following the plaintiff's discharge from military service. In this connection likewise the special provision must be given the force and effect intended, that is, as an abrogation of existing terms and a substitution of terms to be agreed upon in the event of military service; and any ineffectiveness inherent within it pertains only to the matter of its enforcement. The parties are not deprived of reliance thereon in the event of the happening of the contingency with which it expressly deals. On the contrary the special provision then becomes effective as a modification of their agreements. The mere failure to come to agreement did not operate to restore or revive the original terms which were abrogated.

[15] It is clear that it was the intention of the parties to re-open negotiations and agree concerning their future rights and obligations in the event of the plaintiff's military service. That they so understood the effect of paragraph 24 upon their entire agreement is abundantly shown from the record of their conduct, including their attempts following the plaintiff's entry into military service to negotiate a contract which would be effective upon his discharge from military service. Implicit in their contracts was the mutual recognition that the plaintiff's artistic career and the quality of artistic performance might be affected by the passage of time. Their contracts stipulated the special, unique, unusual, extraordinary and intellectual nature and the special and peculiar value of the services to be performed by the plaintiff. The record shows that they were aware of the plaintiff's peak of popularity as a cinema actor; that his continued success and popular following depended on his special ability to enact cowboy roles; that the physical activity and agility required in the success of such roles indicated a limited period when the plaintiff might be at the peak of his performance; and that the loss of several years in military service might well affect the parties' mutual rights and obligations. These considerations, together with the great decrease in the purchasing power of the dollar, of which the court may take notice (Butler v. Allen, 73 Cal.App.2d 866, 870, 167 P.2d 488), and which had already commenced at the time of the 1942 agreement, would have a direct bearing on whether in their own opinion the parties should continue under the existing contracts or whether the contemplated services should be performed on different terms to be agreed upon.

The executed agreements afforded to the defendant the protection of annual options. The defendant might elect not to exercise any one or more of them in the event that the plaintiff's popularity waned or other adverse conditions developed. Provision 24, on the other hand, was intended to afford protection to both parties in the event of changes ensuing upon military service which might bear upon their mutual rights and obligations. The parties thereby consented that neither should be obliged to continue under a contract which might become inequitable. What specific changes were relevant or might create inequalities, it becomes unnecessary to determine. The parties took those factors into consideration and expressly undertook to agree thereon between themselves. They have written their contract. The courts will not rewrite it for them. Foley v. Euless, 214 Cal. 506, 6 P.2d 956.

In Los Angeles Soda Works v. Southern California Aquazone Co., 103 Cal.App. 105, 284 P. 253, relief was denied where a contract similarly provided that the parties would agree in the future concerning terms for continuing an existing relationship, and no new agreement had been reached. The effect of the provision of paragraph 24 and the failure of the parties to agree thereunder, is that the plaintiff's performance was terminated at least as of the contractual expiration date of March 6, 1945. The court's findings and conclusions therefore indicate a failure to give recognition to the agreement and understanding expressed in paragraph 24.

[16, 17] Again assuming however, as the trial court determined, that the original contract terms were merely suspended, the question is whether the record supports the finding and conclusion that delayed performance would impose no substantially greater burden upon the plaintiff. It has been said that the doctrine of revival of contracts suspended during the war is one based on considerations of equity and justice, and cannot be invoked to restore a contract which it would be unjust or inequitable to revive. New York Life Ins. Co. v. Statham, 93 U.S. 24, 32, 23 L.Ed. 789. There should be no hesitancy in saying that equitable considerations should apply to the revival of personal service contracts interrupted by war, where not otherwise governed by statutory provisions. We have noted the factors which led the parties to undertake by the provision of paragraph 24 the determination of the equities for themselves. The considerations which brought them to that understanding cast considerable doubt upon the propriety of the trial court's declaratory judgment in that respect. Whether completion of performance after the plaintiff's discharge would place a substantially greater burden upon him cannot be resolved simply by the fact that his performance, the stipulated consideration therefor, and the time to be consumed thereby would remain the same. The defendant contends that time was not the essence of the contracts nor a material element in the matter of performance. The trial court's conclusion indicates agreement with that contention. But the fact that the same time and effort may be required in making the pictures after release from military duty is not determinative. The court gave no consideration to the substantial period of time that would be taken out of the plaintiff's career by military service. By the option device the defendant was afforded protection against the encroachments of time upon expected profits or the plaintiff's ability and popularity. That protection could be invoked by electing not to exercise the options. Conversely, if time gave the defendant the advantage, profits could be preserved by electing to exercise the options. There was a time limit on the production of each series of plays. And as indicated, paragraph 24 also recognized time as an important factor. It is therefore apparent that the parties contemplated time as an essential element in their agreements. Within that contemplation and as a matter of general knowledge, time may place a severe and therefore very serious handicap on an artist who at the peak of performance and popularity must engage in military service for several years of the limited duration of his artistic career. And if an additional period must be spent in the delayed performance of a contract which otherwise would have terminated, the hardship is increased. A further inequity would be the compulsion to accept for the delayed performance a stipend greatly lessened in value by economic conditions. It may be said that the agreements placed upon the plaintiff the risk of such conditions for the duration of the agreed term. But he may not necessarily be deemed to have undertaken the risk for the longer term by which the contract is sought to be extended because of military service. He cannot be supposed to have consented to take during the postponed period remuneration at a rate much lower than that then prevailing for similar artistic services. Paragraph 24 also indicates the absence of such consent.

[18] The element of time in relation to the special nature of the services to be performed by the plaintiff, and as affected by the economic changes consequent upon the war, should be deemed to have a bearing on the question whether delayed performance would impose a substantially greater burden upon the plaintiff. The probative facts were found by the court; but the question whether those facts support its ultimate finding and conclusion that there would be no such burden is a question of law. Garrison v. Edward Brown & Sons, 25 Cal.2d 473, 478, 154 P.2d 377. Whether impossibility existed is also a question of law. Mitchell v. Ceazan Tires, Ltd., 25 Cal.2d 45, 48, 153 P.2d 53. The parties' contracts and their undisputed conduct, shown by the findings of the probative facts and otherwise by the record, indicate the substantial nature of the hardship in that respect. The trial court's conclusion that the plaintiff would suffer no substantially greater burden by delayed performance is therefore unsupported and in turn affords no support for the judgment.

[19] From the foregoing it follows that the judgment should declare that in the absence of a new agreement to continue the relationship of the parties, there is no duty upon the plaintiff to perform services for the defendant after his discharge from military service.

The judgment is reversed.

GIBSON, C. J., and CARTER, TRAYNOR, and SCHAUER, JJ., concur.

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29 Cal.2d 866

STARTUP et al. v. PACIFIC ELECTRIC RY. CO.

L. A. 19876.

Supreme Court of California, in Bank.
April 28, 1947.

As Modified on Denial of Rehearing
May 26, 1947.

1. Railroads 🔑307(3)

Where interurban railway company had undertaken to warn travelers of approach of its trains by using a wigwag, company was under duty to use reasonable care in construction and maintenance of signal system.

2. Railroads 🔑350(5)

In action against interurban railway company for injuries sustained by automobile passengers in grade crossing collision, where evidence established that signaling system was so constructed that when one train followed another on track on which accident occurred within 600 feet the signal would cease to operate when first train cleared crossing, whether company was negligent in respect of installation, operation or maintenance of signal was for jury.

3. Railroads 🔑307(3)

Where evidence established that crossing signaling system was so constructed that when one train followed another on track on which accident occurred within 600 feet, signal would cease to operate when first train cleared crossing, the fact that placement of switches could have been adjusted so as to give warning of approach of all trains could be considered by jury in determining whether company used reasonable care in installation and operation of signaling system.

4. Railroads 🔑330(2)

A railroad may not encourage persons traveling on highways to rely on safety devices and then hold them to the same degree of care as if the devices were not present

5. Railroads 🔑330(2)

Railroad tracks are themselves a warning of danger and a driver of an automobile must take some precautions for his safety when attempting to cross them, even though the railroad has installed system to warn of approaching trains.

6. Railroads ⚷350(13)

Whether precautions taken by motorist attempting to cross railroad tracks are sufficient in view of all circumstances is ordinarily question for jury.

7. Railroads ⚷350(13)

Where driver of automobile has exercised some care before attempting to cross railroad tracks, question whether care actually exercised was due and sufficient is for jury.

8. Railroads ⚷350(28)

In action against interurban railway company for injuries sustained by automobile passengers in grade crossing collision, where there was evidence that driver of automobile took some precaution before crossing tracks but that when wigwag signals ceased operating he started across track without looking again, an instruction that driver was guilty of negligence as matter of law was erroneous.

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Sadie Startup and others against the Pacific Electric Railway Company to recover damages for injuries sustained as a result of a collision between defendant's train and an automobile in which plaintiffs were riding. Judgment for defendant and plaintiffs appeal.

Reversed.

Prior opinion of District Court of Appeal, 171 P.2d 107.

Samuel P. Young and Paul Blackwood, both of Los Angeles, for appellants.

Frank Karr, C. W. Cornell and O. O. Collins, all of Los Angeles, for respondent.

GIBSON, Chief Justice.

Plaintiffs were guests in an automobile which was struck by an interurban train operated by defendant. They have appealed from a judgment rendered after a verdict in favor of defendant claiming that the jury was erroneously instructed on the law applicable to their theory of the case.

The collision occurred at approximately 12:45 a. m. at an intersection of defendant's private right-of-way with a six-lane highway on which there was heavy traffic both day and night. There were four sets of tracks on the right-of-way; tracks one and two on the west carried southbound trains, and tracks three and four on the east were used for northbound trains. The automobile was proceeding east on the highway and after it crossed tracks one and two, it was struck by a three-car northbound train on track three.

The defendant maintained a warning system with wigwags at the southwest and northeast corners of the intersection. The switches which operated the wigwags were placed at varying distances from the highway crossing and the passage of a train on any one of the four sets of tracks would start and stop the warning device. On track three where the accident occurred, the last cutin switch was 576 feet south of the center of the intersection and the cutout switch was 39 feet north, with the result that if one train was following another on track three within 600 feet, the wigwag would stop operating as the first of the two trains passed the cutout switch, and would not again function while the following train, having already passed the cutin switch, approached the highway.

The evidence is sharply conflicting as to what occurred immediately prior to and at the time of the accident. Plaintiffs' evidence was as follows: The wigwag was operating as the automobile approached the intersection and the driver stopped at the crossing to let a southbound freight train pass on track one. As the freight train cleared the crossing and while the automobile remained standing, a single interurban car passed on one of the three tracks farthest from the automobile. The witnesses did not agree as to the track on which the single car was traveling. The driver of the automobile testified on direct examination that he believed the car was on track three, but that it could have been on track two. On cross-examination he testified that the car was travelling on track three or four. Plaintiff Startup placed the single car on track four, and one of the other plaintiffs testified that it was on track three or four. The wigwag ceased to operate when the single car cleared the intersection, and the driver of the automobile, without again looking north or south, started across the tracks. When the automobile reached track three, it was struck by a northbound three-car train which followed the single car. The train which collided with the automobile sounded no warning and the wigwag was not working as the train approached the intersection nor was it operating after the collision although the train had not passed the cutout switch.

Defendant's evidence was that the automobile did not stop, that neither a freight train nor a single car passed the crossing near the time of the accident, that the wigwag operated at all times and that the train which collided with the automobile sounded appropriate warning signals as it approached the intersection.

It is clear that there was sufficient evidence to support a verdict for defendant, but plaintiffs contend that the evidence presented material questions of fact with regard to the installation, operation and maintenance of the signal system, and that the court erroneously took these questions from the jury by the following instruction: "In this case there is no evidence upon which to support a finding that the defendant was negligent in respect to the installation, operation or maintenance of the wigwag signals installed at the crossing. You are therefore instructed that as to the issue of whether defendant was negligent in respect to the wigwags, you must find that the defendant was not negligent, even though you may believe from the evidence that the wigwags stopped operating after the freight train passed the crossing."

[1] The defendant, having undertaken to warn travelers of the approach of its trains by the use of a wigwag, was under a duty to use reasonable care in the construction and maintenance of the signal system lest the appearance of safety created by the presence of the device constitute a trap for persons relying upon it for protection. Will v. Southern Pacific Co., 18 Cal.2d 468, 473, 474, 116 P.2d 44; Erie R. Co. v. Stewart, 6 Cir., 40 F.2d 855, 857; Mallett v. Southern Pacific Co., 20 Cal.App.2d 500, 506, 68 P.2d 281.

[2, 3] The uncontradicted evidence establishes that the signaling system was so constructed that when one train followed another on track three within 600 feet the wigwag would cease to operate when the first train cleared the crossing thereby indicating that traffic could cross the tracks in safety, notwithstanding the existence of imminent danger from the following train. Plaintiffs' evidence was that these were the circumstances under which the system was operating at the time of the accident. There was evidence that the wigwag was not working as the three-car train approached the intersection on track three, and that the single car which passed the intersection shortly ahead of the three-car train was also traveling on track three. It could be inferred that the wigwag stopped because the three-car train was following the single car on the same track and within the distance in which the wigwag would not operate. The defendant, however, asserts that the operating rules of the company provide that one train shall not follow another at a distance of less than 2,500 feet, and that, if the train which struck the automobile was following so closely that the wigwag failed to give warning of its approach, this was the fault of the motorman and not of the signaling device. It is argued that the negligence of the company, if any, resulted from the failure of its employees to abide by the rules of the company, and that the instruction was therefore correct in stating that the defendant was not negligent in respect to the installation, maintenance or operation of the wigwag signals. This contention assumes that one of the purposes of the rule was to prevent the signaling device from operating as a trap. It follows from this assumption that compliance with the rule was an essential part of the operation of the system as a whole and, since it appears from plaintiffs' evidence that the rule was violated, it cannot be said as a matter of law that defendant was free from negligence in the operation of the signaling system.

Nor can we say as a matter of law that the company was not negligent in the installation of a signaling system which depended upon compliance with such a rule to prevent it from operating as a trap. It appears that the placement of the cutin and cutout switches could have been adjusted so as to give warning of the approach of all trains, and this is a factor which the jury was entitled to consider in determining whether the company, having assumed the duty of warning travelers on the highway of the dangerous proximity of trains, used reasonable care in the installation and operation of its signaling system.

Plaintiffs contend that the court also erred in giving the following instruction: "The driver of the auto in which plaintiffs were riding testified that he started to cross defendants' tracks without looking for approaching trains, but relied wholly on the wigwag. You are instructed that the driver of the automobile was guilty of negligence as a matter of law, and if you find that such negligence on his part was the sole proximate cause of the accident, then your verdict must be for defendant."

As we have seen, the accident happened in the night time at an intersection which carried heavy traffic both day and night. The driver of the car stopped at the crossing in response to the warning given by the wigwag and waited while two trains passed and until the wigwag ceased operating. He started across the tracks without again looking only, when in reliance on the cessation of the wigwag, it appeared to him that he could do so in safety.

[4-6] It is settled that a railroad may not encourage persons traveling on highways to rely on safety devices and then hold them to the same degree of care as if the devices were not present. Will v. Southern Pacific Co., 18 Cal.2d 468, 474, 116 P.2d 44; Toschi v. Christian, 24 Cal.2d 354, 360, 149 P.2d 848; Koch **v.** Southern California Ry. Co., 148 Cal. 677, 680, 84 P. 176, 4 L.R.A., N.S., 521, 113 Am.St.Rep. 332, 7 Ann.Cas. 795. The railroad tracks are, of course, themselves a warning of danger and a driver of an automobile must take some precautions for his safety when attempting to cross them, even though the railroad has installed some system to warn of approaching trains. Will v. Southern Pacific Co., supra; Toschi v. Christian, supra, 24 Cal.2d at page 360, et seq., 149 P.2d 848. It is ordinarily a question for the jury whether the precautions taken by the driver of the automobile are sufficient in view of all the circumstances. Toschi v. Christian, supra, 24 Cal.2d at page 360, 149 P.2d 848; Koch v. Southern California Ry. Co., supra, 148 Cal. at page 680, 84 P. 176, 4 L.R.A.,N.S., 521, 113 Am.St.Rep. 332, 7 Ann.Cas. 795; Will v. Southern Pacific Co., supra, 18 Cal.2d at page 475, 116 P.2d. 44. And it has been held that even where the crossing is unguarded and the driver failed to look that "In determining the degree of care which would be expected from a reasonably cautious person in crossing the railroad track * * * the jury might consider the fact that a freight train had just passed and that one would not ordinarily expect another train so soon." Pietrofitta v. Southern Pac. Co., 107 Cal. App. 575, 580, 290 P. 597, 599. See, also, Lindsey v. Pacific Elec. Ry. Co., 111 Cal. App. 482, 488, et seq., 296 P. 131.

[7, 8] There was evidence that the driver of the automobile in which plaintiffs were riding took some precautions before crossing the tracks, and "where it is shown that a [driver] has exercised some care, the question whether or not the care actually exercised was due and sufficient will always be a matter for determination by the jury." Koch v. Southern California Ry. Co., 148 Cal. 677, 680, 84 P. 176, 177, 4 L.R.A., N.S., 521, 113 Am.St.Rep. 332, 7 Ann.Cas. 795. It was therefore error for the court to instruct the jury that the driver of the automobile was guilty of negligence as a matter of law.

The judgment is reversed.

SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concurred.

TRAYNOR, Justice.

I concur in the judgment. I agree with the main opinion regarding the instruction concerning the installation, operation, and maintenance of the wigwag signals. I cannot agree, however, as to the negligence of the driver of the automobile. The driver stopped at the crossing in response to the warning given by the wigwag and waited until two trains passed and the wigwag ceased operating. The crucial question is whether it was negligence thereafter to cross the tracks without looking for approaching trains. A jury is in no better position than this court to answer this question. There is every reason why this issue, often raised in practice, should be settled by this court and not left to the oscillating verdicts of juries. (See Holmes, The Common Law, 123.) The court therefore should determine the standard of reasonable conduct for deciding whether or not the conduct in question was negligent. See concurring opinion in Toschi v. Christian, 24 Cal.2d 354, 364, 149 P.2d 848; concurring opinion in Satterlee v. Orange Glenn School District, Cal.Sup., 177 P.2d 279. In my opinion the invitation to cross implicit in the cessation of the wigwag and the absence of other factors that might serve to warn of danger relieved the driver of the duty to look for approaching trains. He therefore complied with the requirements of due care when he stopped and waited for the cessation of the wigwag before proceeding to cross the tracks. Such a driver is in a different position from a driver who finds the wigwag silent or in a stationary condition when he approaches the tracks and crosses them without looking for approaching trains. The former is assured by the operation of the wigwag that it is functioning and will warn of approaching trains, whereas the latter, having no such assurance, must anticipate the possibility that the wigwag is not functioning. See Will v. Southern Pacific Co., 18 Cal.2d 468, 474, 475, 116 P.2d 44; 53 A.L.R. 975; 99 A.L.R. 732.

Moreover, the instruction with respect to the driver's negligence was unnecessary and misleading. The plaintiffs were the guests of the driver and his negligence was not imputable to them. Campagna v. Market St. Ry. Co., 24 Cal.2d 304, 309, 149 P.2d 281; Pope v. Halpern, 193 Cal. 168, 174, 223 P. 470; Bryant v. Pacific Elec. Ry. Co., 174 Cal. 737, 164 P. 385; see Restatement, Torts, § 490. "The ultimate question for the determination of the jury was whether defendants were guilty of negligence contributing to plaintiffs' injuries. The conduct of the driver of the automobile, not being in issue, was admissible in evidence only to the extent that it might aid in the determination of the question of the negligence of defendants." Krupp v. Los Angeles Ry. Corporation, 57 Cal.App.2d 695, 698, 135 P.2d 424, 425. The vice of such an instruction is that it tends to lead the jury to believe that their verdict depends on the negligence of the driver. See Krupp v. Los Angeles Ry. Corporation, supra; Renowden v. Pacific Electric Ry. Co., 73 Cal.App. 383, 387, 238 P. 785; Lund v. Pacific Electric Ry. Co., 25 Cal.2d 287, 293, 294, 153 P.2d 705.

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30 Cal.2d 165

NEFF v. NEW YORK LIFE INS. CO.

L. A. 19345.

Supreme Court of California, in Bank.

May 29, 1947.

1. Appeal and error 🔑927(1)

On appeal by plaintiff from judgment for defendant after defendant's objection to the introduction of any evidence, on ground that the complaint showed that alleged causes of action were barred by limitations, the truth of all of plaintiff's allegations was assumed.

2. Limitation of actions 🔑1

A statute of limitations is a statute of repose, enacted as a matter of public policy, to fix a limit within which an action must be brought, or the obligation is presumed to have been paid, and is intended to run against those who were neglectful of their rights, and who failed to use reasonable and proper diligence in the enforcement thereof.

3. Limitation of actions 🔑13

A party, by reason of the fraudulent concealment of a fact, on the existence of which the cause of action depends, may be estopped to set up defense of limitations.

4. Limitation of actions 🔑104(2)

Where insurer plainly advised insured, and later his widow, that insured had no disability rights under life policy, and there was no confidential relationship between insurer and insured or his widow that would relieve either of them from the duty to make diligent inquiry into the merit of insurer's position that insured was not entitled to disability benefits, and there were no deceptive assurances by insurer tending to lull insured or his widow into a sense of security and to forbid suit for statutory period, four-year limitation was not tolled on ground of fraudulent concealment by insurer. Code Civ.Proc. § 337, subd. 1.

5. Limitation of actions 🔑95(1)

A failure to discover a cause of action does not suspend the running of the statute of limitations.

6. Insurance 🔑156(1)

An insurer has the duty of exercising good faith in its dealings with the insured and cannot take any unfair advantage of him.

7. Evidence 🔑5(2)

It is common knowledge that there are often differences of opinion concerning liability under insurance policies.

8. Limitation of actions 🔑96(1), 99(1)

No mere denial of liability by an insurer, even though denial was allegedly made through fraud or mistake, should be sufficient, without more, to deprive the insurer of its privilege of having the disputed liability litigated within the period prescribed by the statute of limitations. Code Civ.Proc. § 337, subd. 1.

9. Insurance 🔑146(3)

In the construction of ambiguities in an insurance policy, the construction most favorable to the insured, and one which will give life, force and effect to the policy, should be adopted.

10. Limitation of actions 🔑13

Where insurer plainly advised insured, and later his widow, that insured had no disability rights under life policy, and there was no confidential relationship involved, and no deceptive assurances by insurer tending to lull insured or his widow into a sense of security and to forbid suit for statutory period, insurer was not estopped to interpose the defense of the statute of limitations. Code Civ.Proc. § 337, subd. 1.

11. Trial 🔑3

A statute merely stating a procedural rule authorizing trial court in a proper case to avoid an unjustifiable expenditure of time in trial of issues relating to the merits of an action when it appears after trial of special defense that plaintiff in any event could not recover, did not require trial court to proceed to the trial of defendant's specific defense that cause of action was barred by limitations, where it could be clearly seen from plaintiff's pleading that he could not present a cause of action not barred by limitations. Code Civ.Proc. § 337, subd. 1; § 597.

CARTER, J., dissenting.

* * *

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action by John V. Neff, administrator with the will annexed of the estate of Arthur V. Neff, deceased, against the New York Life Insurance Company, a corporation, to recover a 10-year accrual of disability payments to which the deceased was allegedly entitled at the time of his death under the terms of a life policy, and to recover the amount of annual premiums on the policy during such period. From an adverse judgment, the plaintiff appeals.

Judgment affirmed.

C. P. Von Herzen and Hunter R. Skinner, both of Los Angeles, for appellant.

Meserve, Mumper & Hughes, Edwin A. Meserve and Roy L. Herndon, all of Los Angeles, for respondent.

SPENCE, Justice.

[1] Plaintiff, as administrator of the estate of Arthur V. Neff, deceased, brought this action to recover a 10-year accrual of disability payments to which the decedent was allegedly entitled at the time of his death under the terms of a life insurance policy, and to recover also the amount of

the annual premiums on the policy which the decedent paid during said period. Issue was joined upon plaintiff's second amended complaint, which pleaded, as successive causes of action, defendant's fraud and mistake in its representation of the insured's rights under the disability clause of his policy. At the commencement of the trial, and after the first witness was sworn, defendant interposed an objection to the introduction of any evidence, on the ground that "the second amended complaint shows on its face that the alleged causes of action are barred by the statute of limitations" and consequently fails to show any cause of action. The objection was sustained over plaintiff's offer of proof, and judgment for defendant was entered. In appealing from that judgment, plaintiff argues that defendant's conduct estops it from relying upon the statute in avoidance of plaintiff's claim. But assuming the truth of all of plaintiff's allegations, as required under the circumstances of the trial court's ruling, plaintiff's position cannot be sustained.

From the first cause of action in the second amended complaint, it appears that in December, 1926, the insured was totally disabled by tuberculosis of both lungs. On or about April 1, 1927, the insured presented due written proof, as required by the terms of his policy, informing defendant that he had "become wholly and presumably permanently disabled by bodily disease," that he "was then and would presumably continue to be prevented from engaging in any occupation whatsoever for remuneration or profit," and that such disability had "existed continuously for more than sixty (60) days before date of such proofs"; and at that time the insured requested "defendant to provide for him and pay to him such benefits as he may have been entitled to under the terms of said policy." The policy, a copy of which is attached to said complaint, provides, on its front page, that defendant would pay to the insured $300 per annum "during the lifetime of the Insured, if the Insured becomes wholly and permanently disabled before age 60, subject to all the terms and conditions contained in Section 1 hereof"; and section 1, on the inside of the policy, provides that said benefits would be paid when the insured "has become wholly disabled by bodily injury or disease so that he is and will be presumably, thereby permanently and continuously prevented from engaging in any occupation whatsoever for remuneration or profit * * *" The policy also provides that the annual premiums would be waived during the continuance of such total and presumably permanent disability.

It is further alleged in the first cause of action that defendant knowing that insured was disabled within the meaning of the policy, "fraudulently, unlawfully and with the intent to deceive and defraud" the insured, "represented" to him that "he was not entitled to any benefits under said policy" by reason of his disability and "fraudulently, wrongfully and unlawfully disclaimed any and all liability under the disability benefits of said policy on the ground that it did not appear to" defendant that the insured "was 'permanently, continuously and wholly prevented thereby, for life, from pursuing some gainful occupation' "; that the policy did not require that the insured present proof that he was disabled "for life" and "defendant well and truly knew that such wrongfully required proof could not possibly be furnished during his lifetime"; that the insured "relied until the date of his death" upon defendant's representations as to his rights under the policy, made no further claim for disability payments and continued to pay the annual premiums; and that said "disease and disability continued until and caused his death" on August 28, 1937.

It is further alleged in the first cause of action that the insured's widow, who was the beneficiary of the life insurance provisions in the same policy and who was the sole beneficiary and executrix named in his will, "requested the defendant to * * * pay to her such sums as were then due" under the policy, and that defendant "fraudulently" represented that "payment of the face of the policy and accrued dividends" were the only sums due her; that by reason of said representations and defendant's concealment of its liability for the accrued "disability benefits" and the "wrongfully * * * collected" premiums, she was induced in September, 1937, to surrender the policy to defendant upon receiving credit for the life benefit only, and she failed to offer the insured's will for probate or to prosecute the claim of his estate for the accrued disability benefits and annual premiums; and that she died on April 1, 1943. It is finally alleged that in March, 1943, during the widow's last illness and when she was "an incompetent," plaintiff, who is the son of the insured and his said widow, discovered correspondence had between insured and defendant in 1927, which caused him to consult counsel as to the existence of this cause of action; and that a copy of the policy "herein sued upon" was then obtained from defendant.

Plaintiff's second cause of action correlates the above sequence of events with defendant's alleged mistake in its successive dealings with the insured and the widow as to the pertinent provisions of the policy.

The original complaint was filed on December 18, 1943, some nine months after plaintiff's discovery of the correspondence of 1927 setting forth defendant's disclaimer of liability on the disability claim in question. Plaintiff seeks to recover: (1) 10 annual disability benefits—1928 to 1937, inclusive—claimed to have accrued in favor of the insured under the terms of the policy; and (2) 10 annual premiums claimed to have been improperly collected from the insured during the same period. It is apparent that the applicable statute of limitations is the four-year period prescribed by subdivision 1 of section 337 of the Code of Civil Procedure, and that plaintiff pleads defendant's fraud and mistake as falling in the same category with respect to considerations of timeliness in discovering the alleged cause of action.

[2] In resolving the question of the correctness of the trial court's judgment against plaintiff on the basis of his pleading and offer of proof, the legislative policy in prescribing a period of limitations for the commencement of actions must be borne in mind. "The statute of limitations is a statute of repose, enacted as a matter of public policy to fix a limit within which an action must be brought, or the obligation is presumed to have been paid, and is intended to run against those who are neglectful of their rights, and who fail to use reasonable and proper diligence in the enforcement thereof. These statutes are declared to be 'among the most beneficial to be found in our books.' 'They rest upon sound policy, and tend to the peace and welfare of society;' The underlying purpose of statutes of limitation is to prevent the unexpected enforcement of stale claims concerning which persons interested have been thrown off their guard by want of prosecution." (1 Wood, Limitations, pp. 8, 9.)

[3] However, plaintiff relies on the rule in this state that a party, by reason of the fraudulent concealment of a fact, upon the existence of which the cause of action depends, may be estopped to set up the defense of the statute of limitations. Kimball v. Pacific Gas & Electric Co., 220 Cal. 203, 210, 30 P.2d 39; Pashley v. Pacific Electric Railway Co., 25 Cal.2d 226, 229-232, 153 P.2d 325. In line with this position plaintiff argues that defendant, either through fraud or mistake in the interpretation of its policy, concealed the "fact" of the insured's right to disability benefits in consequence of his submission of proof to defendant in 1927, and that such conduct tolled the running of the statute upon the insured's claim until plaintiff discovered the "misrepresentation" in 1943, 16 years later. Accordingly, plaintiff cites defendant's letter of May 4, 1927, to its agent, which was promptly transmitted to the insured, in rejection of his claim for disability benefits. This letter, introduced in the record by plaintiff as part of his offer of proof, reads, so far as here material, as follows: "Please advise the insured under the above numbered policy that the Company has now completed its investigation in respect to his claim for disability benefits and from the evidence submitted and information obtained by the Company, it does not appear to the Company that he is wholly and permanently disabled within the meaning of the provision in the policy. It does not appear that he will be permanently, continuously and wholly prevented thereby, for life, from pursuing some gainful occupation. The Company does not feel justified, therefore, in approving claim for disability benefits."

[4] Conceding for the purposes of discussion here that the insured was disabled within the meaning of the policy and eligible to the benefits provided thereunder, it is apparent that defendant's above-quoted letter was an unconditional denial of liability to the insured and gave rise to an immediate cause of action in favor of the insured. At that time the insured was in possession of all the facts concerning the state of his health and the extent of his disability, and he likewise was in possession of the policy defining his insurance rights. However, the insured made no further claim on defendant but continued for 10 years to pay the annual premiums on the policy until his death in 1937. Thereafter that same year, the widow, upon being informed by defendant that she "was entitled to receive only the death benefits and accrued dividends in accordance with the express terms and provisions of the [insurance] contract," surrendered the policy and did not question defendant's reiteration of its position as to nonliability for any benefits owing to the insured. Then six years later, in 1943, plaintiff "discovered" the "correspondence had between insured and defendant in 1927" and consulted counsel preliminary to commencing this action. But plaintiff's "act of discovery" uncovered no fact that was not known to the insured during the last 10 years of his lifetime and likewise known to his widow, who died six years later. The situation here is simply one where plaintiff undertook in 1943 an inquiry which could have been made as readily by the insured as early as 1927 when defendant, by letter, first rejected his claim and thereafter consistently maintained that position of nonliability for the succeeding 10 years of the insured's life without challenge on his part. Then in 1937, the widow, having at her disposal the same writing from defendant for investigation had she elected to assert any surviving rights of the insured to disability benefits, nevertheless failed to have herself appointed his personal representative for the purpose of prosecuting any claim which the insured might have had against defendant and was content simply with the "death benefits" and "accrued dividends" owing to her by defendant as life beneficiary under the policy. That the widow thereafter surrendered the policy to defendant at its request is of no significance with respect to the timeliness of the assertion of a claim for disability benefits owing to the insured, for defendant's letter of disclaimer of liability, as above mentioned, remained in her possession until her death, and had she chosen to make such investigation as plaintiff later undertook upon the same factual premise, presumably she too might have obtained from defendant a copy of the policy which she had previously relinquished. Under the circumstances the conclusion is inescapable that plaintiff, as personal representative of the insured, belatedly attempts to assert a cause of action that allegedly accrued to the insured as the result of an alleged representation which was made 16 years earlier by defendant and which was allowed to stand undisputed for that entire period of time by the aggrieved parties—the insured and his widow—though the same facts on which plaintiff here relies for relief were at all times known to them.

[5] "A failure to discover a cause of action does not, as in the case of its fraudulent concealment, suspend the running of the statute of limitations." Scafidi v. Western Loan & Building Co., 72 Cal.App.2d 550, 566, 165 P.2d 260, 270. In line with this principle such cases as Kimball v. Pacific Gas & Electric Co., supra, 220 Cal. 203, 30 P.2d 39, and Pashley v. Pacific Electric Railway Co., supra, 25 Cal.2d 226, 153 P.2d 325, cited by plaintiff, stand upon a wholly distinguishable factual premise. Thus, in the Kimball case there was concealed from plaintiff a fact essential to his statement of a cause of action against the particular corporate defendant for personal injuries—the employment relationship between the person causing the injuries and said corporate defendant—and it was held that such concealment amounted to a fraud which tolled the statute of limitations. And in the Pashley case defendant's employees concealed from plaintiff certain material facts concerning the extent of the eye injury which served as the basis for the measurement of his recovery and which would obviously influence his commencing suit, so that the statute was tolled while such suppression of plaintiff's cause of action endured. However, here

there is no comparable factor of deception involved, as defendant concealed no fact but plainly stated that it denied liability upon the insured's disability claim; and for 16 years, until plaintiff chose to challenge the merits of such rejection, defendant's stand of nonliability went uncontested.

[6-8] Plaintiff argues that defendant's interpretation of its policy so as to relieve it of liability misled the insured and his widow as to the insured's right to disability benefits and so, in effect, amounted to the concealment of the "fact" of the insured's cause of action. In this connection plaintiff cites the settled rule that an insurer has the duty of exercising good faith in its dealings with the insured and cannot take any unfair advantage of him. See 12 Appleman, Insurance Law and Practice, § 7291, p. 390; Farrar v. Policy Holders Life Insurance Ass'n, 3 Cal.App.2d 87, 93, 39 P. 2d 229. But defendant's acts cannot be relied upon to bring plaintiff within the rule mentioned for that would mean that no insurer could deny liability without indefinitely suspending the running of the statute of limitations until perchance the insured, or his heirs after his death, might obtain at some future time legal advice indicating the view that liability existed. Here defendant clearly stated in its letter of May 4, 1927, that it did not feel justified in approving the insured's claim for disability benefits as "from the evidence submitted and information obtained by the Company, it does not appear to the Company that he is wholly and permanently disabled within the meaning of the provision in the policy." Defendant, concealing no fact from the insured, was free to take this position. The insured, knowing all the facts which were known to defendant, was then free to litigate the issue of the liability which defendant had denied. It is a matter of common knowledge that there are often differences of opinion concerning liability under insurance policies and no mere denial of liability, even though it be alleged to have been made through fraud or mistake, should be held sufficient, without more, to deprive the insurer of its privilege of having the disputed liability litigated within the period prescribed by the statute of limitations.

[9] It is clear that the issue to be determined here—the timeliness of plaintiff's assertion of the alleged cause of action—has no concern with the settled rule cited by plaintiff that in the construction of "uncertainties or ambiguities" in an insurance policy, "the one which is most favorable to the insured and which will give life, force, and effect to the policy should be adopted." Narver v. California State Life Insurance Co., 211 Cal. 176, 180, 294 P. 393, 395, 71 A.L.R. 1374. Nor, contrary to plaintiff's theory, is this a situation similar to one where an insured leaves entirely in the hands of the insurer the matter of providing him with full insurance coverage and is entitled to rely on the insurer not to mislead him by issuing a policy that gives him less protection (Golden Gate Motor Transport Co. v. Great American Indemnity Co., 6 Cal.2d 439, 442, 58 P.2d 374); and in such circumstances the insured's failure to check the terms of his policy upon receiving it will not prevent his recovery for a loss that he relied upon the insurer to cover. Raulet v. Northwestern, etc., Ins. Co., 157 Cal. 213, 229, 230, 107 P. 292.

[15] Likewise an analysis of the equitable estoppel cases cited by plaintiff discloses that they were decided upon distinguishable factual considerations. First to be noted are the cases where the estoppel doctrine was applied to sustain the plaintiff but the question of the statute of limitations was not involved. Morrison v. Mutual Life Insurance of New York, 15 Cal.2d 579, 588, 103 P.2d 963; Glickman v. New York Life Insurance Company, 16 Cal.2d 626, 634, 635, 107 P.2d 252, 131 A. L.R. 1292; and Bonacci v. Massachusetts Bonding & Insurance Co., 58 Cal.App.2d 657, 662-663, 137 P.2d 487. Second to be noted are the cases where the statute of limitations was an issue, and under varying and distinctive factual premises the estoppel doctrine was applied against its assertion. Rutherford v. Rideout Bank, 11 Cal.2d 479, 486, 80 P.2d 978, 117 A.L.R. 383, and Laraway v. First National Bank of La Verne, 39 Cal.App.2d 718, 728, 729, 104 P.2d 95, where there was a confidential relationship between the parties which operated to excuse the plaintiff from failing

to make earlier discovery of the cause of action; Adams v. California Mutual Building and Loan Assn., 18 Cal.2d 487, 489, 116 P.2d 75, The Calistoga National Bank v. Calistoga Vineyard Co., 7 Cal.App.2d 65, 72, 45 P.2d 246, and Miles v. Bank of America, etc., Ass'n, 17 Cal.App.2d 389, 397–399, 62 P.2d 177, where delay in the commencement of action was due to reliance upon representations that an amicable adjustment or determination of the claim would be made without suit; and Bollinger v. National Fire Insurance Co., 25 Cal.2d 399, 410, 411, 154 P.2d 399, where plaintiff brought timely action on an insurance policy but through error of the trial court a nonsuit was entered against him, and his new action filed in another court would have been commenced well within the shortened limitations period provided by the insurance contract had it not been for the insurer's procurement of a number of continuances which delayed the parties in reaching trial on the first action—a peculiar sequence of events deemed to be of controlling importance in suspending the running of the statute of limitations and relieving plaintiff from suffering a "technical forfeiture" of his insurance rights.

The significant factors to be noted here are the following: (1) defendant plainly advised the insured, and later his widow, that the insured had no disability rights under the policy; (2) there was no confidential relationship between defendant and the insured or his widow which would relieve either of them from the duty to make diligent inquiry into the merit of defendant's position if either deemed it to be not well taken under the terms of the insurance contract (Shapiro v. Equitable Life Assurance Soc., Cal.App., 172 P.2d 725); and (3) there were no deceptive assurances by defendant tending to lull the insured or his widow into a sense of security and to forbear suit for the statutory period (Jackson v. Master Holding Corp., 16 Cal.2d 824, 828, 108 P.2d 673), but rather defendant's unconditional denial of liability was sufficient to put each on notice that legal action would be required to cause defendant's recognition of the insured's disability claim.

The statute of limitations here appears as "a defense * * * upon the very face of" plaintiff's second amended complaint and he has failed to plead facts which would estop defendant from asserting such defense. Fleishbein v. Western Auto Supply Agency, 19 Cal.App.2d 424, 427, 65 P.2d 928; Cohen v. Metropolitan Life Insurance Co., 32 Cal.App.2d 337, 347, 89 P.2d 732. Any other view would practically nullify the legislative policy in prescribing a limitation upon the time within which suit may be commenced upon an insured's claim after the insurance company's unconditional denial of liability thereon, when all facts essential to the statement of a cause of action are within the knowledge of the aggrieved party. As defendant states in illustration of this point, "if, perchance, plaintiff had not found this [May, 1927] correspondence when he did, then insured's grandson, rummaging through his grandfather's papers forty years after his death, might just as well have 'discovered' this purported cause of action, petitioned for letters of administration upon the insured's estate, and filed this action in the year 1977." But "statutes of limitations are vital to the welfare of society * * * they promote repose by giving security and stability to human affairs * * * they stimulate to activity and punish negligence." Wood v. Carpenter, 101 U.S. 135, 139, 25 L.Ed. 807; see, also, Fontana Land Co. v. Laughlin, 199 Cal. 625, 636, 250 P. 669, 48 A.L.R. 1308, and cases there cited.

[11] In these circumstances the trial court did not err in sustaining defendant's objection to plaintiff's introduction of evidence on the issue of the statute of limitations. The record discloses that plaintiff was urged to make his "offer of proof as complete as" possible, but he still was unable to show an "enforceable cause of action." However, plaintiff cites section 597 of the Code of Civil Procedure as requiring the trial court nevertheless to proceed to the trial of such specific defense as the statute of limitations when pleaded in defendant's answer. Such position cannot be sustained. The cited code section merely states a procedural rule which authorizes

the trial court in proper cases to avoid an unjustifiable expenditure of time in the trial of issues relating to the merits of an action when it appears after the trial of the special defense that plaintiff in any event could not recover. Booth v. Bond, 56 Cal.App.2d 153, 156, 157, 132 P.2d 520. It has no application here where it can be clearly seen, both from plaintiff's pleading and his: "comprehensive" offer of proof, that he cannot present a cause of action not barred by the statute.

The judgment is affirmed.

GIBSON, C. J., and TRAYNOR and SCHAUER, JJ., concur.

SHENK and EDMONDS, JJ., did not participate herein.

CARTER, Justice.

I dissent. The majority opinion places the stamp of approval upon a rank and palpable fraud perpetrated by defendant upon its sick, disabled and unsuspecting policy holder. True, the majority does this under the guise of protecting the defendant against the assertion by plaintiff of a stale claim, but in so holding the majority disregards the realities and imposes upon the policy holder a burden and duty beyond the realm of reasonableness, and permits the insurance company to avoid its obligation because it was able to conceal its fraud and deceit for a long enough period of time to permit it to interpose the plea of the statute of limitation. Such a holding is contrary to the modern concept of the relationship between insurer and insured which wisely places upon the insurer the imperative duty to speak truthfully, if it speaks at all, respecting the rights of its insured. And if it fraudulently conceals from its insured matters which should have been disclosed, it should not be permitted to rely upon the rigid rules of law applicable to a case where such relationship does not exist. Many lawyers and almost every layman will admit that a reading of their insurance policies leaves them in a state of confusion and uncertainty, and it is the common practice to seek advice from their insurance companies as to their rights as insureds. True they are not required to accept such advice, but it is a matter of common knowledge that most laymen do. Thus the insurer becomes the adviser of its insureds as to their respective rights and obligations, and it must be conceded that such advice is accepted and followed in a vast majority of cases. Such is the situation in the case at bar, and defendant should not be permitted to evade its obligation to its insured because of the latter's failure to discover that he had been ill advised and for that reason had not asserted his rights at an earlier date.

I am in full accord with the views expressed by the District Court of Appeal, Second District, Division One, 168 P.2d 423, 425, when this case was before that Honorable Court, and I adopt, as a part of this dissent, the opinion of that Court prepared by the Honorable Thomas P. White, Associate Justice of said Court, and concurred in by the Honorable John M. York, Presiding Justice, and the Honorable Wm. C. Doran, Associate Justice thereof. Said opinion is as follows: "This action was brought by appellant as administrator of the estate of Arthur V. Neff, deceased, seeking to recover the amount of certain disability benefits to which said decedent was allegedly entitled at the time of his death under the terms of an insurance policy, and also the amount of the annual premiums on the policy which the decedent paid during the last ten years of his lifetime.

"The action went to trial upon plaintiff's second amended complaint, general demurrers to the prior complaints having been sustained. Defendant did not demur to the second amended complaint, but filed an answer thereto, denying the allegations as to fraud, and mistake and pleading that the purported causes of action were barred by the statute of limitations: Subdivision 1 of section 337; subdivision 4 of section 338; and section 353 of the Code of Civil Procedure.

"At the commencement of the trial, and after the first witness was sworn, defendant interposed an objection to the introduction of any evidence, on the ground that 'the second amended complaint shows on its face that the alleged causes of action are barred by the Statute of Limitations' and consequently fails to show any cause of action. The objection was sustained and judgment for defendant entered. Plaintiff has appealed from the judgment.

"From the first cause of action in the second amended complaint, it appears that in 1926 insured was totally disabled by tuberculosis of both lungs. On or about April 1, 1927, insured presented due written proof in accordance with the requirements of the policy 'that he had, on said December 1st, 1926, become wholly and presumably permanently disabled by bodily disease, and that said proofs informed defendant he was then and would presumably continue to be prevented from engaging in any occupation whatsoever for remuneration or profits, and that such a disability had by said April 1st, 1927, existed continuously for more than sixty (60) days before date of such proofs; and at said time and place, the said insured requested the defendant to provide for him and pay to him such benefits as he may have been entitled to under the terms of said policy.' In said complaint it is further alleged 'That the defendant, New York Life Insurance Company, on or about May 7th, 1927, fraudulently, unlawfully and with the intent to deceive and defraud the said insured, represented to the said insured that he was not entitled to any benefits under said policy by reason of the disability from which he was then suffering and fraudulently, wrongfully and unlawfully disclaimed any and all liability under the disability benefits of said policy on the ground that it did not appear to the defendant that the plaintiff was "permanently, continuously and wholly prevented thereby, for life, from pursuing some gainful occupation"; that the said insured believed the fraudulent, unlawful and wrongful representations pertaining to said policy, and the rights of said insured thereunder, and relied until the date of his death, upon the statements and representations of the defendant with respect thereto, and was thereby prevented from making any further claims and from receiving any benefits thereunder at any time during his lifetime. That at the time of said representations and statements by the defendant, as aforesaid, and thereafter during the life of the said insured, the defendant well and truly knew the condition of the said insured and nature and character of the disability from which he suffered, which said disease and disability was total and presumably permanent within the meaning of said policy of life insurance, and that said statement and representation on the part of the defendant were made with the intent to deceive the insured, and to enable the said defendant to withhold the disability benefits to which the said insured was then and thereafter entitled, and that said insured was actually deceived thereby, and believed that said statements and representations were true and correct. That in truth and in fact said policy did not contain any requirement that the insured must show that the disability from which he was then suffering would permanently, continuously, and wholly prevent the said insured *for life,* from pursuing some gainful occupation, and the defendant well and truly knew that such wrongfully required proof could not possibly be furnished during *his* lifetime.' In said second amended complaint it is further alleged that insured's widow (who was beneficiary of the life insurance provided for by the same policy, and who was sole beneficiary and executrix named in the will of the insured) likewise relied upon and believed defendant's fraudulent representation made to her after the death of insured in 1937, that no disability benefits had accrued under the terms of said policy, and by such fraudulent misrepresentation and concealment of the liability of defendant under the correct interpretation of said policy, she was induced to surrender said policy of insurance to defendant upon receiving credit for the life benefit, and, believing defendant's representation that insured was entitled to no disability benefits under said policy, she failed to offer insured's will for probate or to press the claim of his estate for such disability benefits. She died April 1, 1943. In March, 1943, during her last illness, plaintiff (who is the son of insured and his said widow) discovered correspondence had between insured and defendant in

1927, which caused him to inquire as to the existence of the instant cause of action. December 10, 1943, some nine months after the plaintiff's discovery of the facts allegedly constituting such cause of action, the complaint was filed.

"On the instant appeal, we are required to assume the truth of all allegations of the complaint, which undoubtedly states a cause of action on contract. Neither subdivision 4 of section 338 nor section 353 of the Code of Civil Procedure can be applied, but, as contended by respondent, the time limited by subdivision 1 of section 337 ordinarily would have commenced to run against each annual instalment as it became due under the disability benefit clause of the policy, from the year 1928 to 1937, respectively.

"Appellant calls our attention to cases holding that 'a fraudulent concealment of the fact, upon the existence of which the cause of action accrues, is a good answer to the plea of the Statute of Limitations.' Kane v. Cook, 8 Cal. 449; Kimball v. Pacific Gas & Elec. Co., 220 Cal. 203, 30 P. 2d 39; Pacific Emp. Ins. Co. v. Industrial Acc. Comm., 66 Cal.App.2d 376, 380, 152 P.2d 501.

"Respondent's argument that insured's condition was known to him and could not have been concealed by the insurer is beside the point. From the complaint, it clearly appears that the insurer concealed from the insured and his widow the fact that disability benefits had accrued under the terms of the policy of insurance. That was a fact the existence of which was essential to the cause of action. Such alleged concealment is not excused by the fact that the insured was in possession of the policy. Menk v. Home Ins. Co., 76 Cal. 50, 14 P. 837, 18 P. 117, 9 Am.St.Rep. 158; Vierra v. New York Life Ins. Co., 119 Cal.App. 352, 6 P.2d 349.

"The front page of the policy herein sued upon (a copy of which is attached to the second amended complaint) provides that defendant will pay to the insured $300 per annum 'during the lifetime of the insured, *if the insured becomes wholly and permanently disabled* before age 60, subject to all the terms and conditions contained in section 1 hereof'; and section 1 (in the fine print on the inside of the policy) provides that said benefits shall be paid when the insured 'has become wholly disabled by bodily * * * disease so that he is and will be *presumably* thereby permanently and continuously prevented from engaging in any occupation whatsoever for remuneration or profit. * * *.' (Emphasis added.)

"From the second amended complaint, it clearly appears that the insured presented to the insurer proof of disability which he believed would, and which, as alleged, if true, did in fact meet the requirements of the policy and entitled the insured to disability benefits. It is alleged that respondent, in refusing to make the payments requested by the insured, departed, from the language of the policy and attempted to explain its meaning to the insured. The complaint alleges that the insured understood from such explanation that the policy required proof that the insured *was* disabled for his entire life and not merely that *presumably* he was so disabled. Such interpretation of the policy, it is alleged, was erroneous. That it was first adopted by respondent (not the insured) is shown by the allegations of the second amended complaint that insured presented due proof of disability as required by the policy, that respondent rejected his claim on the ground that it did not appear from that insured *was* 'permanently, continuously and wholly prevented thereby, *for life,* from pursuing some gainful occupation.' (Emphasis added.) When an insurer undertakes to explain the meaning of its policy, it owes a duty to the insured to do so accurately and truthfully (Morrison v. Mutual L. Ins. of N. Y., 15 Cal.2d 579, 588, 103 P.2d 963), and when an insurer varies the language of a policy in rejecting a claim, it does so at its own peril. It would be palpably unjust to permit an insurer to take advantage of the insured's delay in bringing action when such delay as is alleged herein was occasioned by the fraudulent and misleading statements of the insurer. Bonacci v. Massachusetts Bonding & Ins. Co., 58 Cal. App.2d 657, 666, 137 P.2d 487. Such alleged erroneous interpretation of a policy and statements respecting the rights of the insured may amount to fraudulent concealment of a fact upon the existence of which the cause of action accrues, and if so, tolls the running of the statute of limitations until the death of the insured's widow and successor in interest on April 1, 1943. The instant action was filed December 10, 1943, well within the period provided by subdivision 1, section 337, of the Code of Civil Procedure, if the insured's widow had a cause of action at the time of her death.

"In the instant action it is alleged that the insured presented his claim for disability under the terms of the policy, in that he had become 'wholly disabled by bodily * * * disease so that he is and will be *presumably* thereby permanently and continuously prevented from engaging in any occupation whatsoever for remuneration or profit * * *.' (Emphasis added.) In rejecting the insured's claim the insurer did not predicate such rejection on the ground that the proofs submitted did not establish the fact that the insured would be 'presumably' permanently disabled, but on the ground that the insurer interpreted the policy to mean that before the insured was eligible for benefits thereunder it must appear to the satisfaction of the insurer that the insured '*will be* (not presumably) 'permanently and continuously and wholly prevented thereby, *for life,* from pursuing some gainful occupation.' Had the insurer rejected the insured's claim on the ground that he would not, under the language of the policy, be '*presumably*' permanently disabled, there can be no doubt that under the statute of limitations his action would be barred. But the insurer did not do that. Instead it proceeded to interpret the policy as requiring not presumptive evidence of permanent disability, but evidence satisfactory to the insurer that the insured would in fact be 'prevented thereby *for life* from pursuing some gainful occupation.' Nothing is said in the policy about disability for life, it provided only that satisfactory proof that the insured would 'presumably' be permanently disabled would suffice to entitle him to benefits. Had it not been for the allegedly incorrect interpretation put upon the terms of the policy by the insurer, the insured during the lifetime and his widow after his death might have taken the necessary steps to establish his or her rights under the policy as they understood its terms; but through the company's alleged representations the insured and his widow were led to believe that proof that he was 'presumably' permanently disabled was insufficient and that proof was required to show that he 'will be permanently, continuously and wholly prevented' by his affliction from pursuing some gainful occupation 'for life.' The second amended complaint alleges that such proof could not be furnished by the insured at any time during his life. The object and purpose of the contract being insurance or indemnity against disability, the courts in construing the rights and duties of the parties thereto should strive to effectuate that purpose. The case before us involves an insurer whose duty of good faith in dealing with the insured is well established. See 13 Appleman, Ins. Law and Practice, § 7386, p. 37; Vance on Insurance (1930) 74.

"With reference to statutes of limitation, it might be observed that they are not so rigid as they are sometimes regarded, and the period of such statutes will be extended or tolled upon the occurrence of certain events. As was said in Bollinger v. National Fire Ins. Co., 25 Cal.2d 399, 411, 154 P.2d 399, 406: 'It is established that the running of the statute of limitations may be suspended by causes not mentioned in the statute itself. Braun v. Sauerwein, 10 Wall. 218, 77 U.S. 218, 223, 19 L.Ed. 895; Collins v. Woodworth, 6 Cir., 109 F.2d 628, 629. It is settled in this state that fraudulent concealment by the defendant of the facts upon which a cause of action is based (Kimball v. Pacific Gas & Elec. Co., 220 Cal. 203, 30 P.2d 39) or mistake as to the facts constituting the cause of action (Davis, etc., Co. v. Advance, etc., Works, Inc., 38 Cal.App.2d 270, 100 P.2d 1067; see 16 Cal.Jur. 505) will prevent the running of the period until discovery.'

"Respondent earnestly insists that appellant has not successfully pleaded an estoppel. Bearing in mind the duty owed by the insurer to the insured when the former undertakes to explain the meaning of the policy and the peril attaching to the insurer when in making such explanation it varies the language of the policy, we are persuaded that the facts pleaded in the second amended complaint and set forth in the offer of proof, unless controverted, were sufficient to raise an estoppel and toll the statute of limitations. Morrison v. Mutual L. Ins. of N. Y., supra, 15 Cal.2d pages 588, 589, 103 P.2d 963. Bollinger v. National Fire Ins. Co., supra, 25 Cal.2d page 411, 154 P.2d 399. Principles of equity and justice are controlling here and require that the second amended complaint be heard on its merits. The allegations of the second amended complaint set forth that the insured was induced to change his position with reference to his rights under the policy by reason of the statements and conduct of the insurer; that such statements were untrue, and that by reason of the acts and conduct of the insurer the insured suffered prejudice. This was sufficient to set in motion the doctrine of equitable estoppel.

"We have examined the cases of Fleishbein v. Western Auto S. Agency, 19 Cal. App.2d 424, 427, 65 P.2d 928; Cohen v. Metropolitan Life Ins. Co., 32 Cal.App.2d 337, 347, 89 P.2d 732, and other cases relied upon by respondent, and are impressed that nothing therein contained militates against the conclusion at which we have herein arrived. The insured was not required to assume that the insurer would mislead him, and courts are inclined to hold that one can act upon the assumption that there exists no intention to cheat or defraud him. 'No one has a right, either in law or in morals, to complain because another has placed too great reliance upon the truth of what he himself has stated.' Togni v. Taminelli, 11 Cal.App. 7, 14, 103 P. 899, 902. As was stated by this court in Laraway v. First National Bank of La-Verne, 39 Cal.App.2d 718, 730, 104 P.2d 95, 101: 'The fact, as urged by respondents, that means of knowledge were open to appellant, does not necessarily debar her from relief. It is only when the circumstances are such that inquiry becomes a duty that the failure to make it becomes a negligent omission. * * * We find nothing in the evidence here that would excite the suspicions of an ordinarily prudent person situated as appellant was or that would put him on inquiry. Even if we concede that some of the representations made by respondents related more or less to matters of opinion, nevertheless expressions of opinion, to avoid an action for deceit or fraud, should be of an opinion honestly entertained by the person making the same (citing cases); and whether representations are of a fact or matters of opinion depends largely on the circumstances.' (Citing cases.)

"Where the delay in commencing an action is induced by the conduct of the offending party, it cannot be availed of by him as a defense. An estoppel may also arise where a party has been induced by another 'to refrain from using such means or taking such action as lay in his power, by which he might have retrieved his position and saved himself from loss.' Miles v. Bank of America, etc., Ass'n, 17 Cal. App.2d 389, 399, 62 P.2d 177, 182. The same case, at page 398 of 17 Cal.App.2d, at page 182, of 62 P.2d, is authority for the statement that 'An estoppel may arise, although there was no designed fraud on the part of the person sought to be estopped.'

"In Bollinger v. National Fire Ins. Co., supra, 25 Cal.2d page 405, 154 P.2d 399, 403, the court said: 'While courts are diligent to protect insurance companies from fraudulent claims and to enforce all regulations necessary to their protection, *it must not be forgotten that the primary function of insurance is to insure.* When claims are honestly made, care should be taken to prevent technical forfeitures such as would ensue from an unreasonable enforcement of a rule of procedure unrelated to the merits.' (Citing cases.) (Italics added.) And at page 407 of 25 Cal.2d, at page 403 of 154 P.2d, we find the following: 'Under the circumstances of the present case it would be manifestly unjust for this court to prevent a trial on the merits, which the law favors.' (Citing cases.)

"The second amended complaint states a cause of action. The judgment is therefore reversed and the cause remanded for a new trial."

30 Cal.2d 184

CALIFORNIA MOTOR TRANSPORT CO., Limited, et al. v. RAILROAD COMMISSION et al.

S. F. 17382.

Supreme Court of California, in Bank.

May 20, 1947.

1. Public service commissions ⚷6

The Railroad Commission has police power over public utilities. Gen.Laws, Act 6386.

2. Automobiles ⚷67

The Railroad Commission's power to issue certificates of public convenience and necessity to highway common carriers is broad. Gen.Laws, Act 6386.

3. Public service commissions ⚷6

The Railroad Commission was designed to protect the people of the state from the consequences of destructive competition and monopoly in public service industries. Gen.Laws, Act 6386; Const. art. 12, §§ 17, 20–23, 24.

4. Automobiles ⚷104

Highway common carrier with certificate of public necessity and convenience from Railroad Commission to transport express traffic for express corporation between San Francisco and Los Angeles, via coast route, subject to restriction that no service can be given to intermediate points, a certificate for similar traffic between San Francisco and Los Angeles via Pacheco Pass and Fresno, subject to same restriction, a certificate to operate between San Francisco and Paso Robles on the coast route, and a certificate to operate between Paso Robles and Fresno, had no right to transport express from San Francisco to Fresno via Pacheo Pass, a saving in distance of 127 miles over such transportation via Paso Robles, without obtaining a special certificate from the Commission. Gen.Laws, Act 6386; Const. art. 12, §§ 17, 20–23, 24.

5. Automobiles ⚷105

Order of Railroad Commission authorizing transfer to highway common carrier from another of a certificate of public necessity and convenience, without imposing restrictions on the common carrier, did not confer right on common carrier to serve a certain city in violation of restriction in the certificate against serving intermediate points. Gen.Laws, Act 6386; Const. art. 12, §§ 17, 20–23, 24.

Proceeding by the California Motor Transport Company, Limited, and the California Motor Express, Limited, petitioners, opposed by the Railroad Commission of the State of California and Harold P. Huls and others, the members of and constituting the Railroad Commission of the State of California, respondents, to review an order of the commission commanding the California Motor Transport Company to refrain from transporting property between certain points unless it obtained certificate of public convenience and necessity, and commanding the California Motor Express to refrain from using the California Motor Transport Company as an underlying intermediate for transportation of express between the same points unless the California Motor Transport Company obtained such certificate.

Order affirmed.

Norman A. Eisner and Douglas Brookman, both of San Francisco, for petitioners.

John M. Gregory, Everett C. McKeoge, Roderick B. Cassidy, Hal F. Wiggins, and Boris H. Lakusta, all of San Francisco, for respondent Railroad Commission.

Marvin Handler, of San Francisco, for respondents interveners.

CARTER, Justice.

This is a review of an order of the Railroad Commission (now the Public Utilities Commission) commanding petitioner California Motor Transport Company, a highway common carrier (hereinafter designated Motor Transport), to refrain as underlying carrier or otherwise from transporting property via Pacheco Pass between San Francisco and Fresno and other San Joaquin Valley points unless it obtains a certificate of public convenience and necessity from the commission; and commanding petitioner, California Motor Express, an express corporation (hereafter designated Motor Express), to refrain from using Motor Transport as an underlying intermediate for the transportation of express between the same points unless the latter obtains the above mentioned certificate.

There are two main highway routes between San Francisco and Los Angeles commonly designated the coast route and the valley route, respectively. Paso Robles is a city on the coast route, Fresno is a city on the valley route, and Pacheco Pass is a lateral connecting the two routes at a point between San Francisco and Los Angeles. There is also a connecting lateral from Paso Robles to the valley route.

Motor Transport acquired (1) a certificate of public necessity and convenience from the commission in 1930 to transport express traffic for Motor Express between San Francisco and Los Angeles, via the coast route, subject to the restriction that no service could be given to intermediate points; (2) a certificate (in 1934) for similar traffic between San Francisco and Los Angeles via Pacheco Pass and Fresno, with the same restriction as number (1); (3) a certificate (in 1944) to operate between San Francisco and Paso Robles on the coast route; (4) a certificate (in 1944) to operate between Paso Robles and Fresno.

Petitioners maintain that by reason of the 1941 amendment (Stats.1941, p. 2061, sec. 1) of section 50¾ (infra) of the Public Utilities Act (Stats.1915, p. 115), Gen. Laws, Act 6386, Motor Transport has acquired the right to transport express for Motor Express and the latter to use the former for such transportation from San Francisco to Fresno *via Pacheco Pass,* a saving in distance of 127 miles over such transportation via Paso Robles.

Section 50¾ was added to the Public Utilities Act in 1935 (Stats.1935, p. 1831) along with other amendments making specific and comprehensive provisions for the regulation of *highway* common carriers by the commission. This section (50¾) required such carriers to obtain a certificate of public convenience and necessity (except in certain cases) before commencing operations. It provided that franchises could be transferred only with the consent of the commission, and that in issuing a certificate the commission "may attach to the exercise of the rights granted by said certificate such terms and conditions as, in its judgment, the public convenience and necessity require." The section as amended in 1941 further provides: "Without the express approval of the commission, no certificate of public convenience and necessity issued to any *one* highway common carrier under the provisions of this section, or heretofore issued by the commission *to one highway common carrier* for the transportation of property by auto truck or self-propelled vehicle, nor any operative right of *one highway common carrier* founded upon operations actually conducted in good faith on July 26, 1917, shall be combined, united or consolidated with another such certificate or operative right *issued to or possessed by another highway common carrier* so as to permit through service between any point or points served, *by one highway common carrier,* ~~under any such separate certificate or operative right,~~ on the one hand, and any point or points served, *by another highway common carrier,* ~~under another such certificate or operative right,~~ on the other hand; nor, without the express approval of the commission, shall any through route or joint, through, combination, or proportional rate be established by ~~any~~ *one* highway common carrier between any point or points which it serves, ~~under such certificate or operative right~~ *on the one hand,* and any point or points served ~~which it serves under any other such certificate or operative right~~ by another highway common carrier, on the other hand. *Any one highway common carrier may establish through routes and joint rates, charges, and classifications between any and all points served by such highway common carrier under any and all certificates or operative rights issued to or possessed by such highway common carrier.*" [Portions italicized are new and those stricken out were deleted by the 1941 amendment.] The last quoted sentence (added in 1941) is relied upon as a grant by the Legislature permitting the establishment of the route here involved.

[1-3] In interpreting the last sentence above quoted several pertinent factors are of controlling significance. The constitu

tion confers upon the Legislature authority to delegate to the commission broad powers in the regulation of carriers and public utilities. Cal.Const., Art. XII, secs. 17, 20, 21, 22, 23, 24. The Public Utilities Act, supra, unequivocally provides for the filing of rate schedules with the commission (sec. 14); for the giving of permission by the commission for changing rates (sec. 15); that no common carrier shall operate until its rates have been filed (sec. 17); for supplying the commission with information necessary for the commission to enforce the act (sec. 28); for the fixing of rates by the commission (sec. 32); *that no highway common carrier shall operate as such until it has obtained a certificate of public convenience and necessity from the commission* (sec. 50¾); requiring consent of the commission to transfer an operative right and authorizing it to affix conditions and restrictions to its consent (sec. 50¾); the vesting of the commission with power to "supervise and regulate every public utility in the state and to do all things, whether herein specifically designated or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction." Sec. 31. Police power over public utilities has been conferred upon the commission. Sutter Butte Canal Co. v. Railroad Comm., 202 Cal. 179, 259 P. 937. The power granted to the commission in issuing certificates of public convenience and necessity is very broad. San Diego, etc., Ferry Co. v. Railroad Comm., 210 Cal. 504, 292 P. 640. The extensive functions which have been delegated to the commission with reference to highway common carriers is summarized as follows in Sale v. Railroad Commission, 15 Cal.2d 612, 617, 104 P.2d 38, 41:

"Created by the Constitution in 1911, the commission was designed to protect the people of the state from the consequences of destructive competition and monopoly in the public service industries. (Citations) Although it has been termed a 'quasi-judicial' tribunal in some of its functions, its powers and duties go beyond those exercised by the judicial arm of government. (citation) A court is a passive forum for adjusting disputes, and has no power either to investigate facts or to initiate proceedings. Litigants themselves largely determine the scope of the inquiry and the data upon which the judicial judgment is based.

"The powers and functions of the railroad commission are vastly different in character. It is an active instrument of government charged with the duty of supervising and regulating public utility services and rates. Cal.Const., Art. XII, secs. 22, 23. The constitution gives the legislature full authority to implement the commission's powers with legislation germane to public utility regulation, and under this authority the legislature has departed from traditional techniques of judicial procedure. The commission has the right and duty to make its own investigations of fact, to initiate its own proceedings and in a large measure to control the scope and method of its inquiries. See Public Utilities Act, supra, passim; 15 Cal.L.Rev. 445. All hearings, investigations and proceedings are governed by the provisions of the act and by rules of practice and procedure adopted by the commission. 'No informality * * * shall invalidate any order, decision, rule or regulation made * * *.' Public Utilities Act, supra, sec. 53. Hence, unless the act requires the commission to proceed in a certain way, the only limitation upon its procedural powers is its duty to provide a fair hearing to any party whose constitutional rights may be affected by a proposed order.

"In the exercise of its authority over highway common carriers, with which we are here particularly concerned, the commission is governed chiefly by section 50¾ of the Public Utilities Act. Under that provision it is required to supervise and regulate such carriers in all matters affecting their relationship with the shipping public. It may grant or deny operative rights with or without a hearing and upon such terms as, 'in its judgment, the public convenience and necessity require'. After a hearing, it may amend, suspend or revoke an existing certificate of public convenience and necessity for good cause shown. No operative right may be transferred except upon the authorization of the commission. When, after a hearing initiated by complaint or by the commission upon its own motion, it is found that a carrier is operating without a certificate or is otherwise violating the act, it may order the offending party to cease and desist. It will be noted that in the exercise of all of these powers public convenience and necessity is the criterion of administrative judgment."

The commission is staffed and equipped and by long experience especially qualified to ascertain the facts and make determinations involving the public convenience and necessity—the routes to be used, and the points to be served and the service to be given by various competing carriers.

[4] In the instant case the precise matter at issue is the advisability of permitting a carrier to follow a certain route and to serve certain points and the effect upon such operative rights of the acquisition by one carrier of several operative rights from other carriers. The impact upon the overall picture of regulation of the many carriers and the public good flowing from the various possible combinations of the several operative rights possessed by one carrier is manifest. Such combinations might well disturb the smooth flow of traffic where they result in routes and points of service which conflict with operative rights of other carriers already serving the same area. These are problems peculiarly within the function of the commission and it is best able to secure and maintain a consistent and orderly regulated pattern. For all of these reasons the 1941 amendment must be scrutinized with care. It must not be construed to take from the commission this important power of regulation with all the attendant experience and equipment necessary to its determination unless the legislative intent is clear and beyond doubt. It is not lightly to be assumed that the commission having available to it all the powers it has been granted, the Legislature by the bare enactment of a legislative act intended to make, in effect, an outright grant of an operative right free from the scrutiny and examination of the commission, which may well throw into confusion the whole regulating plans of the commission. It might be argued that for these reasons a carrier could not combine his rights under the 1941 amendment without the consent of the commission, but it is not necessary to go that far in this case. Assuming that the amendment does authorize (without the commission's approval) a carrier to give through service from point A to point C where he has acquired two certificates, one to serve over a fixed route from point A to point B and the other from point B to point C, it certainly goes no further. It does not authorize the carrier to follow a different route between two points because it has various certificates covering such points. Here petitioners seek to follow the Pacheco Pass route to serve Fresno from San Francisco rather than by way of Paso Robles. The amendment together with the subject matter immediately preceding it are concerned principally with authorizing *through* service and the incidents thereof rather than a shortening or change of routes.

There is another reason why the 1941 amendment cannot be said to confer the rights claimed by Motor Transport. It will be recalled that the certificate to operate between San Francisco and Los Angeles over the coast route and via the coast route through Pacheco Pass and Fresno and then via the valley route were given subject to the restriction that no service be given to intermediate points between San Francisco and Los Angeles nor between the terminals and intermediate points. For the reasons heretofore discussed we cannot believe that the Legislature intended to wipe out those restrictions by the 1941 amendment. It did not clearly purport to do so, and to have done so by legislative fiat would be disruptive of the orderly procedure and plan of regulation by the commission. It requires more than the expression found in the 1941 amendment to show an intent to abrogate prior orders of the commission.

The report on the amendment by the Legislative Counsel to the Governor when it was before the latter for his consideration is relied upon. It merely gives a digest of the amendment and adds nothing to the wording of the legislation itself. Thus it is of small value as an aid to construction.

[5] Petitioners contend that the order of the commission authorizing the transfer

to Motor Transport from the Valley and Coast Transit Company of a certificate without imposing restrictions ipso facto conferred upon Motor Transport the right to serve Fresno via Pacheco Pass, or in other words, that the restriction in its certificate (the second above mentioned certificate), to give through service between Los Angeles and San Francisco via the coast route, Pacheco Pass and the valley route, that it could not serve intermediate points was removed by the order permitting the transfer without mentioning that limitation. The third and fourth certificates above mentioned were originally granted to Valley Coast and Transit Company in 1931 and 1928, respectively, and were acquired by Motor Transit in 1944. The transfer was approved by the commission. 45 C.R.C. 502. It is clear, however, from the face of that order and decision of approval of the commission that it gave no consideration to the use of the Pacheco Pass route as a way of serving Fresno. Therefore the matter was not expressly decided. The case of Re California Transit Co., 33 C.R.C. 574, is not in point. There the authorized transfer resulted in a duplication of service over the same highway. Here the route via Pacheco Pass to Fresno is over different arteries than that from Paso Robles to the valley route and Fresno. Reliance is placed upon Tunzi-Valley and Coast Transit Company, 45 C.R.C. 143. There approval of the commission was sought for a transfer from Tunzi to Valley and Coast Transit Company of an operative right between San Francisco and points in the Salinas Valley via the coast route. Valley and Coast then possessed a right to operate between San Francisco Bay area and Santa Barbara on the coast and extending into San Joaquin Valley. The record showed that if the transfers were authorized, Valley and Coast intended to mould it into their existing rights to the end that through service would be given between San Francisco to San Joaquin Valley points. It was claimed Valley and Coast would rely upon the 1941 amendment to section 50¾ of the Public Utilities Act, supra, to combine and achieve the above purpose unless the commission imposed restrictions. Valley and Coast contended no such restrictions could be imposed because of the 1941 amendment. The issues were stated to be "First—Does the 1941 amendment to Section 50¾ nullify restrictions existing in a highway common carrier operative right at the time the statute became effective, so that they may be disregarded should the holder undertake to consolidate that operative right with another subsequently acquired? And, Second—Has the Commission power to impose a restriction, in a transfer proceeding, limiting, in the public interest, the service that may be performed by the transferee under the operative right acquired?" 45 C.R.C. 143, 148. The commission after pointing out that it did not have before it the question of whether the 1941 amendment automatically permitted any and all combinations where various operative rights were acquired before its adoption, held that the amendment did not prevent the imposition of restrictions on combinations or continuing the restrictions on acquired rights where the transfer of the operative rights was made after the adoption of the amendment, stating that: "If such a restriction [a restriction previously attached to the right sought to be transferred] should disappear, immediately upon the approval of the transfer of the operative right, or upon the acquisition by the grantee of another operative right, the Commission would then be powerless, in the public interest, to safeguard the equities of other carriers occupying the field, so as to insure the continuance of adequate service. Such a construction would strip the Commission of much of the authority it now possesses to protect both the public and the carriers against evils of excessive competition." 45 C.R.C. 143, 148. It is true that the commission went on to say that under the amendment the commission "must" determine in transfer proceedings whether public interest required that restrictions should be continued, yet it goes on to state that the commission "may impose an appropriate condition, designed to safeguard the operations of existing carriers." 45 C.R.C. 143, 150. We do not interpret this to mean that the commission is foreclosed from later imposing restrictions in the public interest if it failed to do so in the transfer proceedings, especially where, as here, the issue was not raised in the transfer from Valley Coast and Transit Company to Motor Transport. 45 C.R.C. 502. It may well be that all persons involved do not appear in the transfer proceedings or that the issues as framed although involving some restrictions do not involve others. To say that the commission is so limited is to deprive it of its flexibility and restrict its power to make salutary regulations in the protection of the public interest. This we are not disposed to do.

The order is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

EDMONDS, Justice (concurring).

I concur in the judgment. The amendment to section 50¾ of the Public Utilities Act, added in 1941 (Stats. 1941, p. 2061), in effect, authorizes a carrier, without the approval of the commission, to combine operative rights owned by it. But to serve Fresno via Pacheco Pass, the petitioners would not be making use of the certificate allowing the transportation of freight to that point in so far as the route is concerned.

INDEMNITY INS. CO. OF NORTH AMERICA v. AMERICAN AUTOMOBILE INS. CO. *

Civ. 15481.

District Court of Appeal, Second District, Division 1, California.

May 23, 1947.

Rehearing Granted June 17, 1947.

1. Pleading 🔑345(1)

A motion by plaintiff for judgment on the pleadings is in the nature of a general demurrer, and motion must be denied if defendant's pleadings raise a material issue or set up affirmative matter constituting a defense.

2. Pleading 🔑350(3)

For purpose of ruling on motion by plaintiff for judgment on pleadings, trial court must treat all of defendant's allegations as being true, and, since moving party admits untruth of his own allegations insofar as they have been controverted, all such averments must be disregarded whether there is a direct and specific denial or an indirect denial.

3. Pleading 🔑129(5)

Where complaint set up stipulation practically in haec verba, and a copy thereof was attached to complaint as an exhibit, but answer neither denied nor referred to stipulation, the stipulation would be deemed admitted for purpose of motion by plaintiff for judgment on the pleadings.

4. Pleading 🔑345(2)

In action by accident liability insurer against motor vehicle liability insurer for contribution on account of a settlement of a death action, where defendant's answer denied that any motor vehicle covered by its insurance was proximate cause of explosion and fire resulting in death and complaint contained no contrary allegation, plaintiff's motion for judgment on the pleadings should not have been granted, but defendant should have been permitted to go to trial on the issue raised by its answer.

5. Stipulations 🔑14(1)

Where accident liability insurer effected settlement of death action against insured, a stipulation theretofore entered into with motor vehicle liability insurer that a certain sum would constitute a good settlement, and that settlement should have the same effect as if action had been fully tried, did not waive right of motor vehicle liability insurer, when sued for contribution by accident liability insurer, to an adjudication of its liability upon trial.

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by the Indemnity Insurance Company of North America against the American Automobile Insurance Company for contribution on account of a settlement of loss made by plaintiff pursuant to certain liability insurance policies. Judgment for plaintiff, and defendant appeals.

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* Subsequent opinion 184 P.2d 316.

Reversed.

Parker, Stanbury & Reese, of Los Angeles, for appellant.

Crider, Runkle & Tilson, of Los Angeles, for respondent.

YORK, Presiding Justice.

By the instant action, plaintiff Indemnity Insurance Company of North America, hereinafter referred to as Indemnity, seeks a contribution from defendant American Automobile Insurance Company, hereinafter referred to as American, on account of settlement of a loss made by Indemnity pursuant to liability insurance policies issued by Indemnity and American to Simmons Tank Service, Inc., hereinafter called Simmons.

The policy of American indemnified Simmons for losses incurred through the ownership, maintenance or use of motor vehicles; the policy of Indemnity insured Simmons against liability imposed by law upon him for bodily injuries or death "caused by accidents"; said policy *excluding* "ownership, maintenance or use of * * * automobiles or trailers," *except* "to the use of special auxiliary equipment while * * * in actual use on any work site."

The limits of liability were fixed in both policies at $100,000 for each person injured, and $200,000 for each accident.

The complaint alleges that on October 17, 1941, while both policies were in effect, Simmons was engaged in cleaning a large oil storage tank in Ventura, and was using "certain tools, equipment, appliances, motors and automobile trucks"; that the trucks were covered by American's policy, and the tools, equipment, appliances and motors were covered by Indemnity's policy; that during the progress of the work the said oil storage tank exploded, fatally injuring one Bertes M. Miller; that on March 17, 1942, the heirs of decedent Miller brought suit against Simmons for recovery of damages for his death caused by the alleged negligence of Simmons. Both American and Indemnity defended Simmons in said action under a reservation of rights.

While the Miller case was on trial, counsel for plaintiffs therein offered to settle the litigation, give a full release and dismiss the action with prejudice in consideration of the sum of $20,000. After said offer of settlement was made, to-wit: on November 19, 1942, Indemnity wrote a letter to American in which it was stated that a difference of opinion then existed between Indemnity and American as to which of the policies covered the accident, or whether it was covered by both; that in the event the proposed settlement was made Indemnity "intends to sue" American under its policy; and that Indemnity would not pay the $20,000 in settlement unless American agreed to stipulate to the following:

I. That any sum up to $20,000 "is a fair and reasonable sum in settlement of said action and would constitute a good settlement, and if paid shall not be construed as a voluntary payment, and American will not question the propriety of said settlement."

II. That Indemnity "may maintain any contemplated action in its own name * * *."

III. That "if said action be settled * * * the settlement and amount paid in settlement shall be considered as having been done with the same force and legal effect as if said action had been fully tried before the jury and the jury had rendered its verdict in favor of the plaintiffs (Miller) above named, and against the defendant (Simmons) above named, and judgment had been entered thereon, which judgment became final and the defendants in suit No. 24915 above named had been paid the sum of $20,000.00 in full satisfaction thereof."

V. That any trucks mentioned in the complaint in the Miller case are trucks mentioned in American's policy of insurance and are covered thereby, and the tools, equipment and appliances mentioned in said complaint are tools, equipment and appliances covered by Indemnity's policy of insurance.

VI. That "although the American Automobile Insurance Company denies that it is obligated for any portion of any sum which may be paid by the Indemnity Insurance Company of North America under circumstances as above set forth, in settlement of the said action, it is stipulated that if it is found that the American Automobile Insurance Company is liable at all its liability shall not exceed fifty per cent of any such sum paid in settlement up to $20,000.00. * * *

"The above stipulation is accepted by the American Automobile Insurance Company."

Thereafter Indemnity settled the Miller suit for $17,700 and a full release was executed by the plaintiffs in that case. When the instant action by Indemnity for a contribution from American for one-half of the $17,700 paid in settlement of the Miller suit came on for trial, Indemnity's motion for a judgment on the pleadings was granted, apparently on the ground that American was not entitled to a trial on the merits because the stipulation amounted to an adjudication of American's liability.

From the judgment rendered on the pleadings, the defendant American presents this appeal, contending that the stipulation of November 19, 1942, was not intended by either party to preclude a trial on the merits, but expressly contemplated such a trial, and that the actual intention of the parties was expressed in a letter from Indemnity to American dated May 4, 1942, reading in part as follows:

"We will afford the assured (Simmons) a defense in accordance with the terms of our policy. We believe that you likewise owe the assured a defense. In the event that it is established prior to or during the trial of this action that the explosion was caused through the operation of a truck, we shall expect you to pay any judgment which may be obtained and all expense incident to defending the case. Otherwise, we will pay any judgment which may be rendered and which is covered by the terms of our policy and the expense connected with the defense of the suit."

Appellant claims that the words in the stipulation "as if said action had been fully tried" were "not intended to crystalize and forever determine the rights of the parties," and that paragraph VI of the stipulation "definitely indicates the contemplation by both parties to it that further litigation to fix the responsibility of the two parties, if any, would be undertaken."

[1,2] "A motion by plaintiff for judgment on the pleadings is in the nature of a general demurrer, and the motion must be denied if the defendant's pleadings raise a material issue or set up affirmative matter constituting a defense. Cohn v. Klein, 209 Cal. 421, 424, 287 P. 459; Cass v. Rochester, 174 Cal. 358, 360, 163 P. 212; Neale v. Morrow, 174 Cal. 49, 54, 161 P. 1165. For the purpose of ruling on the motion, the trial court must treat all of defendant's allegations as being true, and since the moving party admits the untruth of his own allegations insofar as they have been controverted, all such averments must be disregarded whether there is a direct and specific denial or an indirect denial by virtue of affirmative allegations of a contrary state of facts." MacIsaac v. Pozzo, 26 Cal.2d 809, 812, 161 P.2d 449, 451.

[3] The complaint herein sets up the stipulation practically in haec verba, and a copy thereof is attached to the complaint as an exhibit. But the answer neither denies nor refers to the stipulation; hence, it must be deemed admitted.

An examination of the letter accompanying the stipulation discloses that a difference of opinion existed between Indemnity and American "as to which of said policies covers the accident" mentioned in the Miller case, or "whether both policies of insurance cover said accident"; that trial of the Miller case was then in progress and that counsel were defending the case "with a full reservation of rights of their respective companies, and without waiving any provision of either policy and without admitting that either policy covers the accident"; further, that if the Miller case was settled, Indemnity "intends to sue" American under its policy of insurance.

Throughout the controversy, American has continuously denied its liability, paragraph VI of the stipulation providing that although American "denies that it is obligated for any portion of any sum which may be paid by Indemnity * * * in settlement of the said action, it is stipulated that *if it is found that American * * * is liable at all,* its liabililty shall not exceed fifty per cent of any such sum paid in settlement up to $20,000.00."

[4] The trial court herein overruled American's general demurrer to the complaint, whereupon American filed its answer in which it denied "that any truck or motor vehicular equipment covered by any insurance with the defendant was the proximate cause of the explosion and fire referred to in the complaint" in the Miller action. Since the complaint contains no contrary allegation to which this denial could possibly be addressed, such so-called denial constitutes an assertion of an affirmative fact which must be accepted as true under the rule announced in MacIsaac v. Pozzo, supra. Consequently, the motion for judgment on the pleadings should not have been granted, but appellant should have been permitted to go to trial on the issue raised by its answer.

This very situation is discussed by way of dicta in Lamb v. Belt Casualty Co., 3 Cal.App.2d 624, 631, 40 P.2d 311, 314, as follows:

"On the other hand, where there is no trial and no judgment establishing the liability of the insured, but a settlement of the litigation has been made, the question whether the liability of the insured was one which the contract of insurance covered is still open, as is also the question as to the fact of liability and the extent thereof, and these questions may be litigated and determined in the action brought by the insured to recover the amount so paid in settlement. The settlement, or a judgment rendered upon a stipulation of such a settlement, becomes presumptive evidence only of the liability of the insured and the amount thereof, which presumption is subject to being overcome by proof on the part of the insurer. Butler [Bros.] v. American Fidelity Co., supra, [120 Minn. 157, 139 N.W. 355, 44 L.R.A., N.S., 609]; St. Louis Dressed Beef & Provision Co. v. Maryland Casualty Co., supra, [201 U.S. 173, 26 S.Ct. 400, 50 L.Ed. 712]. We are, however, not confronted with any question of settlement or stipulated judgment in this case."

[5] Nothing was agreed to by American in the stipulation that amounts to a waiver of its right to an adjudication of the basic issue here involved, to-wit, its liability under its contract of insurance and the extent of such liability.

For the reasons stated, the judgment appealed from is reversed.

DORAN and WHITE, JJ., concur.

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80 Cal.App.2d 68

PEOPLE v. PERKINS.

Civ. 4095.

District Court of Appeal, Second District, Division 2, California.

May 28, 1947.

1. Criminal law 🔑1144(13)

On appeal from rape conviction, District Court of Appeal viewed the evidence in the light most favorable to the people.

2. Rape 🔑51(4)

In prosecution for forcible rape, evidence was sufficient to sustain implied finding of jury that prosecuting witness resisted defendant's advances and that her resistance was overcome by force or violence.

3. Criminal law 🔑736(2)

In prosecution for forcible rape, whether defendant stated to arresting officers, as testified by them but as denied by him, that he thought that the prosecuting witness had submitted to him because of fear, was a question for the jury.

4. Rape 🔑14

In prosecution for forcible rape, testimony of prosecuting witness that she attempted to tire defendant out so that he would have an emission without penetrating her did not establish that she did not resist defendant's advances, since the resistance of a female need only be such as to make nonconsent and actual resistance reasonably manifest.

◆

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Sam Albert Perkins, Jr., was convicted of forcible rape, and he appeals.

Affirmed.

Ward Sullivan, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From a judgment of guilty of forcible rape after trial before a jury, defendant appeals. There is also an appeal from the order denying his motion for a new trial.

[1] Viewing the evidence in the light most favorable to the People (respondent), the record discloses the following facts:

On June 3, 1946, the prosecutrix was waiting for a bus to take her home. Defendant accosted her and asked if she would like a ride. She inquired if he was going past Prairie Avenue in Los Angeles where she lived, and he replied that he could go there. The prosecutrix then got into defendant's car and he said he would take her home. Instead of driving the prosecutrix home he drove his car to 109th Street and parked in an open field. Defendant thereafter had an act of sexual intercourse with the prosecutrix against her will.

Defendant relies for reversal of the judgment upon the proposition that *there is no substantial evidence to sustain the implied finding of the jury that the prosecuting witness resisted his advances and that her resistance was overcome by force or violence.*

[2] This proposition is untenable. An examination of the record discloses substantial evidence, taken together with inferences which the jury may reasonably have drawn therefrom, to sustain each and every material finding of fact upon which the judgment was necessarily predicated, including the fact that the prosecuting witness resisted defendant's advances and that her resistance was overcome by force or violence. For example, the prosecuting witness testified that defendant penetrated her vagina "after a lot of struggle." She further testified as follows:

"Q. I am asking you, did you give your consent to have sexual intercourse with him? A. I did not.

"Q. You resisted him? A. I did. I did all in my power."

[3] Further, defendant at the time of his arrest stated to the arresting officers as follows:

"Q. Do you feel in your own mind that this girl voluntarily submitted to you without any objection at all? A. I think that she gave in to me because she was frightened and not because she wanted to.

"Q. In other words, you feel that she submitted to the act of sexual intercourse with you because she was afraid of what might happen to her in the event she refused? A. Yes. I guess she was afraid I might knife her or do other bodily injury if she didn't."

It is true defendant denied having made such statement. However, it was a question for the triers of fact whether or not he did. (See People v. Pianezzi, 42 Cal. App.2d 270, 277, 108 P.2d 685.)

[4] There is likewise no merit in appellant's contention that the prosecuting witness did not resist his illegal advances, because of the fact that she testified that she was trying to tire defendant out so that he would have an emission without penetrating her. It is the law that to sustain a charge of rape the resistance of a female need only be such as to make nonconsent and actual resistance reasonably manifest. (People v. Cline, 117 Cal.App. 181, 184, 3 P.2d 575.)

In People v. Norrington, 55 Cal.App. 103, 202 P. 932, the prosecuting witness succeeded in causing the defendant to gratify his desires before he accomplished an act of penetration, and this court held, in passing upon an argument similar to that presented by defendant in the present case, to wit, that the prosecuting witness had not resisted the defendant's advances but had consented thereto, that it was a question for the jury to determine whether or not she had used her best efforts to extricate herself from the predicament in which she had been placed by the defendant; and that when she succeeded in gratifying his lascivious desires without permitting penetration of her person, the jury's finding that such conduct upon her part was reasonable would not be disturbed on appeal.

The judgment and order appealed from are and each is affirmed.

MOORE, P. J., and WILSON, J., concur.

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79 Cal.App.2d 806

SACKS v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 15933.

District Court of Appeal, Second District, Division 1, California.

May 21, 1947.

Rehearing Denied June 13, 1947.

Hearing Denied July 17, 1947.

Insane persons 🔑13

Under section of Probate Code providing that citation shall be "personally served" on alleged insane or incompetent persons in the same manner as provided by law for service of summons at least 5 days before time of hearing, a citation must be delivered to and left with person alleged to be insane, and, where this was not done, orders entered in the proceeding were void notwithstanding that allegedly insane or incompetent person had actual notice of the proceedings. Probate Code, § 1461.

Petition by Allie Walters Sacks for a writ of prohibition directed to the Superior Court of the State of California in and for the County of Los Angeles, and Honorable Newcomb Condee, a judge thereof.

Peremptory writ directed to issue.

S. V. O. Prichard and Bodkin, Breslin & Luddy, all of Los Angeles, for petitioners.

Harold W. Kennedy, Co. Counsel, Wm. E. Lamoreaux, Deputy Co. Counsel, Wilbert C. Hamilton, and R. R. Sleeper, all of Los Angeles, for respondents.

PER CURIAM.

This matter came on for a hearing after the issuance of the alternative writ of prohibition. The question presented to this court is whether the alternative writ should be made peremptory. The petitioner contends that the orders appointing a guardian for her and declaring her to be an incompetent person were absolutely void, and it was upon that theory that the alternative writ was issued.

The question as to whether the orders of the superior court were absolutely void depends upon the interpretation placed upon that portion of section 1461 of the Probate Court which reads as follows: "Said citation shall be personally served on the alleged insane or incompetent person in the same manner as provided by law for service of summons at least five days before the time of hearing." It is contended by the attorneys for petitioner that the words "personally served" mean delivering to and leaving with the incompetent person personally a copy of such citation. It is contended by the respondents that the words "personally served" are limited by the words "in the same manner as provided by law for service of summons."

We are of the opinion that the only possible construction of said portion of section 1461, supra, is that the citation must be delivered to and left with the person alleged to be insane.

It is contended by the respondents that actual notice to the alleged insane or incompetent person constituted a waiver, but it has been determined by the supreme court in every case that it has been cited to us, including Snyder v. Superior Court, 206 Cal. 346, 274 P. 337, and the cases cited therein, that if a person is actually insane or incompetent, he cannot waive actual personal service, and that no attorney can appear for such incompetent.

The respondents contend that the petitioner herein cannot appear by attorney or otherwise, because of the fact that she is incompetent, but at the same time they contend that she could waive the actual service of the citation upon herself. Petitioner, however, contends that any order made without actual personal service is absolutely void and that, therefore, she is entitled to a peremptory writ, and that until properly declared incompetent, she is entitled to employ her own attorneys free and clear of any guardianship or supervision by the parties appointed by the superior court without any such actual personal service.

We think the petitioner is sustained in her contention by the decision of the supreme court in the Snyder case, supra, and that all of the points raised by the respondents are fully answered by the said decision and the cases therein cited. We think it needless to further recite the facts involved in this controversy, as they are not in dispute.

Let the peremptory writ issue as prayed for.

Hearing denied; SCHAUER, J., dissenting.

79 Cal.App.2d 758

In re BASSO'S ESTATE.

SHELLEY v. BASSO.

Civ. 15723.

District Court of Appeal, Second District, Division 2, California.

May 20, 1947.

Rehearing Denied June 5, 1947.

Hearing Denied July 17, 1947.

1. Descent and distribution 🔑71(1)

An heirship proceeding is a "proceeding in rem".

See Words and Phrases, Permanent Edition, for all other definitions of "Proceeding in Rem".

2. Judgment 🔑675(1), 678(1)

Where judgment in heirship proceeding had become final by dismissal of appeal by Supreme Court, judgment was conclusive as to all parties before the court and their privies and was res judicata as to all matters determined by it, and one who instituted proceedings and her attorney were both concluded by judgment, and therefore attorney, as assignee of a share of his client's estate, could not make a collateral attack on judgment, in absence of any showing of fraud. Code Civ.Proc. § 955.

3. Judgment 🔑375, 564(1)

When matters are once determined by final judgment, they are not subject to further inquiry except on direct attack on the judgment on ground of fraud, or for other reasons.

4. Appeal and error 🔑714(5)

District Court of Appeal was required to look to the record and could not consider deposition referred to in brief but which was not in record.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Proceeding in the matter of the estate of John Basso, deceased. From an order of the superior court of Los Angeles county settling the final account and for distribution, W. Frank Shelley, claimant, opposed by Katie Basso, appeals.

Affirmed.

Arthur E. Briggs and W. Frank Shelley, both of Los Angeles, for appellant.

George G. Witter, of Los Angeles, for respondent.

WILSON, Justice.

A mere statement of the principal object of this appeal will indicate the result that must follow. Appellant makes a collateral attack on a judgment that has long since become final and asks this court to review the proceedings and to rule upon the admissibility and sufficiency of the evidence introduced at the trial.

This is the second appeal by W. Frank Shelley from an order settling final account and for distribution. He asserts an interest in the estate by reason of an assignment from Jennie V. Geisler, a daughter of decedent, of 20 per cent of the share of the estate claimed by her. On the former appeal the order settling account and for distribution was reversed with directions that a determination be made (1) as to whether Jennie V. Geisler inherited any property from her deceased father, and in this connection to consider the effect of the previously made findings and judgment determining heirship; (2) as to whether the estate has any interest in the properties claimed by the widow as surviving joint tenant. Estate of Basso, 68 Cal.App.2d 294, 156 P.2d 476. Reference is made to that opinion for a statement of facts except such additional matters as are necessary for the determination of the present appeal. After the decision on the former appeal appellant filed amended objections to the final account and petition for distribution on which the trial was had.

Prior to the decree of distribution from which the former appeal was taken, Jennie V. Geisler, through her attorney, appellant W. Frank Shelley, filed a petition to determine heirship. After a hearing at which all interested parties were represented the court found among other things that decedent left surviving his widow, Katie Basso, sometimes referred to in the probate proceedings as Catterina Basso and Catherine Basso, a son, Charles Basso, and a daughter, Jennie V. Geisler, both adults and both born of the marriage of decedent and Katie Basso; that the greater portion of decedent's holdings at the date of his death were joint tenancy properties, both real and personal; that all the properties subject to probate were acquired as the product of the labor of decedent and his spouse during coverture. As conclusions of law the court found that it was without jurisdiction to make an order in the heirship proceedings with reference to properties held in joint tenancy, or to pass on the validity of the joint tenancies; that the properties subject to probate were for all purposes of succession community property under the laws of this state; that by reason of decedent's will and the provisions of section 201.5 of the Probate Code the surviving widow was entitled to inherit all properties of the estate; that Charles Basso and Jennie V. Geisler were pretermitted heirs of decedent.

Appellant has failed, whether through oversight or design we know not, to include in the record on this appeal the judgment rendered in the heirship proceeding against which his attack is directed. It was in the record on the former appeal "as a target" but the target is invisible in the record before us. We learn from the former opinion (68 Cal.App.2d p. 296, 156 P.2d 476) that judgment was entered in accord with the findings of fact and conclusions of law determining that the widow was entitled to all property that was subject to probate. We learn also from the opinion that Jennie V. Geisler attempted to appeal from the decree but that her appeal was dismissed in the Supreme Court.

In the present appeal, as in the former, the greater portion of appellant's brief is devoted to an argument on the merits of the judgment rendered in the heirship proceeding and the merits of the appeal that was dismissed. He contends that the evidence was insufficient to sustain the findings on which the judgment was based and that the court committed errors in the admission of evidence and in rendering the judgment. Without bringing an action to set aside the five year old judgment in the heirship proceedings on some tenable ground he argues that that portion of the judgment declaring the property to be community property was error and that it should be disregarded on this appeal because something may be found in the evidence introduced at the last trial that may more or less vaguely indicate that a different judgment might have resulted.

Anomalously appellant admits that the judgment is res judicata as to some of the matters adjudicated but contends to the contrary as to others. Although he filed the petition to determine heirship as attorney for Jennie V. Geisler and represented her at the hearing thereon he contends that he is not bound by those portions of the findings and judgment that are against his interest and that he may, nearly five years after its entry, relitigate issues that were determined finally by the judgment.

[1-3] The dismissal of the appeal from a judgment amounts to an affirmance of the judgment. Code Civ.Proc., sec. 955. An heirship proceeding is in rem. O'Day v. Superior Court of Los Angeles County, 18 Cal.2d 540, 544, 116 P.2d 621. Estate of

Horman, 167 Cal. 473, 475, 140 P. 11. Blythe v. Ayres, 102 Cal. 254, 258, 36 P. 522. The judgment having become final, it is conclusive as to all parties before the court and their privies and is res judicata as to all matters determined by it. Jennie V. Geisler as principal and appellant as her attorney, having initiated the proceeding and having participated in the hearing, both are concluded by the judgment. The end to litigation is reached when a judgment has become final. It is elementary that when matters are once determined by final judgment they are not subject to further inquiry except by direct attack on the judgment on the ground of fraud or for other reasons not suggested on this appeal.

Upon the last trial, resulting in the judgment from which this appeal is taken, the court made findings that the petition for determination of heirship was filed on October 2, 1941, by Jennie V. Geisler; that she was represented by appellant; that a hearing thereon was had and evidence introduced; that findings of fact as hereinbefore outlined were made and a decree thereon was entered determining heirship. As conclusions of law the court found that the decree was res judicata; that Jennie V. Geisler and Charles Basso were not entitled to receive any part of the properties listed in the inventory in the probate proceedings; that all were distributable to the widow. The court also found that all properties claimed by the widow to have been held in joint tenancy by herself and her deceased husband were in fact so held and that she was the owner thereof as surviving joint tenant. Judgment was entered accordingly.

[4] With reference to a bank account in the Somerville Trust Company of Massachusetts, the court found and adjudged that $5,000 thereof was distributable to the surviving widow and that as to the remainder, $435.54, Jennie V. Geisler and Charles Basso, as pretermitted heirs, were entitled to one third each. Appellant contends that the evidence was insufficient to sustain the finding that the widow is entitled to the sum of $5,000 but that each of the surviving children is entitled to one third of the entire amount. It is unnecessary to outline the evidence introduced. It is sufficient to say that it supports the findings and judgment. Appellant refers in his brief to an alleged deposition of an officer of the trust company. The deposition is not in the record and since we must look to the record and not to the briefs for the evidence we have no judicial knowledge of its existence or its contents.

All issues required by the decision on the former appeal to be determined have been adjudicated and we find no error.

Order affirmed.

MOORE, P. J., and McCOMB, J., concur.

79 Cal.App.2d 734

PROVIDENCE BAPTIST ASS'N et al. v. LOS ANGELES HOMPA HONOWANJI BUDDHIST TEMPLE et al.

Civ. 15366.

District Court of Appeal, Second District, Division 3, California.

May 19, 1947.

1. Forcible entry and detainer 🔑4

"Forcible entry," as defined by statute, consists of entering upon or into realty by breaking open doors, windows, or other parts of a house or by any kind of violence or circumstances of terror or, after a peaceable entry, turning out the party in possession by force, threats or menacing conduct. Code Civ.Proc. § 1159.

See Words and Phrases, Permanent Edition, for all other definitions of "Forcible Entry".

2. Forcible entry and detainer 🔑5

"Forcible detainer," as defined by statute, consists of unlawfully keeping possession of realty by force or by menace and threats of violence, regardless of whether possession was acquired peaceably or otherwise. Code Civ.Proc. § 1160.

See Words and Phrases, Permanent Edition, for all other definitions of "Forcible Detainer".

3 New trial ⚷70

In action by tenant against landlord and subsequent lessee for damages for forcible entry and detainer, evidence that landlord entered and retained possession of leased premises by means of keys surrendered by tenant and without force or threats of violence, that former subtenant of portion of building thereupon leased building, and that tenant was fully compensated for damages allegedly suffered by reason of prompt removal would support a verdict for defendants, and hence granting defendants a new trial after verdict for plaintiffs was not abuse of discretion. Code Civ.Proc. §§ 1159, 1160.

◆

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action for damages for forcible entry and detainer by Providence Baptist Association, etc., and others against Los Angeles Hompa Honowanji Buddhist Temple, etc., and others. Verdict for plaintiffs and from an order granting a new trial, plaintiffs appeal.

Order affirmed.

A. Brigham Rose, of Los Angeles, for appellants.

Frank C. Weller and Thomas S. Tobin, both of Los Angeles, for respondent Julius A. Goldwater.

Stanton & Stanton, of Los Angeles, for respondent Buddhist Temple.

Wright & Millikan, of Los Angeles, for respondent C. L. Hodel.

SHINN, Acting Presiding Justice.

In this action for damages for forcible entry and detainer, the jury returned a verdict of $5,000 in favor of plaintiff "L. B. Brown, on behalf of the members of Providence Baptist Association" against Los Angeles Hompa Honowanji Buddhist Temple, Julius A. Goldwater, and C. L. Hodel. The motion of defendants for a new trial was granted "on various grounds, including insufficiency of the evidence" and plaintiffs took an appeal from the order. Joined with plaintiff Brown were Providence Baptist Association, a voluntary association, hereinafter called the Association, First Baptist Church, a religious corporation, and Providence Baptist Institute, an unincorporated theological association, all colored religious groups. Defendant Los Angeles Hompa Honowanji Buddhist Temple, hereinafter called the Temple, is an unincorporated Japanese religious organization; defendant Julius A. Goldwater was its attorney in fact, and defendant C. L. Hodel was a tenant of a portion of the property in question and remotely, if at all, involved in the controversy.

By separate leases on January 5, 1944, the Temple leased to the Association a church property on Central Avenue, and "a Buddhist Temple, office building with stores, office and basement" on East First Street in Los Angeles, together with certain personal property therein, for the term of one year, commencing January, 1, 1944. Although having entrance on the two streets, the premises are entire, consisting of three buildings used as one. The lessee entered into possession and portions of the premises were used by First Street Baptist Church, a member of the Association, and Providence Baptist Institute, also a member of the Association, the former conducting church services and the latter conducting classes in theology in the respective portions of the premises occupied by them. Plaintiff L. B. Brown was the Pastor of the church, and president of the Institute. The leases contained a provision that if it became lawful for Japanese aliens to again use the Temple premises for religious purposes or for the lessor to sell the premises, the lessor might terminate the lease and repossess the premises on 30 days' notice, and another provision that if the leases should be in effect at the end of the year and the lessor should have a better offer of rental, the lessee should have the first right to a lease for an additional year at the increased rental.

There were but two issues in the case, namely, whether defendants were guilty of forcible entry or detainer and, if they were, the amount of damage suffered by plaintiffs by reason of defendants' entry or detention of the premises. There was a conflict of evidence on the first issue and the only proof of damage consisted of such inferences as might have been drawn from the facts hereinafter stated.

Reverend Julius A. Goldwater, a white Buddhist priest, represented the Temple as its attorney-in-fact while the officers and members thereof of Japanese birth or ancestry were retained in the custody of the United States Government in the early stages of the war. In the lease negotiations the Association was represented by the Reverends Wade and Moss, its president and secretary, and Reverends Ross, Payne and Brown, all of whose signatures appeared on the leases. Commencing about the middle of December, 1944, conferences were held between Reverend Goldwater and members of the Board of Managers of the Association, in which the latter endeavored to obtain a renewal of the lease and Reverend Goldwater objected thereto for the reason that he was expecting the return of the Japanese people in large numbers early in 1945 and felt it would be necessary to have the Temple available for them. The minutes of the Association meetings of December 15, 1944, January 5, 12, 15, and 19, 1945, attested by the president and secretary of the Association, were received in evidence. They record the negotiations between the parties. The meeting of January 12 was attended also by three Japanese, being the president, vice president, and secretary of the Temple. No agreement having been reached, another meeting was arranged for January 15 and the negotiations between the officers of the Association and the representatives of the Temple were renewed. A further meeting was arranged for January 19 for the presentation by the Association of figures showing the actual loss it would sustain if required to move. The minutes of the January 19 meeting show that the secretary reported the loss the Association would sustain to be $920.12, "with a possible $300.00 more"; that the Temple offered to allow the Association to collect from tenants between January 5 and January 19 up to the sum of $920.12, to be retained by the Association, and all in excess of that amount to be paid over to the Brotherhood, and the minutes read: "Upon their agreement and the agreement of the Association to the terms stated above, a motion was made by Reverend J. E. Pius and seconded by Reverend E. D. Payne that the Association vacate the building immediately and turn possession thereof over to Mr. Julius A. Goldwater. The motion was carried. The President, Reverend Wade, sent for Reverend L. B. Brown, informed him of the Association's action, received the keys of the building from him and turned same over to Reverend Julius A. Goldwater." The testimony of witnesses corroborated the evidence furnished by the minutes of the Association as to the negotiations and the agreement that was reached for the surrender of possession of the property to the Temple. Reverend Wade, President of the Association, testified that the keys were delivered to Reverend Goldwater, as a representative of the Temple. Apparently Reverend Brown kept one of the keys. It appears that the rentals of the store buildings amounted to some $1,900 per month, and that when an effort was made to collect the January rentals under the agreement that had been reached, it was discovered that members of the Association had collected all the January rentals, with the exception of about $100, which sum was turned over by the Association to Reverend Goldwater. The Temple, through Reverend Goldwater, entered into possession of the premises. Reverend Brown appears to have been the only one who objected. He continued with his theological classes. Reverend Brown did not represent the Association and, as we say, had apparently consented to the change of possession by surrender of the keys.

[1, 2] Forcible entry and forcible detainer are defined by sections 1159 and 1160 of the Code of Civil Procedure. Forcible entry consists of entering upon or into real property by breaking open doors, windows or other parts of a house or by any kind of violence or circumstances of terror or, after a peaceable entry, turning out the party in possession by force, threats or menacing conduct. Forcible detainer, so far as here pertinent, consists of unlawfully holding and keeping possession of real property by force or by menaces and threats

of violence, whether possession was acquired peaceably or otherwise. There was no evidence that the premises were entered other than by means of the keys, nor was there evidence of the use of force, violence, menaces, or threats of violence. There was evidence of voluble objections on the part of Reverend Brown, and of an excited argument. The three Japanese representatives of the Temple entered various parts of the building with Reverend Goldwater, and Reverend Brown testified that blackboards which he had upon the wall were taken down, and there was evidence of an argument over the ownership of a chair which Reverend Brown claimed, but which he disowned when it was turned over to disclose that it bore a swastika emblem. No one laid hands upon Reverend Brown or uttered any threats. The trial judge, in ruling upon the motion for new trial, would have been justified in concluding from the evidence that no circumstances of terror accompanied the entry or detention of the premises. The entry appears to have been effected and possession retained peaceably and quietly except for the vocal resistance of Reverend Brown. The court no doubt was impressed by the fact that the management of the Association decided to surrender possession of the premises in the spirit expressed by the president, Reverend Wade, who, it was testified, stated at a meeting with the Temple representatives: "That the Japanese were a minority people like they themselves, they had no wish to deprive them of their own property, and that they could understand the situation, but still they wished to have it if it is available and if it is not available then they cannot help it."

On January 19, 1945, defendant Hodel, a physician, entered into a lease with the Temple of the office building, stores, rooms and basements for a period of three years. At this time the Temple was in undisputed possession of the premises. Hodel had been a tenant of the Association and appears to have been a mere bystander during the controversy between the Association and the Temple.

So far as the issue of damages is concerned, it appears that plaintiff Association was compensated to the extent of more than $900 for the detriment it claimed it would suffer by prompt removal from the premises. The court no doubt considered also in this connection the testimony of Reverend Brown with reference to the surrender of possession, as follows: "Q. Well it (Providence Baptist Association) had taken out any equipment it had there, had it not? A. No, they had no equipment there but their hats." There was a reasonable basis for a belief that the damages were excessive.

[3] Sufficient facts have been stated from the record to demonstrate that a verdict in favor of defendants would not have been without support in the evidence. Under such circumstances an order granting a motion for new trial for insufficiency of the evidence is not an abuse of discretion. (Ballard v. Pacific Greyhound Lines, 28 Cal.2d 357, 170 P.2d 465; Williams v. Field Transportation Co., 28 Cal.2d 696, 171 P.2d 722.)

The orders appealed from are affirmed.

WOOD, J., and KINCAID, J., pro tem.

79 Cal.App.2d 813

JONES et al. v. ROBERTSON.

Civ. 7352.

Sac. 5818.

District Court of Appeal, Third District, California.

May 21, 1947.

Hearing Denied July 17, 1947.

1. Municipal corporations 🔑601

The maintenance of a real estate office in a residential district is prohibited by a zoning ordinance which permits uses customarily incidental to and subordinate to residential use and not involving the maintenance of a store, shop or commercial enterprise.

2. Municipal corporations 🔑601

Under the rule of "expressio unius est exclusio alterius", which means that the express mention of a thing implies the exclusion of another different thing, the provision in a zoning ordinance that a temporary real estate office may be maintained for a limited purpose and time implies the exclusion of a real estate office for any other purpose or time.

See Words and Phrases, Permanent Edition, for all other definitions of "Expressio Unius Est Exclusio Alterius".

3. Municipal corporations 🔑601

Carrying on a real estate brokerage business is not the practice of a "profession" within zoning ordinance permitting in residential districts uses customarily incidental to and subordinate to residential use, including home occupations and "professional" offices and studios maintained within dwellings.

See Words and Phrases, Permanent Edition, for all other definitions of "Profession".

4. Municipal corporations 🔑601

Under zoning ordinance permitting in residence districts, uses customarily incidental to and subordinate to residential use and not involving the maintenance of the store, shop or commercial enterprise, including home occupations and professional offices and studios maintained within dwellings, the conduct of a real estate brokerage office in a dwelling was not authorized unless such use was customarily incidental and subordinate to residential use and one not involving a commercial enterprise.

5. Evidence 🔑20(1)

It is common knowledge that residences are not customarily used as real estate offices though they are sometimes so used.

6. Customs and usages 🔑1

"Custom" is something which has by its universality and antiquity acquired the force of law, in a particular place or country, in respect to the subject matter to which it relates, whereas "customarily" is defined as meaning usually, habitually, according to the customs, general practice or usual order of things, regularly.

See Words and Phrases, Permanent Edition, for all other definitions of "Custom" and "Customarily".

7. Municipal corporations 🔑601

The conduct of a real estate brokerage office in a home is a "commercial enterprise" within prohibition of zoning ordinance permitting in residential districts uses customarily incidental to and subordinate to residential use but not involving the maintenance of a store, shop or "commercial enterprise".

See Words and Phrases, Permanent Edition, for all other definitions of "Commercial Enterprise".

8. Action 🔑6

Zoning ordinance providing that unauthorized uses might be abated as a public nuisance and that violations should be subject to prosecution as misdemeanors did not provide exclusive remedy for enforcement and did not preclude bringing action for declaratory relief, in view of further provision that remedies provided for therein were cumulative and in view of statutory provision that remedy by way of action for declaratory relief is cumulative. Code Civ.Proc. § 1062.

9. Action 🔑6

Before a court may deny declaratory relief on ground that other remedies exist it must clearly appear that asserted alternative remedies are available to plaintiff and that they are speedy and adequate or as well suited to the plaintiff's needs as declaratory relief.

10. Action ⟹6

Resort to action for declaration of rights under zoning ordinance was not improper on ground that plaintiff should have resorted to mandamus to compel enforcement of ordinance by the proper authorities.

◆

Appeal from Superior Court, Placer County; A. L. Pierovich, Judge.

Action by R. C. Jones and others against Joseph C. Robertson, also known as J. C. Robertson, for a declaration of rights under a zoning ordinance. Judgment for defendant, and plaintiffs appeal.

Reversed.

Howe & Finch and Avery J. Howe, all of Palo Alto, for appellants.

F. H. Bowers, of Roseville, for respondent.

ADAMS, Presiding Justice.

Plaintiffs instituted this action in behalf of themselves and others having a common or general interest, as provided by section 382 of the Code of Civil Procedure. It was brought, pursuant to section 1060 of the Code of Civil Procedure, to secure a declaration of the rights of the parties under a zoning ordinance adopted by the Board of Supervisors of Placer County in April, 1940. Said ordinance was adopted as part of a master plan designed eventually to cover the whole county. It provides for a division of areas into districts, which are classified as Residence, Commercial and Industrial. Plaintiffs and defendant are property owners within Zone District Area, Unit 6, as delineated upon the map of Brockway-Carnelian Bay Zone District Area, and their properties lie within a Residence District. Plaintiffs alleged that defendant was maintaining a real estate office in his home in said residential district in violation of the ordinance, and that such use would reduce real estate values in said district to plaintiffs' damage.

Under section 5, subdivision 5.1, of the ordinance, uses permitted in such residence districts—in so far as is pertinent here—are:

"(2) Uses *customarily* incidental to and subordinate to residential use *and not* involving the maintenance of a store, shop or *commercial enterprise;* including home occupations and *professional offices* and studios maintained within dwellings, providing no name plate or sign exceeding three (3) square feet in area shall be displayed in connection therewith.

* * * * * *

"(10) *Temporary real estate offices* for the sale of lands in the subdivision upon which said office is located during the period when sales of said lands are being actively conducted." (Italics added.)

Under section 6, subdivision 6.1, uses permitted in Commercial Districts are enumerated at length, and include a "real estate office." Defendant, in his answer to plaintiffs' complaint, admits that he is a licensed real estate broker, and that he maintains an office in his residence in a residential district; and the only question presented on this appeal is whether, in so doing, he is violating the provisions of the ordinance aforesaid.

The trial court found that defendant was conducting his real estate office in his home, but found that such "brokerage office is incidental to and subordinate to residential use of said home, as defined by said ordinance." And as a conclusion of law therefrom it was recited that defendant's real estate office within his residence did not violate any of the provisions of the ordinance, and that plaintiffs were not entitled to any relief. From the judgment which followed, this appeal was taken.

Plaintiffs' contentions here are: That the ordinance clearly provides that the maintenance of a general real estate office is a commercial use and prohibited in a residential zone and that the trial court was in error in holding that such use by defendant does not violate any provisions of the ordinance.

Respondent defends by asserting that the ordinance provides an exclusive remedy for its enforcement which remedy was not pursued by plaintiffs, and that, anyhow, real estate brokerage is a profession and that since defendant was practicing such profession in his home his use was one permitted by the act.

[1, 2] We agree with appellants' contention that the ordinance prohibits the maintenance of a real estate office in a residential district, except a temporary one for the sale of lands in a subdivision upon which said office is located, and then only during the period when sales of said lands are being actively conducted. It is not contended that defendant's office is such a temporary one as is permitted under subdivision 10, supra. Not only does the ordinance fail to include the operation of a real estate office as a use permitted in a residential zone, but under the rule of Expressio unius est exclusio alterius, the provision that a temporary real estate office may be maintained for a limited purpose and time as provided by subdivision 10 implies the exclusion of a real estate office for any other purpose or time, since the meaning of the maxim is that the express mention of a thing implies the exclusion of another different thing. Gilgert v. Stockton Port District, 7 Cal.2d 384, 387, 60 P.2d 847; Martello v. Superior Court, 202 Cal. 400, 406, 261 P. 476; Homestead Valley Sanitary District v. Donohue, 27 Cal.App.2d 548, 550, 81 P.2d 471; Brintle v. Board of Education, 43 Cal.App.2d 84, 87, 110 P.2d 440; Estate of Pardue, 22 Cal.App.2d 178, 180, 70 P.2d 678; In re Peart, 5 Cal.App.2d 469, 472, 43 P.2d 334; Merchants National Bank of Los Angeles v. Continental National Bank, 98 Cal.App. 523, 532, 277 P. 354; 6 R.C.L. 49; 25 R.C.L. 981, 982; 50 Am.Jur. 238–240; 23 Cal.Jur. 740; 10 Cal.Jur. 10-Yr. Supp. 396. And that real estate offices were intended to be excluded from residential districts is also implied by the provision in section 6, subdivision 6.1, of the ordinance, for the maintenance of such offices in a commercial district.

[3] As for respondent's contention that in the carrying on of the real estate brokerage business he is engaged in the practice of a profession, and therefore the maintenance of his office in his home in the residential district is permitted under section 2 of the ordinance, such business is not one generally considered as professional. Respondent argues that an applicant for a real estate broker's license must furnish evidence of good moral character; that he must study and learn real estate law, contracts, etc., and pass a written examination; that he must pay a fee for a license, and that, after qualifying, he is accountable to the state real estate commission. For these reasons he says that his occupation should be classed as professional.

Similar contentions have been made in other cases, and overruled. In Lavan v. Menaker, 280 Pa. 591, 124 A. 743, 744, the conducting of a general real estate office was held to be a "business" within the restrictions in a deed.

In Cummings v. Pennsylvania Fire Insurance Co. 153 Iowa 579, 134 N.W. 79, at page 82, 37 L.R.A., N.S., 1169, Ann.Cas. 1913E, 235, the court said: "One who operates a real estate agency is not engaged in a professional employment. Pennock v. Fuller, 41 Mich. 153, 2 N.W. 176, 32 Am. Rep. 148, where the court said: 'Professional employment can only relate to some of those occupations universally classed as professions, the general duties and character of which courts must be expected to understand judicially. Real estate agencies are no more professions than any other business agencies.'"

In Bond v. Cooke, 237 App.Div. 229, 262 N.Y.S. 199, 203, it was proposed to carry on the business of undertaker from a residence in a residential zone. An ordinance prohibited uses of residences in said zone except that the office or studio of a physician, surgeon, dentist, lawyer, dressmaker, artist or musician, and certain other uses were permitted in such residences. Appellant contended that an undertaker was not a business man, but was as much a professional person as those mentioned. The court said: "The contention that the undertaker is not in business, but is a professional man, is not in harmony with the views long held by the educated and thoughtful and the great seats of learning, touching the fine arts and the learned professions. People v. Kelly, supra, [255 N.Y. 396, 175 N.E. 108, 109]. That the undertaker is not a businessman and does not conduct a business, within the meaning of section 20 of the General City Law and the ordinance under consideration, is a contention that cannot be sustained."

Also in Building Commissioner of Town of Brookline v. McManus, 263 Mass. 270, 160 N.E. 887, the court held that undertaking is not a profession but a business, and said: "The fact that before a person can lawfully engage in the business of embalming he is required to submit to examination and be registered does not change business into something else any more than the occupation of others are changed by the requirement that they be licensed." To the same effect see State v. Winneshiek Co-Operative Burial Association, Iowa, 22 N.W.2d 800, 803, 165 A.L.R. 1092; In re Dawson, 136 Okl. 113, 277 P. 226.

Also see Otis v. Graves, 259 App.Div. 957, 20 N.Y.S.2d 426 (holding that insurance brokerage is a business and not a profession); People ex rel. Tower v. State Tax Commission, 282 N.Y. 407, 26 N.E.2d 955, 957 (holding that a custom house broker is engaged in business and not a profession); Recht v. Graves, 257 App.Div. 889, 12 N.Y.S.2d 158 (holding life insurance agents to be engaged in business and not a profession). In Geiffert v. Mealey, 267 App.Div. 681, 48 N.Y.S.2d 475, 476, a landscape artist was held to be engaged in business rather than a profession; in De Vries v. Graves, 292 N.Y. 529, 54 N.E.2d 379, a similar holding was had regarding a "furniture designer"; in People v. Maggi, 310 Ill.App. 101, 33 N.E.2d 925, a like determination was made as to beauty operators and barbers; and in Kort v. City of Los Angeles, 52 Cal.App.2d 804, 127 P.2d 66, it was held that defendant was properly restrained from carrying on the business of a public accountant in his home in a residential district of the city, there being nothing in the city ordinance allowing such business to be carried on there. Also see Dvorine v. Castelberg, 170 Md. 661, 185 A. 562, 566; Maryland Casualty Co. v. Crazy Water Co., Tex.Civ.App., 160 S.W.2d 102, 104, distinguishing business from professions.

[4-6] As for the trial court's finding that defendant's conduct of a real estate brokerage office in his home is incidental to and subordinate to residential use of said home, as defined in said ordinance, and its conclusion of law and recitation in the judgment "That the defendant's real estate office within his residence is incidental and subordinate to the residential use of said home and does not violate any of the provisions of Placer County Ordinance 108, Series B, and/or acts amendatory thereof," the conclusion stated does not follow from the premise. The ordinance does not provide merely that a use which is incidental and subordinate to the residential use of a home in a given case is permissible in a residential district; such use must be one *customarily* incidental and subordinate to residential use and one not involving a "commercial enterprise." So whether this defendant's use of his premises as a real estate office is incidental to the use of same as a home, or his use of them as a home is incidental and subordinate to his use of same as a real estate office, is immaterial. It is a matter of common knowledge that residences are not *customarily* used as real estate offices though they are sometimes so used. "Custom" is defined in Ballentine's Law Dictionary as "Something which has by its universality and antiquity acquired the force and effect of law, in a particular place or country, in respect to the subject matter to which it relates; general practice, judicially noticed without proof."

In Fuller Brush Co. v. Industrial Commission, 99 Utah 97, 104 P.2d 201, 203, 129 A.L.R. 511, "customarily" is defined as meaning "usually, habitually, according to the customs, general practice or usual order of things, regularly."

[7] There is no evidence that the use of a home as a real estate office is "customary," and, furthermore, under the authorities hereinbefore cited such use involves a "commercial enterprise" within the prohibition of the ordinance.

[8] Regarding respondent's contention that the ordinance provides an exclusive remedy for its enforcement and that, since under section 14 of same, any use of premises contrary to its provisions constitutes a public nuisance subject to abatement by the county upon order of the board of supervisors, and that any one who wilfully vio-

lates such ordinance shall be guilty of a misdemeanor and subject to prosecution therefor, plaintiffs had no right to bring this action for declaratory relief, even assuming that such contention is pertinent on this appeal, the same section of said ordinance provides that the remedies provided for therein are cumulative and independent. Section 1062 of the Code of Civil Procedure also provides that the remedy provided by way of an action for declaratory relief is cumulative. Innumerable cases might be cited in which zoning ordinances have been tested by means of such actions. Such was the case of La Franchi v. City of Santa Rosa, Cal.App., 52 P.2d 558, 559, decided by this court (reversed on other grounds in 8 Cal.2d 331, 65 P.2d 1301, 110 A.L.R. 639). Also see Andrews v. City of Piedmont, 100 Cal.App. 700, 281 P. 78; Monahan v. Department of Water and Power, 48 Cal.App.2d 746, 751, 120 P.2d 730; Greenfield v. Board of City Planning Commissioners, 6 Cal.App.2d 515, 518, 45 P.2d 219; Hoyt v. Board of Civil Service Commissioners, 21 Cal.2d 399, 132 P.2d 804; Wilkins v. City of San Bernardino, 29 Cal.2d 332, 175 P.2d 542.

It is stated in 5 Cal.Jur.10-Yr.Supp., p. 118, that the remedy by way of declaratory relief does not affect any other remedy; nor is it affected by the existence of another remedy; and, at page 125, that declaratory relief extends to a determination of questions as to the validity, construction, operation and effect of statutes and ordinances, and that a zoning ordinance is, for example, a proper subject of a declaratory judgment as to validity and construction of provisions. And it is said in Borchard's "Declaratory Judgments," 2d Ed., pp. 302, 303, that "it is wrong for courts to decline a declaration on the mere ground that another remedy was available, for declaratory relief was not intended to be exclusive or extraordinary, but alternative and optional. It is only where the court believes that *more* effective relief can and should be obtained by another procedure and that for that reason a declaration will not serve a useful purpose, that it is justified in refusing a declaration because of the availability of another remedy."

[9, 10] Respondent says in his brief that plaintiffs should have resorted to mandamus to compel the enforcement of the ordinance by the proper county authorities; but as to the right of a party to resort to an action for declaratory relief though other remedies may be available, the court said in Maguire v. Hibernia Savings & Loan Soc., 23 Cal.2d 719, 732, 146 P.2d 673, 680, 151 A.L.R. 1062, that before a court may deny declaratory relief on the ground that other remedies exist, "it must clearly appear that the asserted alternative remedies are available to the plaintiff and that they are speedy and adequate or as well suited to the plaintiff's needs as declaratory relief." To the same effect is the opinion in Columbia Pictures Corporation v. De Toth, 26 Cal.2d 753, 761, 161 P.2d 217, 162 A.L.R. 747.

The judgment is reversed.

SCHOTTKY, J. pro tem., and THOMPSON, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

79 Cal.App.2d 556

TSCHUMY v. BROOK'S MARKET et al.

Civ. 15647.

District Court of Appeal, Second District,
Division 2, California.
May 8, 1947.

1. Trial 🔑178

A directed verdict for defendants may be ordered only when giving plaintiff's evidence value to which it is legally entitled, indulging all legitimate inferences therefrom, and disregarding conflicting evidence, there is no evidence of sufficient substantiality to support verdict for plaintiff.

2. Trial 🔑178

A motion by defendants for directed verdict concedes as true all of plaintiff's evidence, with all fair and reasonable inferences therefrom, and even if court might be justified in granting new trial in event of verdict for plaintiff, it would not be justified in directing verdict for defendants on same evidence.

3. Negligence ⚿54

A food market owner, permitting ice company, which leased part of such owner's parking lot for erection and operation of ice vending machine, to use leased premises before effective date of lease, was liable for injuries to market patron as result of tripping over upward curving iron support of advertising sign, installed by such company in leased space, while crossing lot after leaving market.

4. Appeal and error ⚿1195(4)

The law as stated in opinion of District Court of Appeal on appeal from judgment on jury's verdict for defendants in personal injury suit constituted law of case and was binding on trial court at second trial thereof following partial reversal of such judgment, in absence of substantially different evidence at such trial.

5. Negligence ⚿54

An ice company, installing advertising sign with upward curving iron supports in parking lot space leased by it for erection and operation of ice vending machine, was guilty of negligence rendering it liable for injuries to pedestrian tripping over one of such supports before effective date of lease, while crossing lot after leaving lot owner's adjacent food market.

6. Negligence ⚿66(2)

A pedestrian, injured by tripping over upward curving dark metal support of advertising sign, installed by ice company in parking lot space leased by it, while crossing lot on dark night after leaving lot owner's brilliantly lighted adjacent food market before effective date of lease, was not guilty of contributory negligence barring recovery of damages from such owner and ice company, though pedestrian saw sign before accident.

◆

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by Amelia C. Tschumy against Brook's Market and others for personal injuries sustained as the result of a fall caused by defendant's negligence in maintaining a sign on named defendant's parking lot. From a judgment on a directed verdict for defendants, plaintiff appeals.

Reversed.

Lee J. Myers and Robert Rush, both of Los Angeles, for appellant.

Bauder, Veatch & W. I. Gilbert, of Los Angeles, for respondent Central Ice & Cold Storage Co.

Forrest A. Betts, of Los Angeles, for respondents Brook's Market and Meyer Stark.

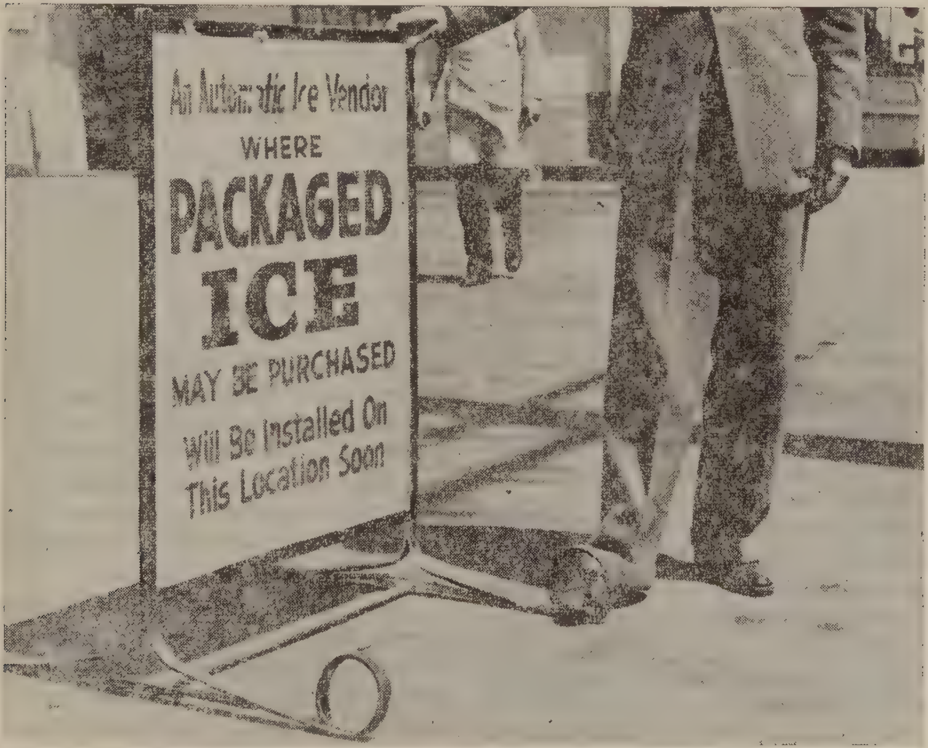
WILSON, Justice.

This is the second appeal in this action. The first appeal was by plaintiff from the judgment entered on a verdict in favor of defendants. That judgment was reversed on account of errors in instructions given to the jury. Tschumy v. Brook's Market, 60 Cal.App.2d 158, 140 P.2d 431.

The present appeal is from a judgment on a verdict which the court directed the jury to render in favor of defendants.

[1, 2] A directed verdict may be ordered only when conflicting evidence is disregarded and plaintiff's evidence is given the value to which it is legally entitled, indulging all legitimate inferences that may be drawn therefrom, and the result is that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff. A motion for a directed verdict concedes as true all evidence given on behalf of plaintiff with all fair and reasonable inferences to be deduced therefrom, and even though the court might be justified in granting a new trial in the event of a verdict in favor of plaintiff it would not be justified in directing a verdict on the same evidence. Estate of Lances, 216 Cal. 397, 400, 14 P.2d 768; Estate of Flood, 217 Cal. 763, 768, 21 P.2d 579; Thomsen v. Burgeson, 26 Cal.App.2d 235, 240, 79 P.2d 136; Engstrom v. Auburn Auto. Sales Corporation, 11 Cal.2d 64, 66, 77 P.2d 1059; Gish v. Los Angeles Ry. Corporation, 13 Cal.2d 570, 572, 90 P.2d 792.

The facts relating to the parking lot on which the accident took place, the adjacent market and sidewalk, the lighting conditions, and the projection from the sign which caused plaintiff to fall, are fully described in the opinion rendered on the former appeal and need not be repeated here. For a better understanding of the character of the sign and its projecting supports a reproduction of a photograph introduced in evidence is appended.



It should be noted in connection with the photograph that according to the evidence, as plaintiff passed in front of the sign (it was on her right) she stepped onto the sidewalk with her left foot and as she raised her right foot it caught in the iron ring at the end of one of the projections from the bottom of the sign, causing her to fall. The ring is approximately 2 feet from the sign and indicates the distance of her body from the sign before she fell.

In addition to the evidence related in the opinion on the former appeal the gasoline station attendant testified at the second trial, referring to the place where the accident happened, that "it was dark in that area," and that when he went to the market, which occurred almost every night, and walked from a brightly lighted place into the area in question, it was a darker spot by comparison with the adjacent area.

[3, 4] On the former appeal the court held that plaintiff was an invitee upon the premises (60 Cal.App.2d at page 165, 140 P.2d at page 435); that the invitation to enter included an invitation for her to depart "from such premises over such portions thereof as a reasonable person, situated as plaintiff was, would reasonably believe were held open as a proper means of departing from the premises"; that the pavement in front of the building, the pavement of the parking lot and of the sidewalk, all being on the same level, constituted a proper means of approach to the entrance by reason of the physical arrangement of the premises, acquiesence, dedication, and a long established custom. 60 Cal.App.2d at page 166, 140 P.2d 431.

The court further held that since defendant Stark gave defendant Ice Company "free possession" of the space leased to the Ice Company as soon as the lease was signed, although it was not effective until more than a month later, and since there was nothing to indicate to plaintiff or to other patrons of the market that there was any change in the custom that had prevailed for several years whereby customers of the market were permitted by Stark to approach and depart from the market across the parking lot, or to signify that the small space thereafter to be occupied by the ice machine was to be excluded from the usual and customary places over which customers for many years had traveled, the Ice Company itself was on the premises prior to October 1st only by the invitation or acquiescence of Stark; that at the time of the accident, irrespective of the lease, Stark had retained the rights of use and passage over the space which was to be occupied by the ice vending machine. Accordingly the court held that the instruction to the jury to the effect that Stark was not liable was prejudicially erroneous. From this it follows that the converse of the instruction is a correct statement of the law, to wit, that Stark was liable by reason of his permission to the Ice Company to use the premises prior to the effective date of the lease and by reason of the presence of the sign installed by the Ice Company. As to the Ice Company, the court held that since plaintiff was an invitee of Stark and since the Ice Company was likewise an invitee or licensee of Stark the company owed plaintiff as an invitee the duty of exercising ordinary care. 60 Cal.App.2d at page 168, 140 P.2d 431. To the same effect see also Brown v. Pepperdine, 53 Cal.App. 334, 336, 200 P. 36; Donahoo v. Kress House Moving Corporation, 25 Cal.2d 237, 243, 153 P.2d 349; Wade v. Buyers, 47 Cal.App.2d 168, 170, 117 P.2d 392.

The law as stated in the former opinion, above outlined, constitutes the law of the case and was binding on the trial court at the second trial.

Defendants contend that the holding on the former appeal is not the law of the case and was not binding in the subsequent trial because the evidence at the latter relating to the relationship of the parties was not the same as that introduced at the first trial. We have not been referred to any evidence at the second trial that was substantially different from that offered previously. Defendants refer in their brief to the evidence of Stark, but his testimony concerning his permission to the Ice Company to take possession before the effective date of the lease was practically the same as that referred to in the opinion on the former appeal. A lighting engineer employed by the Bureau of Power and Light of the City of Los Angeles testified concerning the lighting equipment maintained in the street, the distance of the light standards from each other, and the character of the lamp bulbs on the standards. He did not testify that the lights were burning on the night in question. The latter point was covered by the evidence at both trials. The evidence at the second trial was not in disagreement with that introduced at the first, nor was the additional evidence sufficient to eliminate from this appeal the rule of the law of the case.

[5] It was a negligent act on the part of the Ice Company to install a contraption such as is shown in the photograph. Flat supports would have sustained the sign as efficiently as those that were used. The curves at the ends of the supports were traps that a reasonably prudent person would not have placed where pedestrians would be likely to come in contact with them.

Since the negligence of both defendants is established by the former opinion and by the evidence at the second trial the court was not justified in directing a verdict in favor of defendants unless it could be said as a matter of law that plaintiff was contributorily negligent.

[6] In the argument of defendants they refer to plaintiff's admission that she saw the sign before she tripped over the supporting strips of iron that extended from the bottom of the sign. They say that "she saw the sign before she collided therewith," and with this as their text argue repetitively that she was guilty of contributory negligence. We look to the record and not to the briefs for the evidence. Appellants' argument is demonstratively negated by the fact that there is no evidence whatsoever that she collided with the sign. No contention has been advanced until this appeal

that a collision with the sign caused plaintiff's injuries. The evidence is uncontradicted that her foot caught in the curved end of the support of the sign which was approximately 2 feet from the sign itself, and this was her nearest approach to the sign. The fact that she saw the sign before her foot contacted its appendage, which was 2 feet distant therefrom, does not necessarily constitute contributory negligence.

The evidence reveals that the accident happened on a dark night; the parking lot was paved with dark asphalt; the supports of the sign were constructed of a dark metal; the point where the sign was located was darker than the surrounding area; immediately prior to the accident plaintiff had departed from Stark's market which was brilliantly lighted. It cannot be said that as a matter of law plaintiff was guilty of contributory negligence. The sign was not a warning to plaintiff that a support of the character described in the evidence and shown in the photograph extended from its base. The question of contributory negligence should have been submitted to the jury, and it was error to grant the motion for a directed verdict.

Judgment reversed.

MOORE, P.J., and McCOMB, J., concur.

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80 Cal.App.2d 31

LOVELAND v. CITY OF OAKLAND et al.

Civ. 13317.

District Court of Appeal, First District,
Division 2, California.
May 27, 1947.

1. Municipal corporations 🔑200

In proceeding in mandate to require payment of pension to widow of decedent on ground that decedent died from a service-connected heart injury for which decedent was retired under ordinance, retirement for heart injury was res judicata that decedent was disabled by heart injury in performance of decedent's duty, and, under ordinance requiring restoration to service of one pensioned for disability if disability ceased, failure to restore decedent was conclusive that his service-connected disability continued until death. St.1919, p. 1370, § 103; St.1941, p. 3398, § 103a.

2. Mandamus 🔑168(2)

In proceeding in mandate to require payment of pension to widow of deceased fireman on ground that widow's husband had died from the service-connected disability for which husband had been retired from fire department pursuant to ordinance, widow had burden of establishing that death was due to service-connected disability. St.1919, p. 1370, § 103; St.1941, p. 3398, § 103a.

3. Evidence 🔑574

The testimony of a medical witness in answer to a hypothetical question based on facts in the record is sufficient to support a finding contrary to the testimony of other medical witnesses who have seen and examined the patient.

4. Evidence 🔑571(9)

Evidence that occlusion resulting in fire department member's retirement, under ordinance authorizing retirement for physical disability, was not the cause of death after retirement, sustained judgment denying widow a pension under ordinance requiring pension to be paid to widow if pensioner died by reason of the bodily injury for which he was pensioned. St.1919, p. 1370, § 103; St.1941, p. 3398, § 103a.

◆

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Proceeding in mandate by Zora A. Loveland against the City of Oakland, a municipal corporation, and others to compel grant of pension to fireman's widow. From a summary judgment dismissing the petition, petitioner appeals.

Judgment affirmed.

See also 69 Cal.App.2d 399, 159 P.2d 70.

Frank E. McGuire and Louis DeAvila both of Oakland, for appellant.

F. B. Fernhoff, City Atty. and John W. Collier, Asst. City Atty., both of Oakland, for respondents.

DOOLING, Justice.

Prior to June 1, 1938, Victor F. Loveland was a member of the Fire Department of the City of Oakland. On that date he was retired on half pay by resolution of the board of trustees of the firemen's relief and pension fund of that city. On September 19, 1937, while answering a fire alarm, Loveland had suffered an occlusion of one of the coronary arteries which supply the heart muscle with blood and the heart muscle was thereby impaired. Two physicians who examined Loveland certified to the board that his activities on September 19, 1937, were precipitating factors of his disability. He was retired pursuant to section 103 of the Oakland charter, which read at that time:

"Any member of the department who shall become physically disabled by reason of any bodily injury received in the performance of his duty upon his filing with the Board of Trustees a verified petition, setting forth the facts constituting such disability, and the cause thereof, accompanied by a certificate signed by the Chief of the Fire Department, the Chief of the Battalion to which he belongs, and by two regularly licensed physicians of the city, recommending his retirement upon a pension, on account of such disability, may be retired from the department upon an annual pension, equal to one-half the amount of salary attached to the rank which he held one year prior to the date of such retirement, to be paid to him in equal monthly installments during the balance of his lifetime and to cease at his death. In case his disability shall cease, his pension shall cease, and he shall be restored to the service in rank he occupied at the time of his retirement; provided that the said Board of Trustees may of its own motion retire any member who shall become physically disabled by reason of any bodily injury received in the performance of his duty, who upon examination by two regularly licensed and practicing physicians appointed by the Trustees for that purpose, may be ascertained to be by reason of such disability unfit for the performance of his duty." Stats. 1919, p. 1370.

Loveland died on December 23, 1943. His widow, the petitioner and appellant herein, petitioned for a pension under section 103a of the Oakland charter, adopted in 1941:

"Notwithstanding any other provision set forth in Section 103, if a retired member of the Department shall die at any time by reason of the bodily injury for which he was pensioned, his pension shall not cease but shall continue and shall be paid to his widow to whom he was married at the time of such injury * * *." Stats.1941, p. 3398.

The trustees of the pension fund denied her petition and appellant commenced this proceeding in mandate in the superior court. The superior court likewise denied her relief and appellant takes this appeal. The superior court found: "That said Victor F. Loveland did not die on the 23rd day of December, 1943, by reason of the bodily injury for which he was pensioned." Appellant attacks this finding as unsupported by the evidence.

In support of her case appellant introduced the reports of Drs. Alexander and Rogers upon which the original retirement order was based; the report of a Dr. Shelley dated January 20, 1941 "that I have examined Victor Loveland and find his physical condition such that he is totally disabled from work of any kind"; a letter from a Dr. Leahy dated October 16, 1943, to appellant stating "that your husband is suffering from severe bronchial asthma and heart disease and is being treated for both conditions * * * undoubtedly Mr. Loveland will never be cured, but that the condition can only be improved"; a letter from a Dr. Morrison, more fully quoted hereafter, and the death certificate.

The letter from Dr. Morrison states:

"This is to certify that I gave medical care to Mr. V. Loveland of Oakdale from June 1942 to Sept. 1943 and at the latter date I entered the Armed Forces. During the above mentioned dates Mr. Loveland suffered from a chronic heart ailment due to multiple Coronary Thrombotic episodes and several times became so decompensated that it did not look he would survive. It is quite remarkable that anyone with as extensive cardiac damage as he had did not die at a much earlier date."

The death certificate recites:

"Immediate cause of death, cardiac failure, duration 3 wks.

"Due to coronary arterial disease, duration 6 yrs.

"Due to cardiac asthma."

[1] It is appellant's theory that the retirement for disability of the heart is res judicata that her husband was disabled by a heart injury in the performance of his duty and, in view of the provision of sec. 103 of the charter that "in case his disability shall cease, his pension shall cease, and he shall be restored to * * * service," the failure to restore him to service is conclusive that his service-connected disability continued until his death. So far we may follow appellant without dissent.

The next step in her argument proceeds: Loveland was suffering from an impairment of the heart incurred in the performance of duty; he died of heart failure; therefore his death was caused by reason of the bodily injury for which he was pensioned.

[2] There is a disarming appearance of logical consistency in the sequence: a, heart injury; b, death from heart failure; ergo, c, the death from heart failure was caused by the heart injury. This conclusion, however, was left entirely to inference, since appellant offered no direct proof of the cause of death. The burden was upon appellant to establish the cause of death (Ellenberger v. City of Oakland, 59 Cal.App.2d 337, 139 P.2d 67) and in the face of the adverse finding below she bears the heavy burden before this court of showing, not that the evidence will support a finding that her husband's service-connected injury caused his death, but rather that it will not support the contrary finding actually made; or, to put it affirmatively, appellant must convince us that the evidence compels a finding that her husband's death was caused by the injury for which he was pensioned.

The only direct evidence as to cause of death was produced by the respondent. Dr. Rogers, one of the physicians who examined Loveland in 1938 and reported to the pension fund trustees, testified that in his opinion Loveland's death was not caused by the injury to his heart for which he was pensioned. He based his testimony on his own examination of Loveland in 1938, all of the medical reports in evidence and the death certificate. It was his testimony that the primary cause of a coronary occlusion is arterio-sclerosis, that the coronary occlusion of 1937 for which Loveland was pensioned was due to arterio-sclerosis, with his exertion in performance of duty as a precipitating cause; that any subsequent occlusion would be caused by the preexisting arterio-sclerosis and not by the occlusion of 1937; that the "multiple coronary thrombotic episodes" referred to in Dr. Morrison's letter, quoted above, were subsequent coronary occlusions not in any way caused by the 1937 episode, but due entirely to the preexisting arterio-sclerosis; and that, whether Loveland's death from heart failure was caused by a particular coronary occlusion or by a gradual degenerative process of the heart as a result of a series of successive occlusions, the occlusion of 1937 was not the cause of his death.

Appellant attacks these conclusions as speculative and claims that they will not support the finding of the pension trustees and the court, citing Winthrop v. Industrial Acc. Comm., 213 Cal. 351, 2 P.2d 142; Mark v. Industrial Acc. Comm., 29 Cal.App.2d 495, 84 P.2d 1071; and Brant v. Retirement Board of San Francisco, 57 Cal.App.2d 721, 135 P.2d 396.

The Winthrop case is explained in Nielsen v. Industrial Acc. Comm., 220 Cal. 118, 122, 123, 29 P.2d 852, and Alaska Packers Ass'n v. Industrial Acc. Comm., 1 Cal.2d 250, 263, 264, 34 P.2d 716. The Mark and Brant cases are discussed in Dornell v. Retirement Board, 72 Cal.App.2d 197, 202–206, 164 P.2d 266. The net result of these latter opinions is summed up in the Dornell case 72 Cal.App.2d at page 206, 164 P.2d at page 271 (quoting from Sales v. Bacigalupi, 47 Cal.App.2d 82, 86, 117 P.2d 399):

[3] "The testimony of a medical witness in answer to a hypothetical question based on the facts in the record is sufficient to support a finding contrary to the testimony of other medical witnesses who have seen and examined the patient."

[4] In our case there is no direct conflict in the testimony at all, since the testimony of Dr. Rogers is the only express testimony as to the cause of death. This testimony supports the finding above quoted; and the finding sufficiently disposes of the issue.

This conclusion renders it unnecessary to discuss the other question presented, as to whether appellant falls within the class of beneficiary mentioned in sec. 103a of the charter.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.

80 Cal.App.2d 21

PAUL v. KEY SYSTEM et al.

Civ. 13351.

District Court of Appeal, First District, Division 1, California.

May 27, 1947.

1. Appeal and error 🔑930(2)

Juries are presumed to be composed of intelligent men capable of understanding courts' charges and applying them to evidence.

2. Appeal and error 🔑1001(1)

A jury's fact finding may be reversed on appeal only if there is insufficient evidence to support it.

3. Carriers 🔑318(7)

Evidence supported jury's implied finding that when bus stopped to take on passengers at street intersection, an automobile was approaching so closely on intersecting arterial street as to constitute immediate hazard to bus driver, so as to require him to yield right of way under statute and render bus company and driver liable for injuries to bus passenger as result of collision between bus and such automobile. Vehicle Code, §§ 82.5, 552.

4. Damages 🔑130(3)

A verdict awarding widow, earning $30 to $35 a week by housework, $9,500 damages for fractured ankle in cast for three to four weeks, sprains in neck, lower back and cervical area, and muscle spasm in thoratic vertebra between shoulder blades, necessitating her confinement to bed for about five weeks and visits to physician's office two or three times weekly thereafter for short wave diathermy treatments, was not excessive.

5. Appeal and error 🔑1004(1)

A jury's verdict awarding damages for personal injuries will not be disturbed, unless so grossly disproportionate to any reasonable limit of compensation shown by evidence as to shock sense of justice and raise presumption that it is based on passion and prejudice rather than sober judgment.

6. Trial 🔑131(1)

Defendants waived misconduct of plaintiff's counsel in stating during trial that he had not been able to locate, but had statement of, certain witness, by failure to request trial court to make appropriate order or admonish jury to disregard counsel's reference to such inadmissible hearsay evidence.

7. Trial 🔑133(6)

Improper statement of plaintiff's counsel during trial that he had not been able to locate, but had statement of, certain witness, was not prejudicial to defendants, in view of instruction that jury must not consider as evidence any offered proof to which objection was sustained by court.

8. Appeal and error 🔑930(1)

Triers of facts are presumed to be influenced only by pertinent evidence or testimony introduced during trial.

9. Appeal and error 🔑1048(7)

In action for injuries to passenger in defendant's bus, driven by codefendant, as result of collision with third defendant's automobile at street intersection, admission of bus driver's testimony, on examination by plaintiff's counsel, that statement in witness' deposition as to how near automobile was when he first saw it was corrected immediately afterwards by increasing distance, was not reversible error, though corrected statement was not impeaching because deponent had right to correct deposition. Code Civ.Proc. §§ 2006, 2032, 2055.

10. Witnesses ⚷267

The extent of witness' cross-examination is largely within trial judge's sound discretion.

11. Appeal and error ⚷1064(1)

An instruction that jury may distrust witness or entire testimony of witness who has willfully sworn falsely as to any material matter in jury's opinion was not prejudicial error, where witness' testimony, objected to, concerned collateral matter.

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Appeal from Superior Court, Contra Costa County; Harold Jacoby, Judge.

Action by Ethel Paul against the Key System, a corporation, Chester L. Flansburg and another for personal injuries sustained as the result of a collision between defendant corporation's bus, driven by defendant Flansburg, and third defendant's automobile. From a judgment for plaintiff against named defendants, they appeal.

Affirmed.

Donahue, Richards & Hamlin, of Oakland, Tinning & DeLap, of Richmond, for appellant Key System.

John Paul Jones, of Oakland, for appellant Tiger.

Nichols & Richard, of Oakland, for respondent.

WARD, Justice.

Defendants Key System, a corporation, and Chester L. Flansburg appeal from a judgment awarding plaintiff damages for personal injuries. The jury returned a verdict for $12,000. Defendants' motion for a new trial was denied on condition plaintiff waive all over $9,500, which condition was complied with by plaintiff. The jury found for defendant Grover G. Tiger who takes no part in this appeal.

The points raised on appeal are (1) sufficiency of the evidence, (2) excessiveness of the verdict, (3) prejudicial misconduct on the part of plaintiff's counsel, and (4) reversible error in the conduct of the cross-examination of defendant Flansburg.

The suit concerns a collision of a Key System bus, operated by Flansburg, on which plaintiff was a passenger, and a Ford V-8 sedan, driven by Tiger, in Berkeley, California. Plaintiff testified that on November 27, 1945, at about 6:15 p. m. she and her fourteen year old son were waiting at the coach stop on Sacramento Street near its intersection with Ashby Avenue, an arterial marked with stop signs; that the bus driven by Flansburg in a southerly direction on Sacramento Street, stopped beyond the coach stop near the traffic stop; that she was the last of five passengers to board the bus, and that after boarding the bus she asked for two tickets to San Francisco and tendered a dollar bill. Her testimony was confirmed by two other passengers on the bus, namely, her son and a Mrs. Chase. Flansburg testified, "* * * as soon as she got on she handed me the dollar bill and asked for two tickets. I took the dollar bill and made the 60¢ change." He was then asked: "You were proceeding at that time?" and answered: "I was proceeding to move up to the stop sign." Meanwhile, Tiger was driving a car's length behind a car operated by one Rippy in an easterly direction on Ashby Avenue. The police officer who investigated the collision testified that as a result of the impact of the bus and Tiger's car, the left rear fender of Tiger's car was knocked "in against the left rear wheel," whereas the bus was dented at the right front corner. Mrs. Chase answered affirmatively the question: "Did the automobile [Tiger's] almost get by?" Evidence that only the left rear fender of Tiger's car was damaged, supports her conclusion.

[1, 2] The trial court's instructions are not challenged on this appeal. Vehicle Code, section 522, which was read to the jury, provides: "The driver of any vehicle which has stopped as required by this code

at the entrance to a through highway shall yield the right of way to other vehicles which have entered the intersection from the through highway or which are approaching so closely on the through highway as to constitute an immediate hazard." "It is presumed that juries are composed of intelligent men, and, as such, are capable of understanding the charge of the court and applying it to the evidence." 24 Cal. Jur. 795. It follows that the jury found that Tiger was approaching so closely on Ashby Avenue as to constitute an immediate hazard to Flansburg. On appeal, the jury's finding may be reversed only if there is insufficient evidence to support it. Callaghy v. Mosle, 66 Cal.App.2d 788, 153 P.2d 91; Weddle v. Loges, 52 Cal.App.2d 115, 125 P.2d 914; Duarte v. Postal Union Life Ins. Co., 75 Cal.App.2d 557, 171 P.2d 574; Freeman v. Nickerson, 77 Cal.App.2d 40, 174 P.2d 688.

[3] Defendants urge that if Tiger's car was in the position plaintiff's witness placed it, traveling at the speed they say, the accident would not have occurred, because Tiger would have cleared the intersection before the bus arrived at the point of impact. They cite Hughes v. Quackenbush, 1 Cal.App.2d 349, at page 354, 37 P. 2d 99, at page 102, wherein it is said: "Of course, testimony which is inherently improbable may be disregarded. Neilson v. Houle, 200 Cal. 726, 254 P. 891. But to warrant such action there must exist either a physical impossibility of the evidence being true or its falsity must be apparent, without any resort to inferences or deductions. Powell v. Powell, 40 Cal.App. 155, 180 P. 346, 348; Stahmer v. Stahmer, 125 Cal.App. 132, 13 P.2d 833." Defendants overlook the fact that the testimony to which they refer is not the only evidence from which the jury might determine that Tiger was approaching so closely on Ashby Avenue as to constitute an immediate hazard to Flansburg.

To support their argument that no evidence supports a finding that Tiger's car constituted an immediate hazard to Flansburg, defendants argue that the record shows that Tiger anticipated that the car ahead of him might yield the right of way to the bus. They quote the following portion of Tiger's testimony: "Q. Did you keep watching the bus on not? A. No, when I seen the bus stopped, and the other car was heading—I turned my head to watch the other car, in case he stopped." Immediately after making this statement, Tiger answered the question, "Were there any cars here that you noticed?" with the reply, "I notice when I turned from seeing the bus, that the other was stopped at the stopsign * * *. It was at the stopsign here, on, I guess you would call it Sacramento," indicating that the typed record is not clear as to whether he was referring to Rippy's car or to that of one Ritter who was headed north on Sacramento Street at the time of the accident.

Ritter's testimony supports the finding of the jury that Tiger's car constituted an immediate hazard to any vehicle attempting to cross Ashby Avenue shortly before the collision. After testifying that when he first saw the coach it was stopped on the opposite side of the street from him, he was asked to locate Tiger's car: "A. Coming up Ashby. Q. Do you know how far back it was from the intersection? A. No, I don't but I stopped to let it go by. That is why I stopped there. I was waiting for the two cars to go by."

None of the authorities cited by defendants require a holding that there is insufficient evidence to sustain the judgment. Casselman v. Hartford A. & I. Co., 36 Cal. App.2d 700, 708, 98 P.2d 539, 544, supports the statement that it is not the law "that every motorist who attempts to enter a main highway from a side road, does so at his peril." There, an entry onto a highway was attempted from a side road having no stop sign. The court expressly found that no "through highway" was involved, since Vehicle Code, section 82.5 provides: "A 'through highway' is a highway or portion thereof at the entrance to which vehicular traffic from intersecting highways is required by law to stop before entering or crossing the same, and when stop signs are erected as provided in this code." Unlike the present case, Vehicle Code, section 552 was not involved.

The Casselman case is also cited to support defendants' claim that the bus had the right of way and Flansburg had the right to assume that Tiger would yield to him. See, also, Page v. Mazzei, 213 Cal. 644, 645, 3 P.2d 11. Although section 552 was not involved, the principal expressed in that section is enunciated, 36 Cal.App. 2d at page 707, 98 P.2d at page 544, of the Casselman opinion in a quotation from Pattisson v. Cavanagh, 18 Cal.App.2d 123, 127, 63 P.2d 868, 64 P.2d 945, where it is said: "* * * the law is also well settled that if it would appear to the mind of any reasonable person that the vehicle approaching the intersection on the arterial highway is near enough to constitute an immediate danger, and under those conditions the driver of the other vehicle attempts to enter or cross the arterial, he is negligent in so doing even though he was the first to arrive at or enter the intersection." The court concludes that whether the approaching vehicle constitutes an immediate danger "was a matter for the determination of the jury." In the present case, the jury's implied finding that Tiger's car was approaching so closely on Ashby Avenue as to constitute an immediate hazard to Flansburg must stand.

[4] At the time of the previously described collision, plaintiff was standing by the fare box. Before she had time to sit down, the impact knocked her to the floor of the bus. Plaintiff was removed by stretcher to a hospital and subsequently to her home under the care of a practical nurse. The doctor who attended her testified that he first saw plaintiff on the night of the accident when she was brought to the hospital suffering considerable pain in her neck, back and the extremities on the left side of her body. She had a fractured left ankle which was in a cast for three to four weeks. He paid daily calls to her home—where she was confined to her bed for approximately five weeks—often coming twice a day. When she was able to leave her home she came to his office two or three times a week for short wave diathermy. Under his treatment a sprain in the neck—an actual rupture of the small bands of muscle—and sprains in the lower back and cervical area, disappeared. He further testified that she continues to have difficulty in the seventh or eighth dorsal vertebra or thoracic vertebra, between the tips of the shoulder blades, and that muscle spasm is present in that area. This difficulty was diagnosed as hernia of the intervertebral disc between the seventh and eighth dorsal vertebrae. Plaintiff testified that she is a widow and that prior to the accident she earned $30 to $35 a week by engaging in housework.

Defendants support their contention that the verdict of $9,500 is excessive by pointing out that the testimony of the doctor they called to examine plaintiff differed from the testimony of plaintiff's doctor. Defendants' doctor examined plaintiff for about an hour and concluded that she had no herniated disc. He testified as to an involved series of tests to be given to determine the presence of a herniated disc, but he made no pretense of having subjected plaintiff to such tests. Plaintiff contends that the jury was entitled to discredit defendants' doctor since he testified that he did not recall any cases of herniated disc in the dorsal spine, but on cross-examination it was brought out that he had heard of such a case.

Defendants argue that plaintiff's doctor should have operated to relieve plaintiff's difficulty, thus minimizing the damages. The duty of an injured party to undergo an operation prior to trial depends upon the peculiar circumstances of the case. Mecchi v. Lyon Van & Storage Co., 38 Cal.App. 2d 674, 102 P.2d 422, 104 P.2d 26. Withrow v. Becker, 6 Cal.App.2d 723, 45 P.2d 235, cited by defendants, is not inconsistent with an affirmance of the award of $9,500. There the judgment was reversed and the cause remanded for a new trial because an instruction that the jury must take into consideration all the circumstances in fixing damages was too broad (6 Cal.App. 2d at page 729, 45 P.2d at page 238) "especially in view of the testimony in the record to the effect that the appellant was covered by insurance" and because an operation for an apparently simple hernia (6 Cal.App. 2d at page 730, 45 P.2d at page 239) "would have greatly reduced such damage as appears from the plaintiff's inability to work."

[5] A recent case in point, though not involving the identical injuries that appear in the present case, is Roedder v. Rowley,

28 Cal.2d 820, 172 P.2d 353, wherein the Supreme Court affirmed an award of $9,756.56 to a plaintiff who suffered from spasms of the back muscles as a result of a collision, and two months thereafter resumed work against doctor's advice. At page 823 of 28 Cal.2d, at page 354 of 172 P.2d, the court said: "* * * a verdict will not be disturbed by an appellate court unless it is so grossly disproportionate to any reasonable limit of compensation as shown by the evidence that it shocks one's sense of justice and raises a presumption that it is based on passion and prejudice rather than sober judgment."

[6] Defendants urge that plaintiff's counsel was guilty of prejudicial misconduct when, during the trial, he stated that he had not been able to locate a witness, named Rippy, who drove the car just ahead of Tiger's car, but that he had a statement of Rippy. Defendants' counsel called attention to the fact that the statement was hearsay. Assuming that plaintiff's counsel knew such evidence was inadmissible, and that his action in this respect was reprehensible, if not prejudicial, defendants waived such misconduct by their failure to request the court to make an appropriate order or to admonish the jury to disregard the reference to inadmissible injected evidence. Jones v. Bridges, 38 Cal.App.2d 341, 101 P.2d 91; Freeman v. Nickerson, supra.

[7, 8] That defendants were not prejudiced by the incident appears from the fact that the jury was instructed as follows: "You are not to consider as evidence * * * anything offered to be proven * * * to which an objection was sustained by the Court. All such matters and any inferences you may have drawn therefrom should be entirely eliminated from your consideration and should be treated as though never seen or heard by you." Furthermore, as said in Formosa v. Yellow Cab Co., 31 Cal.App.2d 77, 83, 87 P.2d 716, 719, triers of fact "are presumed to be influenced only by the pertinent evidence or testimony introduced during the trial."

[9-11] During the direct examination of Flansburg under Code of Civil Procedure, section 2055, the following occurred:

"Q. How near to you was this automobile that you ran into when you first saw it? A. I would say 150 to 200 feet. * * *

"Q. Do you remember when in your deposition you said it was 150 to 100 feet? A. I did not. I said 150 to 200 feet.

"Mr. Porlier [Counsel for Defendants]: If the Court please—show him the deposition and let's do it properly, Mr. Nichols.

"Mr. Nichols [Counsel for Plaintiff]: Look at page 9 in your deposition. * * * A. 200 feet. It was corrected immediately afterwards.

"Q. What do you mean 'immediately afterwards'? * * *

"Mr. Porlier: I submit it is incompetent, irrelevant and immaterial.

"Mr. Nichols: If the Court please, he said he made it right afterwards and I am prepared to show that he didn't make it right afterwards at all.

"The Court: Objection overruled.

"Q. When did you make the correction? A. The correction was made to-day."

Defendants' argument that as a deponent has the right to correct his deposition (Code Civ.Proc., secs. 2032, 2006, and see Lewis v. Western Truck Line, 44 Cal.App.2d 455, 112 P.2d 747), the corrected statement in the deposition was not impeaching, is not contested by plaintiff. Plaintiff points out that the impeachment was directed to Flansburg's statement as to the time when the change was made. Defendants contend that the time when the correction was made was a collateral matter and hence the objection to questioning as to when the change was made should have been sustained, citing Estate of Gird, 157 Cal. 534, 108 P. 499, 137 Am.St.Rep. 131, which held that it was not error to exclude impeachment on collateral matters. The trial court committed no reversible error in overruling defendants' objection. As said in Duarte v. Postal Union Life Ins. Co., supra, 75 Cal.App.2d at page 578, 171 P.2d at page 587: "The extent of the cross-examination of a witness is a matter largely within the sound discretion of the trial judge." Defendants quote the trial court's instruction that "if any witness examined before you has, in your opinion, wilfully sworn falsely as to any *material matter*, you may, in your discretion, distrust his or her entire testimony" (emphasis added) to support their argument that prejudice resulted from the conduct of the trial court in permitting Flansburg to be examined on the matter of the time when the correction was made. Assuming defendants to be correct in their assertion that the time when the correction was made was a collateral matter, it is difficult to see that they were prejudiced by an instruction that a witness' testimony may be distrusted if containing a contradiction as to any material matter.

The judgment is affirmed.

PETERS, P.J., and BRAY, J., concur.

79 Cal.App.2d 670

PATTERSON v. BOARD OF SUP'RS OF LOS ANGELES COUNTY et al.

Civ. 15590.

District Court of Appeal, Second District, Division 1, California.

May 14, 1947.

As Modified on Denial of Rehearing June 3, 1947.

Hearing Denied July 10, 1947.

1. Mandamus 🔑159

An alternative writ of mandate will ordinarily issue where upon the showing made any doubt arises as to the rights of the parties, but where it is clear from the petition that the peremptory writ should not issue, the alternative writ should be denied.

2. Mandamus 🔑159

Issuance of an alternative writ of mandate is not a matter of right nor is a court required to grant such writ merely as an appropriate step in the proceedings.

3. Mandamus 🔑174

Where, on motion for alternative writ of mandate to review decision of county board of supervisors granting cemetery permit and zoning exception, all parties were before the court and full transcripts of proceedings before regional planning commission and board were attached as exhibits to petition, trial court could make a final determination as to whether a peremptory writ should issue.

4. Mandamus 🔑172

County board of supervisors in passing on application for cemetery permit functioned in a judicial or quasi-judicial capacity and on mandamus to review board's decision, superior court was limited to the record before the board and could not substitute its opinion on the facts for that of the board.

5. Cemeteries 🔑9

Record of proceedings before county board of supervisors on application for cemetery permit established that those opposing application were accorded a fair, unbiased hearing.

6. Counties 🔑21½

Under Los Angeles County ordinances, a formal finding by county board of supervisors that facts were such as to entitle petitioner to requested zoning exception was not a prerequisite to the granting of such exception.

7. Cemeteries 🔑9

Evidence before Los Angeles County Board of Supervisors was sufficient to support a finding that landowners were entitled to a zoning exception permitting use of land just outside city limits of Long Beach as a cemetery.

8. Counties 🔑21½

Under Los Angeles County ordinances, a zoning exception may be granted where there are practical difficulties or unnecessary hardship in use of property for the purpose for which it is zoned and showing of substantial hardship or difficulty is not necessary.

9. Cemeteries 🔑9

Los Angeles County Board of Supervisors had broad discretion in the matter of granting cemetery permit and appropriate zoning exception.

10. Mandamus 🔑87

Application for alternative writ of mandate to review decision of county board of supervisors granting cemetery permit and appropriate zoning exception was properly denied where such decision was supported by substantial evidence and there was no showing of abuse of discretion or denial of a fair and proper hearing on application for permit and exception and objections thereto.

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Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Proceeding by Kenneth R. Patterson for an alternative writ of mandate to review a decision of the Board of Supervisors of the County of Los Angeles granting an application of Rose Hills Memorial Park for a cemetery permit and landowners' petition for appropriate zone exception. From an order denying his motion for an alternative writ, plaintiff appeals.

Order affirmed.

John W. Finley, Roy J. Brown and Mark L. Taylor, all of Long Beach, and J. Marvin Dean and J. Ames Crawford, both of Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, and Edward H. Gaylord, Deputy County Counsel, both of Los Angeles, for respondent, Board of Sup'rs.

Donald J. Dunne, of Los Angeles, for respondent, Rose Hills Memorial Park.

DORAN, Justice.

The appellant herein sought an alternate writ of mandate for the purpose of reviewing a decision of the respondent Board of Supervisors of Los Angeles County which granted an application of Rose Hills Memorial Park for the establishment of a cemetery just outside the city limits of Long Beach, and which decision also granted the landowners' petition for an appropriate zone exception permitting cemetery use. The original applications were filed with the Los Angeles County Regional Planning Commission which thereafter held a combined hearing in respect to the cemetery permit and the requested zone exception. The Planning Commission recommended to the Board of Supervisors that the cemetery permit be granted as to Parcel 1 of approximately 30 acres, already zoned to permit cemeteries; but recommended that a cemetery permit and zone exception be denied as to Parcels 2 and 3 containing approximately 60 acres not zoned for cemetery use. Rose Hills Memorial Park, and the landowners Montana Land Company and Signal Oil Company, then filed appeals to the Board of Supervisors and requested the Board to grant the cemetery permit as to all three parcels and the zone exceptions necessary in respect thereto. "After one abortive hearing by the Board of Supervisors", to quote from appellant's brief, "the said Board, on October 30, 1946, granted the application * * * as to * * * parcels 1 and 2 and * * * for zone exception over the property described as parcel 2 and also over such property in parcel 1 that lies nearer than 300 feet of a public park".

The appellant contends that the trial court erred in refusing to issue an alternate writ of mandate because, "(1) the alternate writ should have issued as an appropriate step in the proceedings. (2) * * * should have issued upon the basis of the allegations in the first cause of action of the amended petition showing that the hearing before respondent Board of Supervisors was so arbitrarily, capriciously and prejudicially held as to in effect afford appellant no hearing at all. (3) * * * should issue (because) there was no substantial evidence to support the order * * * granting a zone exception".

[1-3] In support of appellant's contention that "The alternate writ should have issued as an appropriate step in the proceedings", there is quoted an excerpt from Tingley v. Superior Court, 1908, 8 Cal.App. 47, 48, 96 P. 20, 21, where the court said: "Ordinarily the alternative writ will issue and should issue where, upon the showing made, any doubt arises as to the rights of the parties". But, as noted in respondent Board of Supervisors' brief, in the same paragraph occurs the following: "Where, however, it is clear from the petition that the peremptory writ ought not to issue, the alternative writ should be denied, thus avoiding delay and expense to the parties". In neither the statutory nor the case law is there any authority for treating the issuance of an alternate writ

of mandate as a matter of right, or requiring a court to grant such writ merely as an "appropriate step in the proceedings", as argued by the appellant. Moreover, as said in the brief of Rose Hills Memorial Park,—"In the instant case all parties were before the Court, the full transcript of the proceedings before the Regional Planning Commission and before the Board of Supervisors were attached as exhibits to appellant's petition and the trial Court was therefore in a position to make a final determination as to whether or not a writ of mandate should issue".

From the "Memo. for Decision" filed by the trial court, it appears that the motion for the alternative writ of mandate "was made, fully argued and submitted on March 12, (1946), supported by points and authorities in addition to the record, and opposed by respondents and Rose Hills Memorial Park, the real party in interest, with objections in writing and points and authorities." In refusing to issue the writ the court stated: "A painstaking review of the whole record herein, including citations of authorities, has been made and a consideration thereof results in the conviction that a full and fair hearing was had before both the Regional Planning Commission and the Board of Supervisors after due notice, resulting in a showing that Rose Hills Memorial Park was entitled under the proofs to the cemetery permit which was granted * * * and to the zoning exception * * * The record fails to show any bias or prejudice on the part of the Board or its members which interfered with or prevented a full and fair hearing to all parties, particularly petitioner herein."

[4] It is conceded in appellant's closing brief that, as stated in North Side Property Owners' Ass'n v. Hillside Memorial Park, 70 Cal.App.2d 609, 616, 161 P.2d 618, 622, "In hearing and passing upon an application for a cemetery permit * * * the administrative body (Board of Supervisors) functions in a judicial or quasi-judicial capacity". And, under the holding in Ware v. Retirement Board, 65 Cal.App.2d 781, 794, 151 P.2d 549, 556, either on certiorari or mandamus, "The Superior Court would, on such proceeding, have been limited to the record before the Board", and could not substitute "its opinion on the facts for that of the Board". Appellant, however, contends that this rule does not or should not apply "where the fairness of the hearing is at issue", and where, as appellant insists, "the hearing, itself (is) a mere sham". Admitting that "There seems to be a great dearth of cases upon this particular point", the appellant has cited Montgomery Ward & Co. v. National Labor Relations Board, 8 Cir., 103 F.2d 147, 149. But that case does not involve a comparable factual situation, nor does the opinion support the above contention. It is particularly to be noted that, in the Montgomery Ward case the reviewing court had carefully read "every word of this extensive record * * *. We cannot escape the conclusion that, in the hearing, the company was denied that fairness which is required by due process of law".

[5] In the instant case, a reading of the record reveals no such situation. As said in the brief of Rose Hill Memorial Park, "Appellant and all other interested persons were accorded full opportunity to make any statement which they desired without limitation. Appellant, himself, was invited to present additional statements and declined to do so. Furthermore, the remarks made by the members of the Board of Supervisors throughout the hearing, as disclosed by the transcript, show that Supervisors Smith, Ford, Darby and Jessup not only followed the testimony closely but asked many pertinent questions". Had this hearing been a "mere sham" as argued, there appears to be no reason why the appellant Patterson, and who was present and testified, should not have entered some protest or objection to the effect that the hearing was unfair. But in place of any such protest the record discloses that Supervisor Smith asked: "Have you finished, Mr. Patterson?", to which appellant answered: "Yes. I wish to thank you gentlemen, very much, for taking your time". At that time the appellant therefore appears to have been satisfied with the hearing accorded, the same hearing now characterized as having been unfairly conducted in an arbitrary and capricious manner by supervisors who were asleep, inattentive and prejudiced.

At the hearing in question some 13 witnesses were produced by the appellant, however, as stated in respondents' briefs, most of these witnesses "said nothing except that they did not want a cemetery and that there was no need of more cemeteries". The board was also addressed by Engineer Tyler Suess for the Planning Commission, and by Mr. John D. Gregg, Vice President of Rose Hills Memorial Park; maps were presented, exhibited and explained. Considerable discussion of the merits of the matter is disclosed by the stenographic record of the hearing which consists of 57 typewritten pages.

[6, 7] The appellant further contends that "The alternate writ should have been issued upon the grounds * * * that there was no substantial evidence to support the order of respondent board in granting a zone exception". In this connection it is interesting to note that "appellant does not question the fact that there was ample evidence before the Board to support its order granting the cemetery permit. It is also conceded that any evidence presented on the subject of the cemetery permit may also, if applicable, be considered in support of the zone exception". The appellant's brief also correctly states that "It is clear from Section 155 (Ordinance No. 1494 (N.S.)) above that the Board has extremely broad discretionary power in the granting or denying of a zone exception". It is argued, however, that this discretionary power is limited to cases where the Board "finds that the facts are such as to entitle the petitioner to such an exception", and that no such finding was made or could have been made under the evidence in the instant case. There is no merit in this contention. The ordinance in question makes no requirement of a formal "finding"; the record of the hearing makes it sufficiently plain that the Board did actually so find. Nor can there be serious doubt that there was substantial evidence before the Board to support such finding. The matter of zoning is dealt with in some detail in the testimony of Engineer Suess; the zone question is likewise discussed by Mr. John D. Gregg, speaking for Rose Hills Memorial Park. And, as appellant concedes, the evidence presented on the subject of the cemetery permit may properly "be considered in support of the zone exception".

[8] Section 155 of Ordinance 1494 (N.S.) provides that "The Board of Supervisors may except such property from any particular restriction or restrictions * * * if it finds that the facts are such as to entitle the petitioner to such an exception". Section 156 stipulates that a petitioner is entitled to an exception which "is necessary for the preservation of a substantial property right of the petitioner", and where "such exception will not be materially detrimental to the public welfare nor to the property of other persons located in the vicinity thereof". The appellant seeks to apply to the present case the provisions of Section 158 of the ordinance, and relying thereon asserts that "the minimum evidence which will support the granting of an exception is that evidence which tends to show substantial hardship or difficulty in the using of the property for the purpose for which it is zoned". It is to be noted, however, that Section 158 merely provides that "An exception *may also be granted* where there are practical difficulties or unnecessary hardships", etc., and that no such showing is required under Sections 155 and 156 above mentioned. (Italics added.)

[9, 10] Both questions here involved, namely the granting of the cemetery permit and the zone exception, were matters involving the exercise of a broad discretion by the Board of Supervisors; no abuse of such discretion is shown and there is substantial evidence to support the decisions made. There is nothing to indicate that a fair and proper hearing was not accorded the appellant. Under these circumstances the action of the Superior Court in refusing to issue an alternate writ of mandate was entirely proper.

The order appealed from is therefore affirmed.

YORK, P. J., and WHITE, J., concur.

Hearing denied; EDMONDS, J., dissenting.

79 Cal.App.2d 845

AHLSTEDT v. BOARD OF EDUCATION OF CITY OF LOS ANGELES et al.

Civ. 15540.

District Court of Appeal, Second District, Division 1, California.

May 23, 1947.

1. Municipal corporations ⚷211

Civil service employee of city high school district, by waiving a hearing on charges against her, did not waive right to have a full and complete investigation of the charges behind her dismissal. Education Code, §§ 14101 to 14142.

2. Mandamus ⚷187(9)

In mandamus proceedings to compel board of education to reinstate petitioner to position as junior secretary in permanent classified civil service, finding that personnel commission did not act upon or investigate charges behind dismissal was supported by substantial evidence and could not be disturbed. Education Code, §§ 14101 to 14142.

3. Municipal corporations ⚷211

Classified civil service employee of city high school district was entitled to have statutory procedure for dismissal strictly followed. Education Code, §§ 14101 to 14142.

4. Officers ⚷103

Where an administrative remedy is provided by statute, relief must be sought from administrative body and administrative remedy exhausted before courts will act.

5. Mandamus ⚷3(8)

Where civil service employee of high school district was dismissed and Personnel Commission, without investigating sufficiency of charges to support dismissal, held that Commission had no further jurisdiction and so advised employee and thereafter employee petitioned board of education to reopen her case, application for writ of mandamus could not be denied on the ground that employee had failed to exhaust administrative remedies. Education Code, §§ 14101 to 14142.

6. Mandamus ⚷176

Where statutory procedure for discharge of civil service employee of high school district was not followed, the dismissal was ineffectual and employee was entitled to reinstatement, and trial court was not limited to remanding matter to Personnel Commission but could issue writ of mandate requiring reinstatement. Education Code, §§ 14101 to 14142.

7. Officers ⚷94

A civil service employee who has been unlawfully deprived of his position is entitled to recover amount of his accrued salary during the period he is prevented from performing his duties, less amount he has received from private or public employment during that period. Education Code, §§ 14101 to 14142.

8. Municipal corporations ⚷211

Where civil service employee of city high school district had been dismissed without compliance with statutory procedure, employee's illness occasioned by dismissal and proceedings in connection therewith did not limit right to reinstatement to time when she was able to resume her duties, especially where her inability to perform duties of her position was not occasioned by her illness and no showing of prejudice to school board appeared by reason of her illness. Education Code, §§ 14101 to 14142.

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Appeal from Superior Court, Los Angeles County; Allen W. Ashburn, Judge.

Action by Mary T. Ahlstedt against Board of Education of City of Los Angeles and others for writ of mandate directing Board of Education to reinstate petitioner in position as junior secretary in permanent classified civil service of the Los Angeles City High School District. From an adverse judgment, defendants appeal.

Affirmed.

Harold W. Kennedy, County Counsel, and Wm. E. Lamoreaux, Deputy County Counsel, both of Los Angeles, for appellants.

Clyde C. Shoemaker, of Los Angeles, for respondent.

WHITE, Justice.

Mary T. Ahlstedt, petitioner and respondent herein, brought an action in the Superior Court of Los Angeles County seeking a peremptory writ of mandate directing the appellant Board of Education of the City of Los Angeles to reinstate her in her position as junior secretary in the permanent classified civil service of the Los Angeles City High School District. Judgment was rendered that a peremptory writ issue requiring the board to reinstate petitioner "and to immediately restore said petitioner to duty in said position, and to all of the rights, benefits and advantages connected therewith, and to immediately pay to said petitioner all of the salary applicable to said position which has accumulated and accrued from the time that the petitioner was suspended * * * on October 28, 1943." From such judgment the present appeal is prosecuted.

Petitioner alleged that on October 28, 1943, she was a "non-certified" (non-teaching) employee of the City High School District, holding the position of junior secretary at Phineas Banning High School; that petitioner was a permanent employee in the permanent classified service of said district within the meaning of section 14119 of the Education Code, and had been an employee of the District for a continuous period of 22 years. It was further alleged that on October 28, 1943, appellant board suspended petitioner for 30 days pending investigation of charges; that on November 18, 1943, the board dismissed petitioner, on the ground that she had been charged with "inability to get along with associates and patrons of school; insubordination—abandoned position; failure to discharge duties assigned to her—inattention to or dereliction of duty; poor judgment in dealing with associates and unreasonable attitude toward them; unaccommodating, ungracious, unpleasant and unfriendly."

It was charged by petitioner that her suspension and dismissal were in violation of the provisions of the merit system adopted by the appellant district as prescribed by article 5, chapter 13, division 7, of the Education Code (secs. 14101 to 14142). Sections 14105, 14106 and 14107 provide for the appointment of a Personnel Commission of three members; section 14113 provides that such commission shall prescribe, subject to the provisions of the article, such rules as may be necessary to secure efficiency and the selection and retention of employees on a merit basis; section 14114 provides that such rules shall provide for the procedure to be followed by the governing board in appointments, promotions, demotions, dismissals, and other matters; sections 14116 and 14117 provide for the appointment of a Personnel Director, who shall be responsible to the commission for carrying out all procedures in the administration of classified personnel.

Section 14130 provides in part as follows: "No person in the permanent classified service shall be demoted or removed except for reasonable cause designated by rule of the commission as detrimental to the efficiency of the service. * * *"

Section 14131 provides: "For reasonable causes an employee may be suspended without pay for not more than 30 days or may be demoted or dismissed. In such case the personnel director shall within three days of the suspension, demotion, or dismissal file written charges with the commission and give a copy of the charges to the employee."

Section 14132 provides: "An employee who has been suspended, demoted or dismissed may appeal to the commission within 14 days after receipt of a copy of the written charges by filing a written answer to the charges."

Section 14133 provides: "The commission shall investigate the matter on appeal and may require further evidence from either party, and may, and upon request of an accused employee shall, order a hearing. The accused employee shall have the right to appear in person or with counsel and to be heard in his own defense. The decision shall not be subject to review by the governing board."

Rule 22.735, adopted by the Personnel Commission, after listing grounds for which an employee might be suspended, demoted or dismissed, provided: "The Personnel *Division* shall, within three days of suspension, demotion or dismissal, file written charges with the Commission and the employee shall be furnished with a copy of such charges." The rule further provided that an appeal might be taken within 14 days after receipt of a copy of the charges by filing a written answer to such charges, and that such appeal could be taken only on the following grounds:

"(1) That the procedures set forth in these rules have not been followed;

"(2) That the removal was made because of affiliations, political or religious acts or opinions, race, color, or marital status;

"(3) That there has been abuse of discretion;

"(4) That the action taken was not in accord with the facts."

The rule further provided:

"(h) The Commission shall begin the hearing within a reasonable length of time from the day the appeal is received and the investigation and hearing shall be confined to the reasons for action as charged by the Personnel Division and relevant defenses set forth in the appeal. The burden of proof is upon the person suspended, demoted or dismissed. * * *

"(j) The findings of the Commission shall be rendered in written form within ten (10) days after the hearing is completed. Copies shall be sent to the Personnel Division and the employee concerned."

It should here be noted that the "Personnel Division" mentioned in the foregoing rule is not the "Personnel Commission" set up under the merit system provisions of the Education Code, but is simply an administrative unit of appellant board of education.

The truth or falsity of the charges or purported charges against petitioner employee are not in issue in this proceeding, the questions presented being whether the proceedings leading to her suspension and dismissal and the review thereof by the Personnel Commission were had in accordance with the pertinent provisions of the Education Code and Personnel Commission rule hereinbefore quoted, and whether petitioner was entitled to reinstatement and back pay or whether the trial court was limited to remanding the matter to the Personnel Commission.

The trial court, in its findings of fact and conclusions of law, found in part as follows:

"That at the time of said suspension, no written charges against the petitioner had been filed with the Personnel Commission by the Personnel Director or by the Personnel Division. That the Personnel Director did not within three days of said suspension, or at all in connection with said suspension, file any written charges against petitioner with said Personnel Commission, and did not give a copy of any such charges to the petitioner. That the Personnel Division of said respondent, Board of Education of the City of Los Angeles, did not within three days of said suspension, or at all in connection with said suspension, file any written charges against petitioner with said Personnel Commission, and that the petitioner was not furnished with a copy of any such charges."

The court found, however, as to the dismissal, that written charges had been filed and served upon petitioner.

The court further found that after receiving notice of her dismissal petitioner requested a hearing, which was set for December 8, 1943; that on November 30, 1943, "the petitioner withdrew her request for a hearing, and notified the Personnel Commission that she relied upon the investigation of the matter on appeal by said Commission."

The court further found "That said Personnel Commission never investigated, acted upon, or rendered a decision, or made any findings in reference to, or upon the subject of said dismissal by the respondents of the petitioner from her said position * * *."

The facts, as to which there is no serious dispute, are substantially as follows:

On October 20, 1943, there was served upon petitioner a "notice of unsatisfactory service," signed by the principal of her high school, and containing substantially the charges subsequently relied upon as grounds for her dismissal and suspension. On October 28, 1943, at a meeting of the school board, petitioner was suspended for thirty days, of which action petitioner was notified by a letter stating that "This action has been taken pending investigation of charges of: inability to get along with associates; insubordination — abandoned position; failure to discharge duties assigned to you — inattention to or dereliction of duty; poor judgment in dealing with associates and unreasonable attitude toward them; and unaccommodating, ungracious, unpleasant, and unfriendly." Attached to this letter was a copy of Form 31.34 of the Los Angeles City School District, Personnel Division, entitled "Assignment Order" containing substantially the same information as was contained in the letter.

On November 18, 1943, petitioner was dismissed upon the same grounds as heretofore set forth, and notice of such dismissal, was sent to petitioner in the form of a letter, accompanied by an "assignment order." Petitioner appealed to the Personnel Commission from both the suspension and the dismissal. In response to the notice of dismissal petitioner wrote to the Personnel Director on November 24, 1947, in part as follows: "* * * My answer to the dismissal notice, which came to me before the Personnel Commission had acted upon the suspension charges, is the same as my answer to the suspension charges. * * * In addition, I am asking for a hearing, please, and I am basing this appeal on the following grounds". Petitioner then set forth her contentions as to the merits of the charges.

The hearing on petitioner's dismissal was set for December 8, and petitioner was so notified. On November 29, petitioner wrote the Personnel Director, stating: "After my telephone conversation with you this morning, I have decided to withdraw my request for a hearing. However, please give the Personnel Commission all of the written materials, particularly my notarized statements."

On December 8, as shown by the minutes of the Personnel Commission, the conclusion was reached by the commission that petitioner's suspension "was justified". The minutes further contain the statement that "in the meantime, under date of November 29, Mrs. Ahlstedt has withdrawn her request for a hearing on the dismissal which followed her suspension."

On December 20, 1943, Mrs. Ahlstedt wrote the Personnel Director a letter which will be hereinafter quoted, and in reply thereto the Personnel Director wrote Mrs. Ahlstedt that her letter had been presented to the Personnel Commission and that the Commission had come to the conclusion "that the matter is now entirely beyond the jurisdiction of the Commission."

Appellants contend, first, that the undisputed evidence shows that the procedures prescribed by law and the rule of the Personnel Commission were fully complied with, and that therefore the findings of the trial court above quoted, to the effect that no charges were filed in connection with the suspension and that the Personnel Commission never investigated, acted upon, or rendered a decision upon the subject of the dismissal, are not supported by the evidence.

On December 8, 1943, the Personnel Director presented to the Personnel Commission, at a meeting of said Commission, a report reading in part as follows:

"To: The Personnel Commission
"From: John Steven, Director
"Subject: Appeal for Investigation in Connection with the Suspension of Mary T. Ahlstedt.
"December 8, 1943

"Summary of Recent Employee History

"On October 29, 1943 the usual letter signed by L. B. Travers and John Steven was sent to Mrs. Ahlstedt informing her that she had been suspended from her position as Junior Secretary at Banning High School, effective from October 28, 1943 to November 26, 1943 inclusive. Abandonment of position was one of the causes alleged for the suspension. There were several others.

"Mrs. Ahlstedt has been employed by the Los Angeles City Schools since October 22, 1921. She has worked in a number of different schools and has several times asked for transfers. Her employment at Banning began on September 14, 1942.

"Mrs. Ahlstedt appealed to the commission on November 1 and on November 5 in answer to my inquiry she made it plain that she was asking for an investigation—not a hearing. The last sentence of her letter reads as follows:

" 'My request is this—that the Personnel Commission please investigate the records on file in Deputy Superintendent Gould's office.'

"I investigated the files in Mr. Gould's office on November 11 and report as follows:

"I attach exhibits from the files of Mr. Gould in chronological order.

"Exhibit I is a copy of a letter dated September 23 from Mr. Travers to Mrs. Ahlstedt in answer to her communication of September 10. Mrs. Ahlstedt had apparently asked the Personnel Division to intervene in a dispute between herself and her principal. Mr. Travers pointed out that her complaints should be settled by the principal with possible appeal to Mr. Gould's office. His letter warned her that she had placed herself in the position of having abandoned her position, and had thereby jeopardized her status as a Board employee.

* * * * * *

"This investigation shows that Mrs. Ahlstedt left her position at Banning High School on September 7; that she attempted to protect her status by putting her controversy with her principal into the hands of the Personnel Division for decision; that the Personnel Division, after a delay of about two weeks, informed Mrs. Ahlstedt that the Division was not the place to settle such problems and that she had placed her status in jeopardy by abandoning her position; that the position of the Personnel Director was made clear to the principal and the superior officer, Mr. Gould; and that as a result charges looking toward dismissal were being prepared by the Girls Vice-Principal at Banning.

"In addition to investigating the files in Mr. Gould's office I also talked to Mr. Gould. He stated that he did not intend to overrule the principal in any action he might take in this matter. * * *"

The minutes of the meetings of the Personnel Commission show the following:

November 24, 1943: "The Commission set December 8, 1943 at 4 p.m. as the date for hearing Mrs. Ahlstedt's appeal from her dismissal as Junior Secretary at Phineas High School."

December 8, 1943: "The Director presented a report on the investigation of the suspension of Mary T. Ahlstedt, Junior Secretary at Phineas Banning High School. The various documents presented by Mrs. Ahlstedt were considered by the Commission and the decision was reached that her *suspension* was justified. In the meantime, under date of November 29, Mrs. Ahlstedt has withdrawn her request for a hearing on the dismissal which followed her suspension."

On December 10, 1943, the Personnel Director wrote Mrs. Ahlstedt advising her of the action of the Commission taken on December 8 and stating: "Since you had withdrawn your request for a hearing on your dismissal, the Commission made no findings on the dismissal itself."

From the foregoing it appears that the Commission never acted upon the appeal from the dismissal, but merely upon the suspension. Appellants, however, rely upon a letter dated December 20, from Mrs. Ahlstedt to the chairman of the Pensonnel Commission, followed by a decision of the Commission on December 22, as shown by its minutes as follows: "Mr. Toll presented and discussed a letter dated December 20, which he had received from Mary T. Ahlstedt, who was recently dismissed from the position of Junior Secretary. He also recounted his several conversations with Mrs. Ahlstedt. After discussion of the legal and other phases of Mrs. Ahlstedt's request Dr. Pfiffner moved that the Director be authorized to reply to Mary T. Ahlstedt's letter of December 20 to our Chairman to the effect that the Commission has given further consideration to the case, especially the points brought up in the letter, and has come to the conclusion that the matter *is now enitrely beyond the jurisdiction* of the Commission. The motion was carried unanimously."

In the letter referred to Mrs. Ahlstedt said:

"Mr. John Steven informed me this afternoon that the decision of the Personnel Commission regarding my suspension was based solely on abandonment of position, and that none of the other charges were investigated although they are remaining on the Board's records as having been substantiated.

"I appealed the charges on the grounds that there had been abuse of discretion and that the action taken was not in accord with the facts, and also that I had not been given the protection the Board provides regarding absence from work.

"In withdrawing my request for a hearing, I was unaware that I had forfeited the right as an employee to have each charge investigated by the commission, and that I had forfeited the right to submit additional proof to substantiate my claim that the charges made against me were false, and to submit additional defense in the form of a thumbnail sketch of my entire career with the Board of Education.

"I feel that even though I withdrew my request for a hearing, all charges should have been investigated and either proved or disproved; otherwise I think they should be cancelled as charges remaining on the Board's records against me. What objection could there be to this?

"I urge the commission to reopen my case on the grounds that the investigation was incomplete. Can't there be a joint hearing with the Board?"

It is urged by appellants that the charges were the same for the dismissal as for the suspension; that the only matter properly before the Commission was the dismissal, because the suspension was not for disciplinary purposes but pending investigation of charges, and that no appeal is provided for an appeal from such a suspension.

[1, 2] We see no escape, however, from the fact that the Commission, according to its own minutes, found merely that the "suspension" was justified, made no finding as to the dismissal and subsequently held that it no longer had jurisdiction. The suspension was ordered "pending investigation of charges." A finding that such a suspension is justified falls far short of a finding that the charges themselves have been substantiated. The only investigation was that of the Personnel Director, and his report was directed to the "Appeal for Investigation in Connection With the *Suspension* of Mary T. Ahlstedt." By waiving a hearing, the employee did not waive the right to have a full and complete investigation of the charges behind the dismissal from which she had appealed. Nor must it necessarily be said that by her letter of December 20, Mrs. Ahlstedt had accepted the ruling of the Commission as a final decision on her dismissal. The court's finding that the Commission did not act upon or investigate the dismissal, being supported by substantial evidence, cannot be disturbed.

[3] Respondent, as a classified civil service employee, was entitled to have the statutory procedure for dismissal strictly followed. Wiles v. State Personnel Board, 19 Cal.2d 344, 351, 121 P.2d 673; Brown v. State Personnel Board, 43 CalApp.2d 70, 75, 110 P.2d 497; Nilsson v. State Personnel Board, 25 Cal.App.2d 699, 705, 78 P.2d 467.

[4, 5] Appellants' contention that respondent failed to exhaust her administrative remedies and was therefore not entitled to equitable relief cannot be sustained. The rule is well settled that "where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act." Abelleira v. District Court of Appeal, 17 Cal.2d 280, 292, 109 P.2d 942, 949, 132 A.L.R. 715; Alexander v. State Personnel Board, 22 Cal.2d 198, 199, 137 P.2d 433. Although appellants cite numerous cases illustrative of the rule, they fail to establish the pertinency or applicability of the holdings therein to the case now before us. In the present case the Commission, after failing to find upon or investigate the sufficiency of the charges to support the dismissal, held that it had no further jurisdiction and respondent was so advised by letter. Thereafter respondent petitioned the Board of Education to reopen her case. It is not pointed out what further administrative remedies were available to respondent. Her waiver of a *hearing* did not relieve the Commission of the duty to "investigate the matter on appeal." Education Code, sec. 14133.

[6] It is next urged that the trial court was limited to remanding the matter to the Personnel Commission, and had no power "to impose its discretion" upon that administrative body. In La Prade v. Department of Water and Power, 27 Cal.2d 47, 162 P.2d 13, 17, it was said: "If a hearing has been denied or the evidence is insuffi-

cient to sustain the action of the board, *and it is still possible for the board to hold a hearing or exercise its discretion,* then the matter should be remanded to the board for further consideration rather than having a trial de novo in the superior court and requiring that court to exercise independent judgment on the facts which should be determined by the board." (Emphasis added.) In the instant case, however, we are not concerned with the exercise of discretion by the Commission or whether in the exercise of the discretion vested in it, the Commission acted arbitrarily or capriciously. Appellants concede in the case at bar that "the causes for the dismissal were not before the trial court, the sole question before the court being as to whether or not the procedures required by law had been followed." Appellants' arguments urging a remanding of the case to the Commission would be pertinent were the question presented one of whether a hearing had been denied or that the evidence was insufficient to sustain the action of the board, and that therefore it was still possible for the Commission to hold a hearing or exercise its discretion. Were such the case, then it might be proper that the matter be remanded to the Commission for further consideration. The sole question presented to us is whether the required procedures, which are essential parts of the entire scheme for the discharge of civil service employees, were followed. If, as we have held, the trial court's findings that such procedures were not followed are supported by substantial evidence, then the dismissal was abortive, ineffective, and for all purposes unauthorized, leaving nothing upon which the Commission could base a hearing or further exercise of its discretion. And, as the trial court found on competent and substantial evidence, the required procedures not being followed, the dismissal was ineffectual and respondent was entitled to reinstatement.

[7, 8] Appellants' final contention, that respondent's reinstatement should have been limited to a time about three months prior to the commencement of her action because she had not theretofore been able to resume her duties by reason of illness, is answered by the findings of the court, supported by testimony of respondent, that "as a result of the aforesaid acts and proceedings on the part of the respondents, said petitioner was beset with worry and anxiety, and was harassed, grieved, and tormented by her dismissal from the permanent classified service, and as a result of said acts and proceedings the petitioner became highly nervous and ill, and was unable to sleep, or to manage her affairs, or to engage in any other work or activity"; and further, that "as a result of the said acts and proceedings, petitioner suffered a nervous collapse, and became, and was, seriously ill and unable to look after or manage her affairs, and that as a consequence thereof the petitioner was unable to give attention to the protection of or enforcement of her rights or privileges under the law in respect to the aforesaid wrongful acts and proceedings on the part of the respondents, * * *." The court further found that Mrs. Ahlstedt "during all of the times herein mentioned has been qualified to occupy and hold said position in the permanent classified service, and has been ready, anxious and willing to carry on and perform all of the duties pertaining thereto, but that the petitioner has been unable to do so, and has been prevented from doing so, by the acts and proceedings aforesaid." The law is well settled that a civil service employee who has been unlawfully deprived of his position is entitled to recover the amount of his accrued salary during the period he is prevented from performing his duties, less the amount he has received from private or public employment during that period. Stockton v. Department of Employment, 25 Cal.2d 264, 273, 153 P.2d 741; Wiles v. State Personnel Board, 19 Cal.2d 344, 121 P.2d 673. Furthermore, no showing of prejudice to appellants appears by reason of respondent's illness. Her inability to perform the duties of her position was not occasioned by her illness. She was excluded from her position by the acts and conduct of respondents and not by reason of her physical or mental condition. It affirmatively appears from the record that during the period she was prevented by appellants from performing the duties of her position she was not engaged in any other work or activity, and

consequently there is nothing to be deducted from the total accrued amount of salary she would have received had she not been unlawfully prevented by appellants from discharging the duties of her position.

The judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

79 Cal.App.2d 771

HILL v. PROGRESS CO. et al.

Civ. 15476.

District Court of Appeal, Second District, Division 3, California.

May 20, 1947.

1. Pleading 🔑129(2)

In action for breach of contract, failure to deny allegation of complaint that two of the defendants were partners doing business as a copartnership, and that another defendant was employed by them ac company superintendent, was an admission of those allegations.

2. Trial 🔑165

On motion for nonsuit, every inference fairly deducible and every favorable presumption fairly arising from evidence favorable to plaintiff must be considered as facts proved in his favor, and if one of several inferences may reasonably be made, court must take view most favorable to plaintiff and discard contradictory evidence.

3. Carriers 🔑69(3)

Evidence established creation of a contract whereby plaintiff was to have exclusive right to haul all oil drums which were to be hauled under contract between partnership and army, so long as contract between partnership and army was in existence, at agreed rates provided plaintiff would furnish all trucks necessary to perform such services and that he performed such services, and that partnership willfully breached and terminated the contract.

4. Carriers 🔑69(3)

In action against partnership for breach of contract for hauling of oil drums by plaintiff for partnership, proper consideration was required to be given, by way of diminishment of damages, to evidence showing that plaintiff consented, either expressly or impliedly, to the hiring of additional truckers by partnership, and to testimony that he wanted no profits of other truckers.

5. Carriers 🔑69(3)

In action against partnership for breach of contract for hauling of oil drums by plaintiff for partnership at 10¢ a drum, evidence with reference to damages was sufficient over objection that any award of damages would be based wholly on speculation and conjecture in violation of statute because allegedly not clearly ascertainable in either nature or origin. Civ.Code, §§ 1512, 3300, 3301.

6. Carriers 🔑69(3)

In action against partnership for breach of contract, evidence did not establish abandonment of contract by plaintiff because of his failure to protect his interest by calling on other subsequently employed truckers for a share of their profits.

7. Carriers 🔑69(1)

Truck operator was not precluded from obtaining judgment against partnership for breach of contract to haul oil drums for the partnership because he had only a permit as a "radial highway common carrier" but was in fact acting as a "highway contract carrier" where partnership had hired numerous other carriers to haul oil drums allegedly covered by the private contract and had violated the contract, with the acquiescence of truck operator. Gen.Laws, Act 5129a.

8. Torts 🔑27

Truck operator who allegedly had contract with partnership to haul all oil drums, in order to hold superintendent of partnership and another truck operator liable for damages for allegedly inducing partnership to breach the contract, was required to establish by the evidence that contract would otherwise have been performed, but was breached by the wrongful act of the superintendent and other trucker and that such act was the moving cause thereof, and that the act was the proximate cause of injury.

9. Torts ⚿12

The fact that partnership's superintendent discharged truck operator, pursuant to express instructions of partners, did not render the superintendent personally liable to the truck operator for the breach of contract between truck operator and partnership.

10. Torts ⚿27

In action against superintendent of partnership and another to recover damages because defendants allegedly induced partnership to breach its contract with plaintiff to haul oil drums, evidence was insufficient to establish that defendants induced breach of the alleged contract.

◆

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by E. J. Hill against the Progress Company, a partnership, composed of Marc D. Leh and David E. Brown, Marc D. Leh and David E. Brown, individually, Joseph F. Toland and Harry L. Berry to recover damages for breach of hauling contract as against the partnership and the partners, and for damages against Joseph F. Toland and Harry L. Berry on ground that they wrongfully induced and caused the breach of contract. From a judgment of nonsuit granted on conclusion of plaintiff's case, the plaintiff appeals.

Judgment reversed as against the partners, both individually and as partners, and affirmed as to Joseph F. Toland and Harry L. Berry.

Grant E. Syphers, of Los Angeles, for appellant.

Richard A. Terrell, of Los Angeles, for respondents Progress Co., Marc D. Leh and David E. Brown.

R. G. Akers, of Long Beach, for respondents Joseph F. Toland and Harry L. Berry.

KINCAID, Justice pro tem.

[1] Appeal is taken by plaintiff from a judgment of nonsuit granted upon conclusion of plaintiff's case at the trial. The complaint herein alleges, and it is admitted by failure to deny, that the defendants Marc D. Leh and David E. Brown are partners doing business as The Progress Co., a copartnership, and that the defendant Joseph F. Toland was employed by such defendants as the company superintendent. It is also alleged that the defendant Harry L. Berry is a motor truck operator conducting his business under a written contract with the company. The Progress Company had contracted with the Quartermaster Corps of the United States Army for the performance of certain services incidental to which the hauling of oil drums was required. Plaintiff alleges that he entered into an oral contract with defendants Leh, Brown and The Progress Company whereby he was granted the exclusive right to do all of such hauling, which contract was breached by these defendants at a time when they were still in need of trucking services pursuant to the aforesaid agreement with the United States Army. Plaintiff's cause of action is two fold in character, in that plaintiff seeks damages for breach of his hauling contract as against the claimed contracting defendants, but as to defendants Toland and Berry damages are sought on the theory that they wrongfully induced and caused the breach of such contract.

A nonsuit having been granted, we are immediately presented on this appeal with the question as to whether evidence has been presented by plaintiff which, notwithstanding any conflict, would support a judgment in his favor. The evidence must be considered most strongly against the defendants.

[2] "'Every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence adduced must be considered as facts proved in favor of the plaintiffs. Where evidence is fairly susceptible of two constructions, or if one of several inferences may reasonably be made, the court must take the view most favorable to the plaintiffs. If contradictory evidence has been given, it must be disregarded. * * * The plaintiff must also be given the benefit of every piece of evidence which tends to sustain his averments

and such evidence must be weighed in a light most favorable to plaintiffs' claim.'" Mitchell Camera Corporation v. Fox Film Corporation, 1937, 8 Cal.2d 192, 197, 64 P. 2d 946, 948. Measured by these rules the evidence presented by plaintiff shows the following facts: In the latter part of October, 1943, Toland asked plaintiff if he would be interested in hauling drums or barrels for The Progress Company. Plaintiff replied that he would if he could have all of the hauling. Toland promised to take up the matter with Leh. A few days later Toland informed plaintiff that Leh said he could have the exclusive contract for hauling the drums, if he could furnish the trucks for the job, at the rate of 10¢ per drum for hauling them from the railroad siding across the street from The Progress Company plant into the company yard. Plaintiff replied that he would take the job if he could have all of the company's hauling and that he would furnish the necessary trucks. This was agreed to with the further understanding the rate per drum to be paid for other hauling should be later fixed, depending upon the length of the haul. Under the agreement made with the company, through the defendant Toland, its superintendent, plaintiff commenced work at the company yard on November 9, 1943, and spent three days in preparing the ground for the storing of drums. On November 12, 1943, plaintiff started hauling drums in his trucks from the railroad siding across the road into the company yard. On this day defendant Leh told plaintiff that he was recommended very highly to him by his superintendent, Mr. Toland, and he understood that plaintiff wanted all of the company's hauling. Plaintiff replied in the affirmative and that he wanted a written contract to cover the terms of their agreement. According to plaintiff, Leh replied: "[A]s soon as they got going good they would give me a written contract, but for me not to worry, as long as I could furnish them trucks for the job I could have the contract as long as they had it. The Army could cancel their contract at any time, but as long as they had it I would have it, and I promised I would do the work, and could get all the trucks needed for the job." Also, on November 12, 1943, plaintiff had a conversation in the company yard with the defendant, David E. Brown, as follows: "Mr. Brown asked me, he said he understood I had the trucks to do the hauling on the job, and I said, 'Yes', 'Well,' he says, 'as long as you got the trucks to do the hauling here, and can get the trucks, you can have the hauling as long as we have it,' and I promised that I would fulfill the job and furnish men to haul the drums." On November 14, 1943, in the company yard, plaintiff had another conversation with Leh, as follows: "Mr. Leh was telling me that he wanted some beds built different and longer than the ones that was on the truck to handle the barrels, and I asked him what kind, and he was describing them to me, so I called my men and my wife over to listen to how the trucks was to be built, because I wanted them to help build the beds, and they come over and Mr. Leh told them how he wanted to build the beds, the way he would suggest, and I told him it would be quite a bit of expense. He says, 'Don't worry about the expense,' he says, 'as long as you have got this job,' he says, 'you have got the contract to do all the hauling.' He said, 'charge the lumber to the Progress Company and the Progress Company will hold it out of your pay,' which I did get some lumber that way, and I asked him then, I says, 'Well, you are sure that I will have all the hauling?' 'Yes,' he says, 'all the hauling will have to come through you, don't worry about it.' So I had these people help me build the beds." Plaintiff continued to haul drums pursuant to his contract with defendants Leh, Brown and The Progress Company, until June 17, 1944. During this period he was paid for the hauling at the following rates: at the beginning of the job 10¢ per empty drum from the siding to the yard, but this was later lowered to 8¢; 16¢ per empty drum from Los Angeles Harbor to the company yard, and 20¢ per full drum from the rail siding to the yard. Plaintiff owned four trucks, capable of hauling 650 drums at one time, these trucks being kept at the defendant company yard at all times excepting when taken out for repairs. Immediately prior to the termination of his contract by defendants, appellant purchased a fifth truck. In addition to his own trucks plaintiff made arrangements to rent trucks from other owners whereby he would secure from 10 to 15 trucks on a day's notice any time he needed them. Leh testified that, with few exceptions, the hauling done by plaintiff was satisfactory to the defendant company.

Over plaintiff's protests and objections, various other truckers were employed by The Progress Company to haul oil drums pursuant to the Army contract during the period when plaintiff, under his contract, had the exclusive right to do such hauling. Plaintiff protested to Leh who said he would see about it and would straighten things out, but nothing was done. Several additional truckers were employed with plaintiff's consent.

Shortly after plaintiff began hauling under his contract, Toland asked plaintiff to pay him a "cent a barrel kick back", which appellant refused to pay. Toland repeated this request upon various occasions, the last being about a week before plaintiff was ordered off the job. About March, 1944, Toland put the defendant Berry to work hauling drums for the defendant company, at which time plaintiff protested to Berry and told him that he had a contract with the company for all the hauling and that all new trucking which was hired was supposed to come through him. Berry continued to do hauling for the defendant company subsequent to the termination of plaintiff's contract, telling plaintiff that he then had the hauling contract and that plaintiff could work for him with his five trucks if he would pay him 15%. Berry showed plaintiff his written contract for such hauling with defendant company.

[3] On June 17, 1944, Toland asked for appellant's pass into the company yard, tore it up and ordered appellant to get his trucks off the property, refusing to give any explanation. Leh testified that, through his superintendent Toland, he ordered plaintiff off the property and that his pass be picked up. This evidence, viewed in the light of the above set forth rules relating to nonsuit, sufficiently establishes the creation and existence of a contract between plaintiff and defendants Leh, Brown and The Progress Company, whereby plaintiff was to have the exclusive right to haul all oil drums which were to be hauled under the contract between such defendants and the Quartermaster Corps of the United States Army, so long as the latter contract was in existence, at the agreed rates, provided plaintiff would furnish all trucks necessary to perform such services. It further shows that plaintiff performed the services required of him by the agreement, furnished or was prepared to furnish all trucks necessary under its terms, and that defendants Leh, Brown and The Progress Company, wilfully and without just cause breached and terminated it.

As to plaintiff's damages, his books were admitted in evidence by which plaintiff contends a profit is shown from his hauling, performed under the contract with defendants, in the net sum of $9,540.22 which represents 56% of his gross income from such source. The evidence further shows that between November 12, 1943, and December 1, 1945, The Progress Company paid out the sum of $514,682.35 to truckers for hauling and loading of drums pursuant to its contract with the United States Army and the laying down of tracks and piling of drums. Applying the same percentage, "56%", of net profit to this figure, plaintiff claims he would have made $288,222.11, which he contends to be the damages due him for the breach of his exclusive contract to perform all of the hauling in question.

[4, 5] Defendants argue that this evidence with reference to plaintiff's damages is insufficient for the reason that any award of damages thereunder would be based wholly on speculation and conjecture and would be violative of section 3301, Civil Code, in that they are not clearly ascertainable in either nature or origin. While proper consideration should be given by the trial judge, by way of diminishment of damages, to the evidence showing plaintiff to have consented, either expressly or impliedly, to the hiring of certain of the additional truckers, and to his testimony to the effect that he wanted no profits of other haulers on the job, nevertheless we are unable to agree with defendants that damages under the evidence as presented are clearly unascertainable or must necessarily be

speculated or conjectured. The measure of his general damages would not only be those provided for in section 3300, Civil Code, but "[I]f the performance of an obligation be prevented by the creditor, the debtor is entitled to all the benefits which he would have obtained if it had been performed by both parties." Civ.Code, sec. 1512; 8 Cal.Jur. 820, par. 77.

[6] Defendants further contend that, if plaintiff did have the exclusive hauling contract claimed by him, in failing to protect his interests by calling upon the other subsequently employed haulers for a share of their profits, he necessarily indicated his abandonment of his exclusive right to do all defendants' hauling. The evidence as to this subject, while giving much basis for defendants' argument, when measured by the rules relating to nonsuits whereby plaintiff must be given every favorable inference and presumption and the benefit of every piece of evidence tending to sustain his averments, does not necessarily show such an abandonment.

Defendants urge as a further point justifying the nonsuit the illegality of the hauling contract. This contention is based upon the fact that a permit as a "highway contract carrier" had not been issued to plaintiff by the California Railroad Commission prior to or during the time of the hauling in question. The evidence shows that, more than a year prior to commencement of work for defendants plaintiff applied for and was issued by such commission a "radial highway common carrier" permit which was valid and in good standing at all times thereafter. He testified that, in addition to holding this permit, he advised the representative at the California Railroad Commission office at Long Beach, California, of his contract for truck hauling with defendants and was told by him to go ahead and operate and a highway contract carrier permit would be issued to him later. This permit was issued to him on October 19, 1944.

Defendants strongly rely upon the cases of Roddy v. Hill Packing Co., 156 Kan. 706, 137 P.2d 215, and Rainer v. Western Union Tel. Co., Mo.App., 91 S.W.2d 202, as authority for their position that plaintiff cannot here recover because of his failure to possess the requisite license. These cases may be distinguished, however, in that the truckers there involved had no permit to act as public carriers of property over the state highways. The plaintiff herein was licensed by the proper state commission as that type of carrier which assumes the most responsibility to the public, a common carrier.

The transportation of property over highways of this state is regulated, so far as the situation before us is concerned, by the Highway Carriers' Act, Stats.1935, p. 878; Am.Stats.1937, p. 2006; Act 5129a, Deering's Gen.Laws, 1937, vol. 1, p. 2145. The terms "highway common carrier," "radial highway common carrier" and "highway contract carrier" are there defined, but these definitions constitute the only reference to the latter two in the Act. In all other portions of the Act both types of carriers are referred to as "highway carriers." There is no distinction in requirements for obtaining permits, or in the applicability of other parts of the Act to them.

A leading case before the California Railroad Commission showing the distinction between these classes of carrier is Pete Rampone et al. v. P. J. Leonardini et al. (1936), 39 C.R.C. 562. The Commission there, after quoting the statutory definition of each class of carrier, proceeded to distinguish them by showing, in part, that a "highway common carrier" holds out his transportation services to the public for the purpose of transporting certain varieties of freight, at approved rates, between fixed termini or over a regular route. A "radial highway common carrier" is generally the same as a "highway common carrier" excepting that he does not usually operate between fixed termini or over a regular route, but serves anyone within a clearly defined dedicated area. A "highway contract carrier" is one who does not dedicate and hold out his transportation services generally to the public, or a substantial portion thereof, but is employed by a selected and limited group of shippers, as a private carrier for an agreed compensation, to the exclusion of all others, by a mutually binding contract, entered into and performed in good faith, for an agreed term, and which contract mutually binds the carrier to transport and the shipper to supply a specific category of freight.

The opinion then goes on to say:

"In determining whether such a carrier is in fact a 'highway contract carrier,' it is of controlling importance to determine by his conduct, in the matter of soliciting and procuring the contract or contracts, that he has not made available his services generally to the public, or a substantial portion thereof. Does such conduct display a willingness to serve generally the public, or a substantial portion thereof? If so, the carrier is not a 'highway contract carrier' but is a common carrier. Such carrier's conduct constitutes evidence of controlling importance. It is from this evidence of conduct as presented in each case, that the Commission may determine his true status.

"It is also important, in determining whether such a carrier is in fact a 'highway contract carrier,' to scrutinize the scope and conduct of his shipper in the matter of how the shipper determines and distributes his freight movements. Such shipper crosses the boundary of private carriage and enters the field of common carriage if he diverts, in violation and disregard of the terms of the contract, with the acquiescence and sufferance of the carrier, the identical quantum and catagory of freight which constitutes the subject of private contract to a promiscuous group of carriers, promiscuously and competitively soliciting and bidding for the same. Plainly, a shipper cannot preserve the true status of 'highway contract carriage' if he hazards, in violation and disregard of the terms of the contract, and with the acquiescence and sufferance of the carrier, any public bidding or competition that may result in diverting from such a 'highway contract carrier' any of the specific freight that comprises the specific object of his contract. Correspondingly, such shipper's conduct constitutes evidence of importance, and it is also from this evidence of conduct, as presented in each case, that the Commission may determine the carrier's true status."

[7] The shipper defendants herein are hardly in a position to challenge the right of plaintiff to enforce his claimed contract upon the ground that he is a "highway contract carrier" without the requisite permit, when they not only expressly deny the existence of any contract that could be the basis of this class of carrier but by their own conduct in hiring numerous other truckers to haul the merchandise claimed to be covered by the private contract have violated and disregarded its terms, with the acquiescence and sufferance of the carrier, and under the construction of the Act above quoted, thereby conceded that plaintiff was not a contract highway carrier. Under these conditions we are unable to agree that plaintiff is prevented from maintaining his action because of any illegality of his contract.

[8-10] While the evidence, considered in the light of the rules relating to nonsuit, would support a judgment in plaintiff's favor as against the defendants Leh, Brown and The Progress Company, a different situation exists so far as the defendants Toland and Berry are concerned. In seeking to hold these latter defendants liable for damages plaintiff must establish, by the evidence, that the contract which otherwise would have been performed, was breached and abandoned by reason of their wrongful act and that such act was the moving cause thereof. Unless the act complained of is the proximate cause of the injury there is no liability. 62 C.J. 1115, sec. 30; 84 A.L.R. 51; 15 R.C.L. 63. See Johnson v. Union Furniture Co., 1939, 31 Cal.App.2d 234, 237, 87 P.2d 917. The fact that Toland employed and discharged plaintiff in his capacity as superintendent of defendant company pursuant to express instructions of his employers carries no personal responsibility for breach of any contract between plaintiff and such employers. To show additionally that Toland made requests for a "kickback" and that plaintiff refused to pay it, represents at most a suspicious circumstance denoting a measure of reprehensible conduct, but falls far short of proving any causal relationship between such request and the breach of plaintiff's hauling contract with such defendant's employers. Likewise, to merely show that Berry continued to haul drums under an arrangement with the companv

after plaintiff told him he had a contract for all the hauling fails to prove this act to have caused the employers to have breached their contract with plaintiff. Such breach, if any occurred, took place with the hiring of Berry or other truckers and not by, or at the time of, the subsequent conversation complained of.

The judgment is reversed as against the defendants Marc D. Leh and David E. Brown, both individually and as partners doing business as The Progress Company, but is affirmed as to defendants Joseph F. Toland and Harry L. Berry.

SHINN, Acting P. J., and WOOD, J., concur.

WESTON INV. CO. v. STATE et al.*

Civ. 15521.

District Court of Appeal, Second District, Division 2, California.

May 13, 1947.

Hearing Granted July 10, 1947.

Taxation ⚷709(2)

Where the United States took realty in city by condemnation while taxes were delinquent, so that sale of realty thereafter by tax collector to the state for delinquent taxes was void, original owner, against whom the realty had been assessed, was not liable for redemption penalties as result of attempted sale to the state. Revenue and Taxation Code, §§ 202, 2617, 2618, 3436, 3439, 3440, 3442, 3443, 3476, 3511; Const. art. 13, § 1.

WILSON, J., dissenting.

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Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by the Weston Investment Company, a corporation, against State of California, County of Los Angeles, a body corporate, and the City of Torrance, a municipal corporation, to recover amount of redemption penalties which had been charged against the plaintiff by the county. From a default judgment awarding the plaintiff the amount of the redemption penalties after demurrer of defendants had been overruled, defendants appeal.

Judgment affirmed.

Hill, Morgan & Farrer, A. J. Hill, and Charles P. McCarthy all of Los Angeles, for plaintiff and respondent.

Harold W. Kennedy, Co. Counsel, of Los Angeles, by Gordon Boller, Deputy Co. Counsel, of Los Angeles, and John E. McCall, City Atty., of Torrance, for defendant and appellant.

MOORE, Presiding Justice.

The question for decision is whether the sale of real property to the state for taxes and penalties after title thereto has been vested in the United States is a void sale.

On March 2, 1942 (tax date), respondent was owner of 476.63 acres in Los Angeles county. The land lies within the city of Torrance whose legislative body had prior to the tax date elected to have the property within its corporate limits assessed by the county assessor and its taxes collected by the tax collector of the county. Such land was assessed as of the tax date and the tax was fixed for the fiscal year of 1942–1943. The taxes became due on November 1, 1942, the first installment became in default on December 5, 1942, and a penalty became due by reason thereof. On October 26, 1942, the United States, hereinafter referred to as "the government," instituted condemnation proceedings in the United States District Court, deposited $252,800, the amount of the estimated compensation for the property, and on March 19, 1943, filed its declaration of taking. The first half not having been paid prior to the delinquency of the second half on April 20, 1943, a further penalty for such non-payment was added in addition to the delinquent penalty of three per cent on the second half. Revenue & Taxation Code, secs. 2617, 2618. On June 30, 1943, the land was "by operation of law and the declaration of the tax collector * * * sold to the State." Revenue and Taxation Code, sec. 3436. The collector filed with the government the county's claim of $6,806.62 for its taxes and accrued penalties. Thereupon Weston Investment Company filed a stipulation that $6,806.62 should be paid out of the fund on deposit to the tax collector in satisfaction of the county's claim. But with such stipulation the company filed a formal written protest against the payment of a portion of the county's claim, towit: $956.58, the amount of the "redemption penalties." Pursuant to the stipulation the county was paid on July 5, 1945, for both itself and the city of Torrance. Such stipulation was filed by reason of the government's insistence and to prevent the continuing accrual of penalties.

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* Subsequent opinion 189 P.2d 262.

This appeal is from a default judgment awarding respondent the amount of the redemption penalties after the demurrer of appellants had been overruled.

Respondent's position then and now is that the sale to the state was void by reason of the fact that title to the property was vested in the government upon the filing of its Declaration of Taking, March 19, 1943; that by reason of the nullity of the sale to the state it acquired no title or interest in the property on June 30, 1943; that therefore no redemption could occur; and since no redemption was possible, a redemption penalty could not accrue and the collection thereof was void.

Appellants contend (1) that the status of property for taxation depends upon its condition on the tax date; (2) that the lien which attached continued until the tax is paid; (3)that taxes are the personal obligation of the owner; (4) that penalties on delinquent taxes continue to accrue against privately owned property, notwithstanding its subsequent acquisition by the government; and (5) that since respondent owned the property on the date the tax lien attached, and on the days it became payable and delinquent, the redemption penalty cannot be avoided by the fact that the sale to the state occurred subsequently to the investment of the government with title.

The first four of such contentions having been conceded by respondent to be valid, the sole issue remaining is whether the prior decree transferring the land to the government rendered inane the statutory sale to the state by the tax collector on June 30, 1943; also, whether the state justifiably collected from respondent the redemption penalties.

Contrary to appellants' contentions, the sale to the state by the tax collector on June 30 was a sale. When a list of delinquent properties and taxpayers has been published, all properties on which taxes, assessments, penalties and costs have not been fully paid shall by operation of law and the declaration of the tax collector be sold to the state. Revenue & Taxation Code, sec. 3436. The procedure of the officer consists of his entry on the delinquent roll of the words "Sold to the State," with the date of sale and the amount for which the sale was made. Ibid., sec. 3439. Immediately after such sale the collector must transmit to the controller a statement in detail of each sale to the state (Ibid., sec. 3440), and furnish the county auditor and assessor with a list of all property so sold. Ibid., secs. 3442, 3443. If the taxpayer does not redeem the property within five years his right of redemption is terminated and the property is deeded to the state. Ibid., sec. 3511. Upon receipt of a deed the state is then at liberty to sell such land in accordance with statutory provisions. Ibid., sec. 3476.

Appellants denounce the sale to the state (Ibid., sec. 3439, supra) as no sale at all but merely a "paper sale" and entry for the purpose of commencing the period of redemption and of the accrual of further penalties and interest. While it is true no deed is delivered and possession is not taken, the official declaration and entries are the equivalent of a buyer's declaration that he had exercised an option to make the purchase of land and has made the initial payment. Such a transaction between two citizens would be a purchase and sale. Provided that all previous proceedings relative to the assessment of land are valid, after the collector's entries and declaration have been made the taxpayer is powerless to deprive the state of its ownership without first having redeemed the property from the state. By the tax collector's sale to the state it becomes vested with an equitable title which ripens into a legal title upon the expiration of "at least five years." Ibid., sec. 3476. Although the state has not the right of occupancy after land is sold for delinquent taxes and penalties, in other respects its title may be assimilated to that of a vendee under a conditional sales agreement prior to his payment in full of the purchase price. In the event a diastrophism should engulf (1) land held by a private purchaser under a contract of purchase or (2) land condemned by the government prior to the statutory sale proceeding and the collector's declaration, neither would the purchaser be able to acquire title to any existing thing nor would the taxpayer have anything to redeem.

Prior to its payment of the taxes for 1942 and accrued penalties the lands of respondent had been swept away by the rising tide of federal activities. They had been claimed by condemnatory, judicial proceedings and occupied by the government. As a result there remained nothing to redeem. If the lands were irredeemable how could there be a redemptioner's penalty? Also, what was there against which to levy a penalty? The land had ceased to exist in the world of the tax collector. It had become vested in the government over 100 days prior to June 30, 1943. With the lands removed from the jurisdiction of the California taxing authority (Constitution, Art. XIII, sec. 1; Revenue and Taxation Code, sec. 202; L. E. White Lumber Co. v. Mendocino, 177 Cal. 710, 712, 171 P. 799) the sale to the state was without meaning, could have been intended for no useful purpose and was therefore necessarily void. United States v. Alabama, 313 U.S. 274, 282, 61 S.Ct. 1011, 85 L.Ed. 1327; United States v. Pierce County, D.C., 193 F. 529, 531; Smith v. Santa Monica, 162 Cal. 221, 222, 121 P. 920.

What fact or reason could justify the sale? Certainly the land could not be security for the unpaid taxes, for it had already been vested in the government. The lien once held as security for the payment of delinquent taxes had been transferred to the moneys deposited in the registry of the federal court as compensation for the land. Under these circumstances, for the collector to pretend that the addition of further penalties would hasten payment of the taxes and accrued penalties was only a specious subservience to custom and a blind adherence to statutory forms. If he knew the government then occupied the premises his "sale" was a tyrannical act designed solely to take from a taxpayer moneys not earned by or on any account justly due the state. If he did not know it then his effort was without accomplishment, for he had no power to lay penalties upon the government, consciously or unconsciously. If the collector knew that respondent had been divested of its lands, his act in attempting to add to its tax burdens operated effectually to perpetrate a fraud upon the corporation. If he did not know at the time that his sale would cause a penalty to be charged against respondent in the sum of almost a thousand dollars, then promptly upon his discovery of that fact he should have revoked his entry or otherwise corrected the injustice by appropriate action. In the conduct of any government, local or national, officials in any division of the public service should aim to be just to all persons whose property and affairs are intimately linked with those of the state. They are entitled to fair and equitable treatment and its denial weakens the cause of free government. In the case of a governmental unit operating under a statute which prescribes the duties of its officials and defines the proceeding whereby to effect the collection of taxes, it comes with poor grace for such unit to repudiate the very statute which is the source of its authority. The virtue of the proceeding is not to be determined by the name affixed by the statute. Call it a pronouncement and its nature is not changed. Regardless of the name its purpose is to add a redemption penalty to the burden of the taxpayer. Such burden could not have been intended for one who could not redeem, because the state has by the exercise of its supreme authority eradicated the hitherto taxable estate.

The doctrine that the owner of real property on the tax date is personally liable for penalties assessed on account of the sale prescribed by section 3439, supra, even though his title has become vested in the national government at a time antedating such sale, is violative of the public wel fare and forebodes ill to the state. Such penalties are merely devices for enforcing tax payments and to compensate for additionally necessary expenses. When an owner has been driven from his land by the exercise of eminent domain it is inconceivable that he should be required to pay such penalty accruing against the land after his divestiture. The contention of appellants that respondent is personally liable for the redemption penalties because it was owner of the land on March 2, 1942, cannot be justified in reason or by authority. Having been divested of ownership prior to the sale and having incurred penalties for delinquent non-payments which it has paid, its personal obligation for the redemptional penalty became a myth. The reason for the sale having disappeared it was iniquitous to invoke the language of the statute for the purpose of collecting from the former owner redemption penalties when he could not redeem. The authorities which support the assessment of such penalties apply to a derelict owner or his private grantee.

In support of the contention that a redemption penalty, levied after the government had become the owner and after the lien for delinquent taxes and penalties for such delinquencies had attached, is properly chargeable against the owner as of the tax date, numerous authorities are suggested: Long Beach City School District v. Payne, 219 Cal. 598, 601, 28 P.2d 663; The City of Santa Monica v. Los Angeles County, 15 Cal.App. 710, 713, 115 P. 945; United States v. Certain Lands, 2 Cir., 129 F.2d 577, 580; State of California v. Hisey, 9 Cir., 84 F.2d 802, 805; United States v. Five Acres, D.C., 56 F.Supp. 628, 633; United States v. Certain Lands, D.C., 49 F.Supp. 225, 226; United States v. Certain Parcels of Land in Mifflin Township, D.C., 47 F.Supp. 333, 334; United States v. 53¼ Acres of Land, D.C., 46 F.Supp. 875, 876; United States v. Certain Parcels of Land in the City of San Diego, D.C., 44 F.Supp. 936, 937, 938; United States v. Certain Land in City of St. Louis, D.C., 29 F.Supp. 92, 97. A careful scrutiny of such authorities discloses that there was not a redemption penalty involved in any of them. The most that can be said, in so far as they apply here, is that where the tax lien has attached prior to the decree confirming the declaration of holding, the lien continues as security for all unpaid taxes and for penalties for such delinquencies until paid in full. Obviously the "penalties" mentioned in each decision refer to penalties for delinquences imposed by law to accelerate payments of taxes. Not one of them sanctions the act of a municipal authority in ruthlessly adding other burdens to the taxpayer after he has been divested of his land and his money is in the court registry for the payment of all subsisting liens.

It must therefore be held that the sale of June 30, 1943, was a void sale and without efficacy to incur new penalties against one who could never redeem.

If the sale was void it cannot supply the basis of the state's enforcing payment of a redemption penalty which accrued solely by virtue of the sale. In United States v. Alabama, 313 U.S. 274, 61 S.Ct. 1011, 1014, 85 L.Ed. 1327, liens for taxes and accrued interest had attached to lands acquired by the United States. Sale for delinquent taxes occurred after title had been vested in the government. In the government's action to quiet title to the land thus encumbered the court held that the lien of the taxes persisted, although not enforcible during the government's ownership, for the reason that the lien arose at the taxing date which preceded the taking by the government. But the action involved nothing like a redemption penalty. The Supreme Court held that the "United States was an indispensable party to proceedings for the sale of the lands, and in the absence of its consent to the prosecution of such proceedings the county court was without jurisdiction and its decrees, the tax sales and the certificates of purchase issued to the State were void * * *. The United States is entitled to a decree setting aside the tax sales and the certificates of purchase."

Appellants contend that redemption penalties are not essentially different from the tax collector's penalties. On the contrary a sharp difference between them appears, especially when viewed in such a situation as is presented by this appeal. While the collector's penalties accrue by reason of the delinquencies in December and in April (Revenue and Taxation Code, sec. 2617), redemption penalties result from the sale to the state on June 30. They are the sum of (1) a charge of one per cent a month "on the amount of sold taxes" for the first year following the sale to the state; (2) one half of one per cent a month thereafter to the time of redemption; (3) beginning July 1 of each subsequent year, one per cent a month for the first year thereafter on the "unpaid taxes for which the property would have been sold to the State in that year if there had not been a previous sale," then one half of one per cent a month to the time of redemption. Revenue and Taxation Code, sec. 4103. Besides such charges a redemptioner must follow a statutory procedure in order to clear his title and to have it reinvested in himself. Ibid., Part 7, Chapter 1, secs. 4103–4113. Such proceedings as are there prescribed require the active services of the tax collector, tax assessor, county treasurer, recorder, auditor, state controller and the superior court if the redemptioner should determine to quiet his title. While delinquent penalties which attach on December 5 and April 20 for the first and second installments respectively are coaxing devices to persuade the land owner to pay his taxes, redemption penalties are assessed for the purpose of compensating the state for the services of its agents.

It thus appears that the redemption penalty is not only not akin to the delinquent penalty but it is of a racially different breed. No one can redeem unless he is an owner or such owner's grantee, and unless the collector has made a valid sale. The very word implies a previous ownership of which the owner has been divested while clothed with the privilege of recovering by pursuing a prescribed statutory procedure. 2 Bouvier's Law Dictionary, Rawle's Third Revision, Penalty; Revenue and Taxation Code, sec. 4101; Webb v. Ritter, 60 W.Va. 193, 54 S.E. 484, 491; In re United Educational Co., 2 Cir., 153 F. 169, 171; Williams v. Hoffman, 39 Ind.App. 315, 76 N.E. 440. Also, it implies a previous valid sale. Therefore, no one can redeem but the former owner or his grantee, and he cannot redeem unless there is land to redeem.

If the taxed land has been completely eliminated from the earth's crust by diastrophic movement, or morally erased from the state's jurisdiction by reason of its occupancy by the government pursuant to a valid judgment, there is no redemption possible. If the collector uttered his speech announcing "sold to the state" when there was nothing that could have been sold to the state for delinquent taxes and assessments, he performed an act which was effective for no purpose at all. The rights of appellants were already secure and the sums due them as taxes, interest and delinquent penalties were available out of the award in the condemnation proceedings. But such payment, whether by contract or pursuant to judgment, is no basis for requiring respondent to pay for redeeming what it could not redeem and could never own again save as grantee or successor in interest of the United States.

Judgment affirmed.

McCOMB, J., concurs.

WILSON, Justice (dissenting).

I dissent for the reason that the majority opinion announces new principles in tax law amounting to judicial legislation which find neither sanction in the statutes nor support in the decisions of the courts. The judgment affirmed by the majority is contrary to the express provisions of the law and to the previous decisions in this state and it ignores the rules laid down by the federal courts in cases in which the circumstances are identical with those in the instant case.

The opinion holds that delinquency penalties may be separated from the tax and that the latter may be paid and the lien satisfied without payment of the statutory penalties accruing by reason of nonpayment of the tax. In order to provide means for the application of this pronouncement the opinion goes further and declares that in the circumstances existing concerning the property involved in this action the tax collector should have omitted the performance, as to respondent's property, of acts required of him by mandate of the law, or having executed his official duty he should have withdrawn the property from the effect of one provision of the statute and should have cancelled a book entry required by another. The acts referred to are mandatory jurisdictional steps in the tax proceedings. The tax collector has no discretion except to execute the law as he finds it in the statute books.

I cannot find in the record, in the briefs, or in the opinion of the Presiding Justice, any legal, equitable or moral ground upon which respondent may be relieved of the payment of the lawful penalties attaching by reason of its nonpayment of a just tax levied against its property. If respondent had remained the owner of the property the payment of the penalties as well as the tax would have been necessary in order to avoid the loss of its title through a tax sale. Since the tax was a valid indebtedness owing to the County of Los Angeles and to the City of Torrance the transfer of title to the United States furnishes no reason for the evasion of payment.

(References to sections hereinafter made are those of the Revenue and Taxation Code unless otherwise indicated.)

When the first installment of taxes became delinquent on December 5, 1942, a penalty of 6 per cent was added and upon failure of payment on April 20, 1943, an additional penalty of 3 per cent attached to the first installment and a like amount to the second installment. Secs. 2617, 2618. No part of the tax having been paid on June 30, 1943, the property, although declared by the tax collector to be sold to the state (sec. 3436) and so marked on the delinquent tax roll (sec. 3439), was not actually sold in a legal or any concept of the term. The state obtained no title which it could convey to any one who desired to purchase but acquired merely a lien that could be removed at any time by the payment of the amount of the tax levied, together with penalties for delinquency, interest and costs in the amounts prescribed by law.

It is not until five years have elapsed after the "sale" provided for in section 3436, if the taxes have not been paid in the meantime, that an actual sale is made to the state. Sec. 3476. It then receives a deed transferring the title and is in a position to execute a conveyance to a purchaser which is indispensable to support an action to quiet title against the record owner of the property. Swann v. Carson, 56 Cal. App.2d 502, 503, 132 P.2d 863; Jones v. Luckel, 174 Cal. 532, 534, 163 P. 906; County Bank v. Jack, 148 Cal. 437, 442, 83 P. 705, 113 Am.St.Rep. 285; McArthur v. Goodwin, 173 Cal. 499, 502, 160 P. 679; Bublitz v. Reeves, 40 Cal.App. 75, 79, 180 P. 28.

Respondent contends (1) that there can be no redemption from a sale, and therefore no exaction of a redemption penalty arising from the sale, unless there has been a valid sale from which a redemption can be had; (2) that the sale of the property here involved was invalid because made after title had been taken by the United States. This argument presupposes that there was a sale and that title was conveyed to the state on June 30, 1943.

The so-called sale of the property on June 30, 1943 (sec. 3436), was not a sale in any sense of the term, not even a "paper sale" as it is charitably designated in appellants' brief.

The word "sale" has a fixed legal significance but is not always expressed in the same terminology. It is the transfer of property from one person to another for a consideration of value (Arnold v. North American Chemical Co., 232 Mass. 196, 122 N.E. 283, 284); a transfer of the title and possession of property in consideration of a price paid in money (Hatfield v. State, 9 Ind.App. 296, 36 N.E. 664); a contract whereby one acquires a property in the thing sold and the other parts with it for a valuable consideration (Cole v. Laird, 121 Iowa 146, 96 N.W. 744; Popp v. Munger, 131 Okl. 282, 268 P. 1100, 1102); an exchange of goods or property for money paid or to be paid (Meyer v. Rousseau, 47 Ark. 460, 2 S.W. 112, 113; Cooper v. State, 37 Ark. 412, 418). To constitute a valid sale there must be a transfer of the beneficial interest in the property intended to be sold from the vendor to the vendee for a price paid or promised. Mobley v. Marlin, 166 Ga. 820, 144 S.E. 747, 753.

What took place on June 30, 1943, the date of the purported sale, had none of the attributes of a sale. Respondent did not transfer the property to another, no other person acquired title to the property or any interest therein, and no price nor consideration was paid or promised. The operation of law and the declaration of the tax collector (sec. 3436) and the entry on the delinquent tax roll of the words "Sold to the State" (sec. 3439) neither singly nor collectively constituted a sale. The state acquired neither title nor equity. These were merely additional acts provided by law to induce the taxpayer to pay his taxes and avoid the addition of further penalties to those imposed for nonpayment of the first and second installments.

In Revenue Laws of California, 1945, published by the State Board of Equalization, section 3436, is given the title " 'Stamp' sale; time and place" and section 3439 is entitled "Entry of 'stamp' sale." In Ducey v. Dambacher, 27 Cal.App.2d 658, 661, 81 P.2d 597, 598, the court said that the official act performed pursuant to those sections *does not operate as a sale* "but is merely a book transaction to facilitate the adjustment of accounts between the tax collector and the auditor." In Crocker v. Scott, 149 Cal. 575, 596, 87 P. 102, 111, the court said with reference to the "sale" by operation of law and the declaration of the tax collector: "The only practical effect of a compliance wtih these provisions, in addition to preserving the rights of the state in the matter of such taxes as are ultimately found to be valid, is to start running the period of five years within which redemption can be effected and at the expiration of which a deed may be issued to the state. During this period, the legal title to the property continues in the taxpayer, subject to the lien in favor of the state created by the assessment and levy." A property owner is not dispossessed of his property by the act of the tax collector in declaring the property sold to the state and in so stamping it on the delinquent assessment roll, "but he has five years within which to redeem, before he is divested of legal title." Kipp v. Billingham, 217 Cal. 527, 528, 20 P.2d 318, 319. Since there was no divestiture of respondent's title there was no sale.

The statutory designation of the official acts that were required by law to be performed on June 30, 1943, as a "sale" and the declaration "sold to the State" did not invest the proceeding with the legal characteristics that constitute a sale. The legislative language is a laconic substitute for a larger descriptive phrase that would be necessary for the accurate identification of the proceeding.

There is nothing sacrosanct in the words "sold" and "sale" as used in sections 3436 and 3439. The "sale" is nothing more than a symbolic device whereby the tax lien is continued in force and the beginning of the five-year period is fixed at the termination of which the state receives a conveyance of the property if in the meantime the taxes, penalties and costs have not been paid, thereby effecting a transfer of the title, an actual sale, from the owner to the state. By such conveyance, and by it only, is a sale consummated.

The symbolic "sale" bears not the slightest resemblance to an option given by the owner of property to a prospective purchaser, nor to a conditional sales contract. There is no contract between the owner and the state. A purchaser or optionee is required to perform the acts and to make the payments provided in the contract or option. The state does neither. There are no terms with which it is required to comply. The state does nothing but await the expiration of the five-year period. Meanwhile the owner may, by payment of the taxes and penalties, terminate the right of the "purchaser," the state, to demand a conveyance.

The property continued in the ownership of respondent when the first installment of the tax became delinquent on December 5, 1942. Title passed to the United States on March 19, 1943, when the declaration of taking was filed. 40 U.S.C.A. § 258a. Payment not having been made of either the first or the second installment the proceedings required by sections 3436 and 3439 were taken on June 30, 1943, and the additional penalties, interest and costs were added as provided by law to the amount of the tax lien.

There is nothing in the record to indicate that the tax collector had any knowledge on June 30, 1943, of the pendency of the condemnation suit or of the fact that respondent had been divested of its title as a result of the action. Even if he had possessed such knowledge he was required by the mandatory provisions of sections 3436 and 3439 to perform the acts therein prescribed. Having made the declaration and the book entry required by those sections he was without authority to revoke them. Any such purported act would have been without legal effect and the tax lien would have remained.

Implicit in the nature of the tax scheme from the date when taxes become a lien until the actual sale to the state five years after the symbolic sale, paper sale or stamp sale, by whatever appellation it may be designated, is the preservation of the tax lien. There is no dissolution of the lien until the taxes and accrued penalties have been paid.

The property was privately owned on the tax lien date, the first Monday in March, 1942, and therefore was liable to taxation. Const. Art. XIII, secs. 8, 8a; Revenue and Taxation Code, secs. 405, 2192. The tax lien attached on that date. Sec. 2192. It had the effect of a judgment against the person (sec. 2186) and of an execution levied against the property (sec. 2193). The denouncement of these provisions by the majority opinion does not eliminate them from the statute nor render them innocuous or unenforceable. The tax remained a lien until paid or legally cancelled. Sec. 2194.

Consonant with the provisions of the statute and with the decisions herein cited respondent concedes in its brief (1) that the liability of property to taxation depends on the status of the property on the tax lien date, the first Monday in March; (2) that the taxes constitute the personal obligation of the property owner; (3) that the later acquisition of the property by the United States did not wipe out the tax that had theretofore attached to the property, together with the penalty prescribed for failure to pay the tax. But, contends respondent, (1) a sale for delinquent taxes made subsequently to the time when the United States acquired title is not valid and (2) any redemption penalty prescribed by law as a condition precedent to the right to redeem the property from such sale is also invalid.

The first contention has been disposed of in that there was no "sale" of the property after title passed to the government but that the so-called sale was merely a proceeding to perpetuate the lien for unpaid taxes and penalties. However, if it be assumed that there was a sale, as argued by respondent, the redemption penalty and the interest and costs added on June 30, 1943, as required by law, were nothing more than penalties accumulating in addition to those added for nonpayment of the two installments of taxes. The only difference between delinquency penalties and redemption penalties is that the former become fixed in the definite amounts specified in the statute upon the respective delinquency dates and the latter increase with the lapse of time and are computed to the date of redemption.

Respondent's argument on its second contention is based on the exemption from taxation of property of the United States (Cal.Const. Art. XIII, sec. 1; Revenue and Taxation Code, secs. 201, 202) and on the judgment in United States v. Alabama, 313 U.S. 274, 61 S.Ct. 1011, 85 L.Ed. 1327, declaring that actual tax *sales* had and certificates of purchase issued to the state after the United States acquired title to the property should be set aside. This argument ignores the law as clearly stated in the Alabama case that the tax lien that had accrued prior to the conveyance of title to the United States remained unaffected by that conveyance. The tax lien date was October 1, 1936. The three conveyances were made to the government on October 1, 1936, December 10, 1936, and March 10, 1937, respectively. The taxes became due on October 1, 1937, and delinquent on January 1, 1938. The sales took place on June 12, 1939. Such penalties as were provided by law obviously accrued after title had vested in the United States.

In the Alabama case the court held that the United States having acquired one of the parcels on the tax date and the others after that date, the lien on the land persisted although the property could not be sold for nonpayment of the tax without the consent of the government. 313 U.S. at page 281, 61 S.Ct. 1011, 85 L.Ed. at page 1332. The court expressly refused to make an exception of the parcel conveyed on the tax lien date. The property was in actuality sold pursuant to law for nonpayment of the tax and certificates of purchase were issued to the state. The action was an original proceeding in the Supreme Court. The government sought a decree quieting its title against the state, asserting its right to a merchantable title and to a decree cancelling the liens, tax sales and certificates of purchase. The court held that the government was entitled to a decree setting aside the tax sales and the certificates of purchase because the sales were made and the certificates issued after the United States had become the owner of the property and the proceeding against the property amounted to a suit against the government which could not be maintained without its consent, but that the land remained subject to the tax lien notwithstanding ownership by the United States and a decree quieting title was denied.

Since the symbolic "sale" to the state on June 30, 1943, pursuant to section 3436 was not an actual sale and did not purport to convey title to the state, but was merely an added step in the perfection and perpetuation of the lien for unpaid taxes and resulted in nothing more potent than added penalties for nonpayment, the title of the United States was not placed in peril. On the basis of the Alabama case an action by the government to quiet title would have failed, and an action to set aside the proceeding denominated a sale that was not a sale would likewise have failed.

The lien for the amount of the original tax is not legally separable from the lien for penalties, interest and costs. The latter is an accretion to the original lien and the result is an enlargement of the amount necessary to be paid in order to remove the lien. Nor are the penalties (1) for nonpayment of the second installment or (2) those that accrued on June 30, 1943, both of which were added after the United States acquired title, separable from the penalty for nonpayment of the first installment.

The difference between a delinquency penalty and a redemption penalty is in name only. Both are penalties required by law to be added to the tax and both must be paid in order to effect a clearance of the title. No case has been cited to the effect that a redemption penalty is dissimiliar in effect from a delinquency penalty, and no reason suggests itself that one should be enforceable and the other not.

The tax lien relates back and attaches to the land as of the tax date and exists for the full amount of the tax, penalties, costs and interest imposed by law. Respondent concedes that the liability of its property to taxation depends on its status on the tax lien date, which means that since the property in question was owned by respondent on the tax date it was taxable and the law then in force followed through until the tax lien was satisfied by the payment of the tax and all penalties accruing by reason of nonpayment.

When the United States acquires land by condemnation after the tax date the lien for taxes attaches for the full amount of the tax and penalties. In United States v. Certain Lands (Eau Claire), D.C., 49 F.Supp. 225, 226, the court allowed the tax lien out of the deposit made by the government "for the full amount of the tax, penalties and interest." In United States v. Certain Parcels of Land (Mifflin Twp.), D.C., 47 F.Supp. 333, 334, interest was awarded "from the time of the condemnation until the time of payment." The court remarked that the property owner could have stopped the accruing interest by requesting the payment of the taxes, including the interest thereon, when the land was taken. In United States v. Five Acres (Suffolk County), D.C., 56 F.Supp. 628, 633, the city was held to be entitled to interest on the taxes "up to the time of payment." Affirmed sub.nom. Richard T. Green Co. v. City of Chelsea, 1 Cir., 149 F.2d 927. In United States v. 53¼ Acres of Land (Brooklyn), D.C., 46 F.Supp. 875, the property owner contended that the city was not entitled to interest and penalties on the taxes after the date of vesting of title in the United States because the city could have applied for the payment due at any time after the date of vesting. This contention was overruled. The court said, 46 F.Supp. at page 876, that the owner could have made application for the payment to the city immediately after the date of vesting of title and thereby could have avoided payment of interest and penalties. The lien for taxes attaching on the first Monday in March remains notwithstanding the acquisition thereafter by a municipality, and the latter takes title "subject to the lien for county purposes to the same extent as would a private purchaser." City of Santa Monica v. Los Angeles County, 15 Cal.App. 710, 713, 115 P. 945, 946. Since the city would be in the shoes of a private purchaser it would be compelled to pay interest, penalties and costs in addition to the tax in order to remove the lien. The penalty is part of and follows the tax. Long Beach City School Dist. v. Payne, 219 Cal. 598, 601, 28 P.2d 663.

There can be no apportionment of taxes but the entire amount of the tax lien must be paid out of the money deposited as compensation for the land. United States v. Certain Lands (Eau Claire), D.C., 49 F.Supp. 225, 226. Since the tax lien remains against the property until paid and since the property cannot be sold to satisfy the lien, the taxing officers must look for the recovery of the tax and penalties to the fund deposited by the United States upon the filing of the declaration of taking. Where the obligation for payment of taxes matures before the appropriation of title by the United States, the responsibility for payment of the tax with interest and penalties rests wholly on the property owner, who may stop the accumulation of interest and penalties at any time by paying the amount due. United States v. Certain Land (St. Louis) D.C., 29 F.Supp. 92, 97. The fund deposited by the United States in the Registry of the court as compensation to be paid to landowners in a condemnation case stands in the place of the land condemned and is subject to the claims of all lienholders for the payment of the amount of their liens, with interest and other accretions that had attached to the real estate at the time of the appropriation of the property by the government. The lien status is not changed by the taking of the land. United States v. Certain Land (St. Louis), supra, D.C., 29 F.Supp. at page 94; United States v. Certain Lands (Brooklyn), 2 Cir., 129 F.2d 577, 580; United States v. Certain Parcels of Land (San Diego), D.C., 44 F.Supp. 936, 937. If the penalty as well as the tax is a lien on property, the penalty is part of the tax and the payment of the penalty cannot be differentiated from the payment of the lien for the tax. State of California v. Hisey, 9 Cir., 84 F.2d 802, 805.

There are federal decisions that from casual reading appear to be contrary to the cases cited above, but an examination of them will reveal that some were decided under state statutes that permitted taxes to be apportioned up to the time of condemnation and that in others the taxing authorities were attempting to obtain payment of taxes out of the funds on deposit that had not ripened into liens when title was taken by the United States. In California there is no statutory provision for apportionment. The tax lien attaches to the property on the first Monday in March and remains, with all its accumulations and accretions in the form of penalties, interest and costs, until paid or cancelled.

The loss of the property by condemnation does not excuse respondent from payment of the tax and penalty. The majority opinion holds that the loss of the property relieves respondent from payment of the penalties. The argument is based on the proposition that when there is an agreement to sell or an uncompleted sale of property and it is destroyed before title is transferred, thus rendering the contract impossible of performance, the loss falls on the seller and he cannot collect the sale price. This thesis is negated by the fact that the property was not lost as would have been the case if it had been destroyed by tidal wave or earthquake. Respondent did not suffer such a loss. Nothing was destroyed. Respondent received cash in exchange for the land, and since the compensation paid by the government stands in the place of the land respondent suffered no detriment.

There was no occasion in any of the federal cases to distinguish between redemption penalties and delinquency penalties for the reason that it does not appear that any of the tax proceedings under discussion had progressed to the point of a sale from which redemption would be required. The cases all hold that penalties and interest up to the time of payment must be awarded with the taxes out of the fund on deposit. Such being the rule from which no court has dissented until in the instant case, I see no logical justification for attempting, as the majority opinion does, to differentiate between penalties because they are of different classes or are designated by different names, or because they arise for different reasons and at various stages of the tax proceedings. If the penalties go with the tax and if the transfer of title to the government does not intervene to stop the accumulation of one penalty, how can such transfer annul the other?

Title remained in respondent until March 19, 1943, more than a year after the taxes became a lien. During that time it had the possession, control and use of the property and received the revenues produced from it. It received the same benefits and protection from the state, the county and the city to which all property owners and taxpayers are entitled. In lieu of the real property it received cash to which the same benefits and protection were transferred. In equity it should pay the tax and the penalties that were added as compensation to the state and its political subdivisions for the delay in paying the lawful levy.

Respondent could have avoided penalties, costs and interest (1) by paying each installment of taxes when it became due or (2) by applying at any time after March 19, 1943, the date of the deposit and declaration of taking by the United States, for an order for the payment of the taxes out of the fund deposited in payment for the land. See cases cited. Having done neither it cannot complain because it is required to pay the same amount that would have been necessary to satisfy the tax lien if it had retained title.

The liability for the tax did not cease when the government took title and possession. Since the lien for penalties, interest and costs cannot be separated from the lien for the tax, respondent's concessions hereinbefore noted (1) that the liability of the property to taxation is fixed as of the tax date, (2) that the taxes were its personal obligation, and (3) that the taxes and penalties were not affected by the acquisition of the property by the United States after the tax date, sufficiently dispose of the question of respondent's liability for the penalties and costs in dispute.

The judgment should be reversed. Since the complaint does not and cannot state a cause of action the trial court should be directed to sustain the demurrer without leave to amend and to enter judgment for defendants.

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79 Cal.App.2d 711

WEST v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al.

Civ. 15697.

District Court of Appeal, Second District, Division 3, California.

May 16, 1947.

Rehearing Denied June 5, 1947.

Hearing Denied July 10, 1947.

1. Workmen's compensation 🔑338

A practical nurse who is supervised in the details of her work by the one who hires her, is an "employee" within the Workmen's Compensation Act, and not an "independent contractor".

See Words and Phrases, Permanent Edition, for all other definitions of "Employee" and "Independent Contractor".

2. Workmen's compensation 🔑276

Practical nurse who was employed for an indefinite time to take care of a bedridden patient, was not excluded from coverage of the Compensation Act, on ground that her employment was only "casual employment". Labor Code, § 3354.

See Words and Phrases, Permanent Edition, for all other definitions of "Casual Employment".

3. Workmen's compensation 🔑659

Where employment of practical nurse to take care of bedridden patient required her to live and board at the premises of her employer, the fact that she was resting when she received alleged injuries in fall of swing, did not exclude her from coverage of the Workmen's Compensation Act.

4. Evidence 🔑570

The opinion of a medical expert is no stronger than the facts on which it is based.

5. Workmen's compensation 🔑1418

Where physician's report in compensation proceeding contained no medical history of claimant prior to fall, and was palpably based on a superficial and inadequate medical examination of claimant, and was at variance with the whole current of expert evidence in the proceeding, the report was required to be disregarded.

6. Workmen's compensation 🔑809

The Workmen's Compensation Act does not award compensation for mere pain, unless the pain is of such a character as to raise a presumption of incapacity to earn.

7. Workmen's compensation 🔑1417

Though an employee may testify in compensation proceeding as to his inability to work, a hidden physical impairment of the back is a matter properly cognizable only by those trained and expert in such matters.

8. Workmen's compensation 🔑1704

Though it is the province of the Industrial Accident Commission in a compensation proceeding to determine the credit and weight to be given the evidence, the Commission may not disregard the facts established by the evidence.

9. Workmen's compensation 🔑1939

Findings of fact of the Industrial Accident Commission in a compensation proceeding, like the findings of a trial court, may be set aside and an award based thereon annulled if the findings are contrary to the evidence, read as a whole, or are without meritorious support in the evidence.

10. Workmen's compensation 🔑1939

An award of the Industrial Accident Commission in a compensation proceeding will be set aside if no reasonable man could reach the conclusion that the Commission reached.

11. Workmen's compensation 🔑1939

The fundamental principle that there shall be but one trier of the facts, assumes that the trier of the facts, such as the Industrial Accident Commission in a compensation proceeding, will use every reasonable means at disposal to ascertain the truth concerning disputed matters.

12. Workmen's compensation 🔑1079

The Industrial Accident Commission is a court deliberately clothed by the legislature with administrative facilities to permit it to develop the facts in compensation proceedings in reference to matters not generally known to laymen.

13. Workmen's compensation 🔑1419

Where medical evidence was required in compensation proceedings, the Industrial Accident Commission had the responsibility of seeing to it that such evidence was reasonably complete, whether by use of its own medical experts or otherwise.

14. Workmen's compensation 🔑1090

The Industrial Accident Commission has the duty in a compensation proceeding to do equal justice between the employer and the employee.

15. Workmen's compensation 🔑1653

Evidence was insufficient to sustain Industrial Accident Commission's total temporary disability award to practical nurse who allegedly injured her back.

16. Workmen's compensation 🔑1410

The testimony of a compensation claimant with reference to disabling pain may be satisfactory and sufficient to sustain a finding by the Industrial Accident Commission of disability.

17. Workmen's compensation 🔑1704, 1939

The power of the Industrial Accident Commission in a compensation proceeding to make determinations of fact is broad, but it may not be exercised in disregard of fundamental concepts as to what constitutes legal proof and of the duty to weigh the evidence fairly, and a reviewing court should not consider itself bound by a finding which has no reasonable basis in the evidence.

18. Workmen's compensation ⇨1947

On the annulment of a compensation award, unless otherwise ordered, the case goes back to the Industrial Accident Commission for retrial of all issues of fact initially before the Commission.

19. Workmen's compensation ⇨11

The purpose of a compensation award is not to make the employee whole for the loss which he has suffered but to prevent him and his dependents from becoming public charges during the period of his disability.

20. Workmen's compensation ⇨8, 811

Money payment under the Compensation Act is supposed to represent a specified portion of the disabled employee's loss in earning capacity as such earning capacity existed at time disability began, and "average earnings" which means earning capacity, is the statutory term for the basis on which actual past earnings are computed in order to arrive at such earning capacity. Labor Code § 4453.

See Words and Phrases, Permanent Edition, for all other definitions of "Average Earnings".

21. Workmen's compensation ⇨26

The various statutory methods of computing the average weekly earnings set forth in subdivisions (a–c) governing the computation of average earnings on a weekly basis, possess validity only to the extent that they truly reflect actual earning capacity at the time of injury. Labor Code, § 4453(a–c).

22. Workmen's compensation ⇨803

"Earning capacity" within meaning of the Workmen's Compensation Act is composed of ability to work, willingness to work, and opportunity to work. Labor Code, § 4453.

See Words and Phrases, Permanent Edition, for all other definitions of "Earning Capacity".

23. Workmen's compensation ⇨825

The purpose of the amendment to the Workmen's Compensation Act that redefined full-time employment on a weekly rather than an annual basis, introduced multiple employer computation formula, removed limitation on earning capacity, and withdrew seasonal work from specific initial coverage of the earning capacity subdivision, was to remove from the statutory concept of earning capacity at the time of injury, the factor of opportunity to work so far as full time permanent employees were concerned. St.1933, pp. 1343–1344.

24. Workmen's compensation ⇨822

Compensation award to practical nurse who worked only intermittently, was sustainable only if correctly computed under that provision of the Workmen's Compensation Act dealing with the computation of average earnings of one who does part time work. Labor Code, § 4453(d).

25. Workmen's compensation ⇨822

Provision of the Workmen's Compensation Act which deals with computation of average earnings of an employee engaged in part time work, applies to intermittent employees. Labor Code, § 4453(d).

26. Workmen's compensation ⇨1377

Where the evidence in a workmen's compensation proceeding discloses periods of unemployment by the claimant, the claimant had the burden of explaining them for the purpose of computation of his average earnings. Labor Code, § 4453.

27. Workmen's compensation ⇨1626

Where evidence in compensation proceeding by practical nurse who previous to her injury had been only intermittently employed, was such that it could not be determined whether her unemployment was by choice or because of lack of opportunity, Industrial Accident Commission was unable properly to evaluate claimant's earning capacity at time of accident and its award must be annulled. Labor Code, § 4453(d).

◆

Proceeding by Minnie West, an uninsured employer, against the Industrial Accident Commission of the State of California and Cora A. Best, compensation claimant, respondents, to have a total temporary disability award in favor of the claimant annulled.

Case remanded to Commission for further proceedings not inconsistent with opinion.

James B. Ogg, of Alhambra, for petitioner.

R. C. McKellips, of San Francisco, and John A. Rowe, Jr., of Los Angeles, for respondent Industrial Acc. Commission.

SHINN, Acting Presiding Justice.

Petitioner, an uninsured employer, seeks to have annulled a total temporary disability award of the commission in favor of respondent and against petitioner. Respondent, a 60-year old woman, was hired by petitioner on January 21, 1946, for $35 a week plus room and board as a practical nurse for petitioner's bedridden husband. Six days later on January 27, 1946, a porch swing at petitioner's residence fell to the floor while respondent was sitting in it. Respondent claimed that her back was injured in this fall of the swing. The commission so found and issued the award before us.

Petitioner's attack upon the award merits discussion only as to the following points: (1) the existence of the employment relationship; (2) the activity of respondent at the time of the injury found; (3) the existence of the injury and of total temporary disability resulting therefrom; (4) average earnings.

[1-3] Petitioner contends that the existence of the employment relationship between petitioner and respondent was not established. The evidence shows, however, that petitioner hired respondent and supervised her in her work. But petitioner further asserts that respondent's legal status was that of independent contractor and, if not, that her employment was only casual. These assertions are without merit. The legal relationship of a practical unrse to the one who hires her and supervises her in the details of her work as the record discloses occurred here is that of servant to master. New Amsterdam Casualty Co. v. Industrial Acc. Comm., 1934, 137 Cal.App. 719, 720, 724, 31 P.2d 245. Respondent's employment was not casual within the meaning of section 3354 of the Labor Code since the work contemplated was indefinite in duration. Melone v. Industrial Acc. Comm., 1935, 9 Cal.App.2d 569, 572, 573, 50 P.2d 503. As to respondent's activity at the time of the injury found, the fact that she then was resting is without legal consequence where her employment required her to live and board on the premises of her employer. Employers' etc. Corp. v. Industrial Acc. Comm., 1940, 37 Cal.App.2d 567, 569, 99 P.2d 1089; Note, 158 A.L.R. 606.

[4] Petitioner's contention that the findings of the commission as to injury to respondent and the total temporary disability resulting therefrom are without substantial evidentiary support requires more extended treatment. These findings rest upon respondent's testimony, two medical reports and one X-ray report, all offered by respondent. Respondent testified in effect that she injured her back in the fall of the swing, that since that occurrence she had had a constant stinging pain around the end of her "tail bone" (coccyx), that medical treatment had been ineffective in permanently alleviating this pain, and that the severity of the pain prevented her from working. The first medical report, that of Dr. Rickabaugh, dated March 18, 1946, contains a diagnosis of sacro-iliac sprain based upon respondent's account of the fall in the swing and the tenderness to pressure she exhibited over the sacro-iliac joints, the body of the sacrum and the coccyx. It is significant that this report is silent as to the indispensable factor in diagnosis of the nature and cause of injury, in such cases, namely, the medical history of respondent prior to the fall. It states no reason whatever for basing a diagnosis of sacro-iliac sprain upon tenderness in the lower back, it amounts to no more than a statement that the subject complained of pain, and in our opinion was not the statement of a medical opinion in the true sense. The second medical report, dated June 12, 1946, that of the White Memorial Clinic, sets forth a tentative diagnosis of "Chronic low-back, sprain, mild; and Osteoarthri-

tis." The diagnosis of osteoarthritis was based upon an X-ray of the lumber spine taken according to respondent's testimony less than three weeks prior to the commencement of her employment by petitioner. This medical report further states: "patient was advised to work shorter hours, because of Osteoarthritis." The X-ray report on respondent's coccyx "shows fusion of the several segments therefore but probably a developmental abnormality." The foregoing is a complete summary of all the evidence in the record from which the attacked findings might receive support. Analysis of this evidence reveals that respondent's testimony and Dr. Rickabaugh's report furnish the only support for these findings. Dr. Rickabaugh's report adds little to respondent's testimony since an expert opinion is no stronger than the facts upon which it is based. Blankenfeld v. Industrial Acc. Comm., 1940, 36 Cal.App.2d 690, 698, 98 P.2d 584. On the other hand the record is replete with evidence opposed to these findings. The record shows that respondent pursued her normal routine of life just after the accident and did not seek medical treatment for over a week thereafter. Specifically, the following is established by unopposed evidence. Shortly after the accident respondent took a brief drive in her car. The evening of the accident she attended church. The morning following the accident she performed the duties of her employment in full until her employment was terminated by petitioner. She then moved with some assistance her small steamer trunk from petitioner's residence. The second day after the accident she attended the trial of a case in court.

Specifically as to injury the commission's records introduced in evidence show that respondent's back has been a recurrent source of compensation income to her. In 1941 she collected over $100 from a compromise settlement of her claim that she had sprained her wrist and back in a fall suffered while working as a practical nurse. At that time she stated that within the prior two years she had injured her spine at least three times. X-ray examination of her back however revealed nothing except a congenital anomaly in the lumbar region and some slight arthritic development in the sacro-iliac area which development was not of recent origin. When her attention was distracted during the physical examination of the area of her back which she claimed was paining her, she exhibited no signs of pain even under heavy pressure upon that area. She had a normal range and freedom of spinal movement. Her medical history did indicate as possible causes of her claimed back discomfort her diabetic condition and her chronic bowel disorders. In 1944 respondent again collected compensation indemnity in the amount of approximately $160 by way of a compromise settlement of her claim that she had injured her chest and back in another fall. Medical examination however including X-rays of her lumbar spine and sacrum showed no signs of old or recent injury to her back although the X-rays did disclose marked osteoarthritic changes in her spinal column. Notwithstanding her complaint of excruciating pain throughout the physical examination of her back all her body motions were then observed to be quick, complete, and unaccompanied by muscle spasm.

Specifically as to total temporary disability respondent testified that following the accident she made no effort whatsoever to obtain employment but did remarry. She further admitted that she had gone on county relief upon her arrival in Los Angeles from Sacramento in the last part of November, 1945, that she remained on such relief continuously thereafter including the week of her employment by petitioner, and that she was still receiving such relief in June, 1946. According to respondent this relief was given her on account of her inability to work. From this testimony of respondent it would seem then that the claimed injury had no effect upon her ability to work. In this connection it is to be noted that the White Memorial Clinic merely recommended shorter hours of work and that because of osteoarthritis.

[5] In summary the record shows that respondent has been a willing seeker after compensation income and that the condition of her back in February 1946 was both arthritic and chronic. Aside from her own

testimony and Dr. Rickabaugh's report there is nothing in the record tending to prove that respondent was injured in the fall of the swing or that this fall aggravated or exacerbated the then existing defective condition of her back. Dr. Rickabaugh's report contains no medical history of respondent prior to the fall of the swing and is palpably based upon a superficial and inadequate medical examination of respondent. Accordingly it should be disregarded on account of its unsatisfactory nature and because it is at variance with the whole current of expert evidence. United States Fidelity & Guaranty Co. v. Industrial Acc. Comm., 1928, 95 Cal.App. 186, 191, 272 P. 589; Winthrop v. Industrial Acc. Comm., 1931, 213 Cal. 351, 2 P.2d 142.

[6-10] This leaves merely respondent's testimony to support the findings of injury and total temporary disability. Respondent's testimony upon these points is to the effect that she has been in such constant and severe pain since the accident that she has been unable to work. While the person who claims to have been injured is ordinarily the first person who should testify as to whether he is suffering pain (Employers' etc. Corp. v. Industrial Acc. Comm., 1941, 42 Cal.App.2d 669, 671, 109 P.2d 716), it should be borne in mind that the law does not award compensation for mere pain unless it is of such a character as to raise a presumption of incapacity to earn. Marsh v. Industrial Acc. Comm., 1933, 217 Cal. 338, 344, 18 P.2d 933, 86 A.L.R. 563; Associated Indemnity Corp. v. Industrial Acc. Comm., 1945, 71 Cal.App.2d 820, 824, 163 P.2d 771. Similarly although the employee may testify as to his inability to work (Western Pac. R. Co. v. Industrial Acc. Comm., 1936, 17 Cal.App.2d 119, 120, 61 P.2d 459) a hidden physical impairment of the back such as respondent claimed is a matter properly cognizable only by those trained and expert in such matters. Pacific Employers Ins. Co. v. Industrial Acc. Comm., 1941, 47 Cal.App.2d 494, 500, 501, 118 P.2d 334; Simpson Const. Co. v. Industrial Acc. Comm., 1925, 74 Cal.App. 239, 243, 240 P. 58. While it is the province of the commission to determine the credit and the weight to be given the evidence, the commission may not disregard facts established by the evidence. Bussey v. Industrial Acc. Comm., 1938, 26 Cal.App.2d 211, 212, 79 P.2d 169; Moquin v. Industrial Acc. Comm., 1939, 33 Cal.App.2d 511, 516, 92 P.2d 413. Findings of fact of the commission like those of a trial court may be set side and an award based thereon annulled if the findings are contrary to the evidence, read as a whole, or without meritorious support in the evidence. Nielsen v. Industrial Acc. Comm., 1934, 220 Cal. 118, 122, 29 P.2d 852; Pacific Palisades Ass'n v. Menninger, 1933, 219 Cal. 257, 267, 26 P.2d 303; Williams v. Kidd, 1915, 170 Cal. 631, 642, 151 P. 1; Smith v. Belshaw, 1891, 89 Cal. 427, 430, 26 P. 834. Stated otherwise the rule of review is that an award of the commission will be set aside if no reasonable man could reach the conclusion the commission reached. Engels Copper Min. Co. v. Industrial Acc. Comm., 1920, 183 Cal. 714, 717, 192 P. 845, 11 A.L.R. 785.

[11-13] The fundamental principle that there shall be but one trier of the facts assumes that the trier of the facts will use every reasonable means at his disposal to ascertain the truth concerning disputed matters. The inadequacy and incompleteness of the record in this case manifestly shows that the commission here did not properly discharge this basic duty of discovery of the facts. The commission is a court (Bankers' Indemnity Ins. Co. v. Industrial Acc. Comm., 1935, 4 Cal.2d 89, 97, 47 P.2d 719), deliberately clothed by the legislature with administrative facilities to permit it to develop the facts in reference to matters not generally known to laymen. It was not intended that the litigants before it be impaled upon the results of their lack of familiarity with the often occult problems of medical science frequently arising in compensation cases. As a consequence the commission may not leave undeveloped matters which its acquired, specialized knowledge should identify as requiring further evidence. In this case the resolution of the issues of injury and disability was not patent. Medical evidence thereon was therefore required. Under these circumstances the commission had the responsi-

bility of seeing to it that such evidence was reasonably complete, whether by use of its own medical experts or otherwise.

[14, 15] As society's representative it is the duty of the commission to do equal justice between employer and employee. McManus v. Lindberg, 1936, 47 Ariz. 214, 54 P.2d 997, 999. As the same court said in a more recent case: "However, perfection and absolute accuracy are not expected; all that can reasonably be demanded is an honest and conscientious effort to do the right thing. It is too bad if some who are entitled to compensation are denied it, but it must be remembered that all claimants for compensation are not entitled to it. It is as much the duty of the commission to deny compensation to a malingerer or to one who is not an employee as it is its duty to grant compensation to the honest employee who is actually injured in the line of duty." Holmes v. Osborn, 1941, 57 Ariz. 522, 115 P.2d 775, 789. Applying the foregoing established legal rules to the case before us, the award of the commission must be annulled.

[16, 17] We do not hold that the testimony of a claimant of disabling pain may not properly be accorded greater weight by the commission than is accorded medical testimony that no cause for the pain could be found upon expert examination. Such evidence may be satisfactory and sufficient to sustain a finding of disability. We do hold that the testimony of respondent that she suffered such pain as a result of her alleged injury as to incapacitate her for work was wholly unsubstantial and without probative value. In view of respondent's admitted activities following the alleged injury, her belated complaint of injury and visit to a physician, her ability to carry on her household duties after her remarriage, and her proven disposition to use a chronic lower back condition, which, as she claimed, habitually caused disabling pain, as a convenient source of income through claims of injury, her mere assertion that the fall in the swing caused disabling pain, opposed as it was by reliable expert evidence, and supported by none of any substance, was not sufficient to establish liability of petitioner as her employer. The realities of the situation were too obvious to be overlooked. The power of the commission to make determinations of fact is indeed broad, but it may not be exercised in disregard of fundamental concepts as to what constitutes legal proof and of the duty to fairly weigh evidence. A reviewing court should not consider itself bound by a finding of the commission which has no reasonable basis in the evidence. We consider this such a case.

[18] Were we to rule otherwise as to the sufficiency of the evidence, the award would nevertheless have to be annulled because, as will be developed shortly, the commission erred as a matter of law and accordingly exceeded its jurisdiction in its application of section 4453 of the Labor Code in computing the amount of the award. Upon annulment of the award, unless otherwise ordered, the case goes back to the commission for retrial of all of the issues of fact initially before the commission. Winthrop v. Industrial Acc. Comm., 1934, 220 Cal. 114, 29 P.2d 850; Nielsen v. Industrial Acc. Comm., supra, 220 Cal. 118, 120, 29 P.2d 852.

In regard to average earnings petitioner contends that the commission's award is unreasonable in amount and therefore in excess of its powers. Petitioner asserts that in computing respondent's average earnings on a full-time basis at the rate of pay at the time of the accident, the commission ignored respondent's true earning capacity at that time as shown by such evidence as there was as to her actual earnings during the year immediately preceding the accident.

[19] In California as elsewhere a compensation award consists of a money payment and medical care. Western Metal Supply Co. v. Pillsbury, 1916, 172 Cal. 407, 419, 156 P. 491, Ann.Cas.1917E, 390; Dodd, Adm. of Workmen's Compensation, 1936, p. 41. The purpose of the award is not to make the employee whole for the loss which he has suffered but to prevent him and his dependents from becoming public charges during the period of his disability. Union Iron Works v. Industrial Acc. Comm., 1922, 190 Cal. 33, 39, 40, 210 P. 410. In short the award transfers a portion of the loss

suffered by the disabled employee from him and his dependents to the consuming public. Western Indem. Co. v. Pillsbury, 1915, 170 Cal. 686, 693, 151 P. 398. Complete protection is not afforded the employee from disability because this would constitute an invitation to malinger or to be careless on the job as he would then lose nothing in assuming a disabled status. 1 Schneider, Workmen's Compensation Law, Per.Ed. 1941, p. 6.

[20] The money payment is supposed to represent a specified portion of the disabled employee's loss in earning capacity as such capacity existed at the time disability began. Dodd, op. cit., supra, p. 687. "Average Earnings" is our statutory term for the basis upon which actual past earnings are computed in order to arrive at such earning capacity. The computation of this earning capacity is, of course, not independent of the fundamental purpose of the award just set out. As a consequence there is provided a maximum and minimum for all average earnings. Exact ascertainment of earning capacity is further departed from by providing certain specific computation formulae for the purpose of taking care of the ordinary run of cases in speedy and uniform fashion. But earning capacity at the time disability began remains as the base upon which the money payment is computed. By "Average Earnings" nothing more is meant than earning capacity.

[21] Section 4453 of the Labor Code is the provision governing the computation of average earnings on a weekly basis. It has four subdivisions. One of these, (b) covers employment by two or more employers. Since it is inapplicable to the case before us, it will not be considered further. The other three pertain to various types of employment by one employer. Subdivision (a) applies to full-time work, while subdivision (d) applies to part-time work. Subdivision (c) applies to two situations—earnings at an irregular rate or specified to be by the week, month, or other period. Subdivision (d) also applies where (a), (b) or (c) "can not reasonably and fairly be applied." It defines average weekly earnings as 95% of the sum "which reasonably represents the average weekly earning capacity of the injured employee at the time of his injury, due consideration being given to his actual earnings from all sources and employments." Thus earning capacity at the time of injury is the touchstone of average earnings in California. Consequently the various statutory methods of computation of average weekly earnings set forth in subdivisions (a), (b) and (c) possess validity only to the extent they truly reflect actual earning capacity at the time of injury.

[22] What constitutes such earning capacity? Earning capacity is composed of three factors: (1) ability to work; (2) willingness to work; and (3) opportunity to work. Mahony Co. v. Marshall, D.C.W.D.Wash.1931, 46 F.2d 539, 545.) It has been suggested, however, that the history of the statutory definition of average earnings in California shows that earning capacity at the time of injury does not include the third factor, opportunity to work.

We turn therefore to a consideration of such statutory history. The earliest compensation legislation in California was the Roseberry Act of 1911. This act differed from the present law in that its one specific formula for the computation of average earnings applied only to full-time employees—employees of a class working substantially the whole of the year immediately preceding the injury; and the earning capacity considered was limited to that in the employment in which injury occurred. Stats.1911, ch. 399, p. 800. The Boynton Act of 1913, which supplanted the Roseberry Act, merely broadened the concept of earning capacity to include therein employment similar to the one in which injured but not of a higher class. Stats. 1913, ch. 176, pp. 288–289; Stats. 1915, ch. 607, pp. 1086–1087.

The present law in its original form was passed in 1917. It changed both the definition of full-time employment just mentioned and the formula for the computation of the average earnings therein. In recognition of the trend from the six-day week to the five-day week, 260 days a year was declared to be full-time employment. The daily earnings at the time of injury.

instead of the average daily wage paid when working during the year immediately preceding the injury, were used to compute average weekly earnings. Earning capacity was further broadened to include all sources and employments, but the earnings from other occupations could not be included at a wage rate in excess of that paid at the time of injury. The special formula for the computation of earnings at an irregular rate or on a periodic basis was added. Stats.1917, ch. 586, pp. 842–843.

[23] The only basic later change made was the 1933 amendment which redefined full-time employment on a weekly rather than an annual basis, introduced the multiple employer computation formula, removed the limitation on earning capacity just stated, and withdrew seasonal work from the specific initial coverage of the earning capacity subdivision. Stats.1933, ch. 522, pp. 1343–1344. It may well be a reasonable inference from the general economic conditions prevailing at the time of the enactment of the 1933 amendment that its purpose was to remove from the statutory concept of earning capacity at the time of injury the factor of opportunity to work so far as full-time permanent employees were concerned.

That is not the question before us. Respondent was working as a practical nurse at the time of the accident. Such employment is by its very nature intermittent. A practical nurse goes from case to case. Continuity of such employment is the exception rather than the rule. Yet the commission computed respondent's average earnings under subdivision (a) on the ground that her employment was full-time, that is, in excess of the statutory minimum therefor—the 30-hour, five-day week. We note that an equally good prima facie case exists for computing them under subdivision (c) in view of the fact that her earnings were specified to be by the week. But it is unnecessary to decide this point. Neither (a) nor (c) can be used if they "can not reasonably and fairly be applied." If such a situation exists, resort must be had to subdivision (d). This is the situation here. It is not fair and reasonable to use either (a) or (c) because they both ignore the element of discontinuity in respondent's employment. Cf. Neahr v. Industrial Acc. Comm., 1936, 13 Cal.App.2d 146, 56 P.2d 568; Mahaffey v. Industrial Acc. Comm., 1917, 176 Cal. 711, 171 P. 298.

[24] Accordingly, the award is sustainable only if computed correctly under (d), the earning capacity subdivision. The award was computed at the rate of pay at the time of the accident on the basis of full-time work. This method of computation under this subdivision has been affirmed when applied to permanent full-time employees irregularly employed due to generally poor business conditions (California, Casualty Indemnity Exchange v. Industrial Acc. Comm., 1933, 135 Cal.App. 746, 27 P.2d 782), temporary full-time employees (Dept. of Water etc. v. Industrial Acc. Comm., 1933, 130 Cal.App. 231, 19 P.2d 832), seasonal employees (Howell v. Industrial Acc. Comm., 1941, 47 Cal.App.2d 326, 117 P.2d 919), and intermittent employees. Ætna Life Ins. Co. v. Industrial Acc. Comm., 1933, 130 Cal.App. 488, 20 P.2d 372; Colonial etc. Ins. Co. v. Industrial Acc. Comm., 1941, 47 Cal.App.2d 487, 118 P.2d 361. On the other hand an award under this subdivision based upon an evaluation of an intermittent employee's past earnings within the year immediately preceding the injury was affirmed in the Neahr case.

[25] We believe the Neahr decision correctly interprets subdivision (d) as applied to intermittent employees. As previously stated and as conceded in the California Exchange case, 135 Cal.App. at page 753, 27 P.2d at page 782, ordinarily opportunity to work is a factor of earning capacity. The opportunity to work of the intermittent employee normally is not equal to that of the full-time permanent employee. That circumstance is an element of considerable importance in the choice of a job or a trade. To take the rate of pay at the time of injury and apply it on a full-time basis in computing earning capacity at that time is to ignore an established incident of intermittent employment—its discontinuity. The result

may often be to give to the disabled employee a greater income from a compensation award for idleness during disability than he received while working and to bestow upon him an income far in excess of his true earning capacity. When so administered a law, the fundamental purpose of which is to shift merely a portion of the loss in earning capacity of the disabled employee from such employee and his dependents, is distorted into a device whereby it would be more profitable to be on compensation than it would be to work. Such an administration of the workmen's compensation law would invite both carelessness on the job and malingering and is therefore contrary to public policy.

Earning capacity under subdivision (d) cannot properly be determined by reference to the rate of pay alone, as the Ætna (130 Cal.App. at page 493, 20 P.2d at page 372) and Colonial (47 Cal.App.2d page 492, 118 P.2d at page 361) decisions erroneously assume. Fundamentally, earning capacity is total earnings measured against the period of time within which those earnings were made. Whether the earning capacity rate is identical with the pay rate depends upon the steadiness of employment. Thus the particular wage rate an employee is receiving at the moment of injury may or may not be indicative of his actual earning capacity at that time.

The statutory formulæ for the calculation of average earnings cannot be blindly applied. As stated earlier they are valid only to the extent their application results in ascertaining actual earning capacity at the time of injury. This is so because their use is subject to the reasonable and fair limitation stated in subdivision (d) which we have paraphrased and quoted. If they "can not reasonably and fairly be applied," earning capacity as defined in subdivision (d) must be determined. In making this determination due consideration must be given to the earning history of the disabled employee. We agree with the statement in the Ætna decision, 130 Cal.App. at page 492, 20 P.2d at page 372, that due consideration means reasonable and not exclusive consideration. But earning history must be considered in arriving at earning capacity, and more often than not, it will be determinative.

[26] We now proceed to examine the award before us in the light of the foregoing discussion and particularly with respect to the three factors which make up earning capacity at the time of injury. As to the first factor, ability to work, respondent testified in effect that she had been on county relief since her arrival in the county in November, 1945, because of her inability to work. As to the second factor, willingness to work, one overlooked in the Ætna decision, respondent testified: "I work when I can." As to the third factor, opportunity to work, respondent's testimony is silent unless it may be inferred that she included this factor in her declaration of inability to work. In the California Exchange decision, 135 Cal.App. at page 753, 27 P.2d at page 782, the novel proposition is advanced that it is incumbent upon the employer to introduce evidence as to the employee's lack of opportunity to work. We say novel because the common experience of man informs us that the wage earner typically will work if he can in order to give as much support as he is able to his dependents and himself. Therefore, it is more logical to rule that when the evidence discloses periods of unemployment, the employee has the burden of explaining them. Cf. Meyers v. Industrial Acc.Comm., 1940, 39 Cal.App.2d 665, 669, 103 P.2d 1025. The commission is certainly informed generally as to the conditions of the labor market and the opportunities for work.

[27] The commission could not properly evaluate respondent's earning capacity under subdivision (d) on the present record. If prior to her employment by petitioner respondent possessed no ability to work, as a literal understanding of her testimony indicates to be the fact, she suffered no compensable loss by reason of the claimed injury. But if she did possess such ability, notwithstanding her testimony to the contrary, two equally plausible surmises present themselves. The general condition of the labor market prevailing in the fall of 1945 and the following win-

ter would indicate that her unemployment was by choice. On the other hand, her unemployment may have been due to lack of opportunity to engage in the work of practical nursing. In any event, the record contains nothing as to her employment or unemployment prior to her single week's employment by petitioner except her relief status and the fact that she once had had a two-month nursing job in Sacramento. Faced with such an inadequate and incomplete record, the commission was unable to perform its statutory duty of giving due consideration to respondent's earning history. It could not properly evaluate respondent's earning capacity at the time of the accident pursuant to subdivision (d) of section 4453 of the Labor Code. Accordingly, the award must be annulled as the result of an erroneous application of the law and as unreasonable. Labor Code, sec. 5952.

The case is remanded to the commission for further proceedings not inconsistent with this opinion.

WOOD, J., and KINCAID, J. pro tem., concur.

Hearing denied; CARTER, J., dissenting; TRAYNOR, J., not participating.

79 Cal.App.2d 781

BROWN et al. v. HOOK et al.

No. 13340.

District Court of Appeal, First District, Division 1, California.

May 21, 1947.

Rehearing Denied June 20, 1947.

Hearing Denied July 17, 1947.

1. Trade unions 🔑7

The word "disbanding", as used in provision in constitution of international union authorizing Grand Lodge to take over property of local lodge upon local lodge disbanding, was intended to cover any severance by local lodge of its tie with international union, including withdrawal or secession.

See Words and Phrases, Permanent Edition, for all other definitions of "Disband".

2. Trade unions 🔑7

Fact that constitution of international union contained provision imposing penalty upon any member advocating secession did not establish that word "secession" was not included in the word "disbanding", as used in provision in constitution authorizing Grand Lodge to take over property of local lodge upon local lodge disbanding.

See Words and Phrases, Permanent Edition, for all other definitions of "Disbanding" and "Secession".

3. Trade unions 🔑7

Under provision in constitution of international union authorizing Grand Lodge to take over property of local lodge upon local lodge disbanding, property of local lodge became property of Grand Lodge upon local lodge seceding from international union.

4. Trade-marks and trade-names and unfair competition 🔑3(1)

Generally, the courts will not enjoin the use of a name consisting solely of generic terms, but it may do so where its use would be confusing and misleading.

5. Trade-marks and trade-names and unfair competition 🔑70(2)

Where local lodge before seceding from international union was known as "San Francisco Lodge No. 68, International Association of Machinists", international union was entitled to injunction enjoining seceding lodge from using the name "Machinists' Union No. 68", even though name consisted of generic terms, on ground that its use would be confusing.

◆

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Action by H. W. Brown and others, individually and as members of the Grand Lodge of the International Association of Machinists, and another against Harry Hook and others and Machinists' Union No. 68. From an order granting injunction pendente lite enjoining defendants from transferring funds and property of the former San Francisco Lodge No. 68, International Association of Machinists, to another union, requiring defendants to refrain from preventing plaintiff International Association of Machinists taking possession of funds and property and administering the affairs of San Francisco Lodge No. 68, International Association of Machinists, and restraining defendants from using the name Machinists' Union No. 68, the defendants appeal.

Affirmed.

J. H. Sapiro and George Olshausen, both of San Francisco, for appellants.

Tobriner & Lazarus, of San Francisco, for respondents.

BRAY, Justice.

Appeal from an order of the superior court granting an injunction pendente lite, enjoining defendants from transferring funds and property of former San Francisco Lodge No. 68, International Association of Machinists, to another union (Machinists' Union No. 68); requiring defendants to refrain from preventing plaintiff International Association of Machinists taking possession of the funds and property, and administering the affairs of San Francisco Lodge No. 68, International Association of Machinists; and restraining defendants from using the name "Machinists' Union No. 68."

This litigation arises out of a conflict between the Grand Lodge of the International Association of Machinists (hereinafter referred to as "International") and defendants Machinists' Union No. 68 and its officers (hereinafter referred to as the "Union"). There is no dispute as to the facts, which are as follows:

International is a voluntary unincorporated organization designed to coordinate the activities of affiliated unions composed of machinists and claiming, among its purposes, the obtaining of higher standards of living for its members. Machinists' Union No. 68, also an unincorporated voluntary association and labor union, was originally organized in 1885. After the organization of International in 1890, the Union joined International and was issued a charter as San Francisco Lodge No. 68, I. A. M. (hereinafter referred to as the "Lodge"). It, also, is a voluntary unincorporated association, a labor union.

In the year 1941 disputes between International and the Lodge commenced. In May of that year, the Lodge called a strike in eleven plants where ships were being repaired or constructed, without the consent and over the objection of International. The President of the United States and the President of International intervened, and after six weeks of strike, work was resumed. Thereafter sporadic labor disputes occurred in which the Lodge was involved. In September, 1944, the Lodge became involved in a major labor dispute after it refused to allow its members to work overtime in approximately 105 "uptown" shops. The Navy took over and maintained control of these shops until the middle of September, 1945. On October 7, 1945, without regard to the War Labor Disputes Act, 50 U.S.C.A.Appendix, § 1501 et seq., and despite the fact that International had previously advised all lodges that they must comply with the provisions of that act, the Lodge voted to strike the "uptown," "fringe" shops and the shipyards.

The Lodge requested the Executive Council of International, which was then meeting in Washington, to extend strike sanction to it. The Executive Council notified the Lodge that such strike sanction could not be considered (1) as long as the Lodge failed to comply with the War Labor Disputes Act; (2) until the Lodge severed its relationship with a certain C. I. O. affiliate; and (3) until it refrained from striking shipyards with which agreements of no strikes during the war had been made. The Lodge ignored this communication and on October 29, 1945, went out on strike. The Executive Council received numerous communications and telegrams from members of the Lodge, civic groups and others in the Bay Area, requesting that International intervene in the strike which it had not authorized.

Thereafter the Executive Council, except one member, came to San Francisco to make a thorough investigation of the situation. On March 5, 1946, the Executive Council, through the General Secretary-

Treasurer, notified the Lodge that charges for the suspension or revocation of its charter had been preferred against it, and that a hearing before the Executive Council would be held at the Whitcomb Hotel on Monday, March 11th, and requested that the Lodge send a committee to this hearing to defend the Lodge against these charges. A copy of the charges accompanied the notice. Immediately the Executive Board and Strike Committee of the Lodge called a mass meeting of its members for Sunday, March 10th, for "a full and complete discussion of the situation which has been created by charges against Lodge 68 and the attitude of the Grand Lodge Executive Council which is in San Francisco. All issues and factors involved will be reported on, and the membership will be accorded an opportunity to take any action they deem appropriate."

At this meeting a majority of the Lodge members were present. The membership then stood between seven and eight thousand persons. The charges made by the Executive Council were read, and a motion to send a committee to defend against the charges at the meeting called for the next day was voted down. A motion that "Lodge No. 68 withdraw from the International Association of Machinists" was carried by an overwhelming majority. Its charter was returned to International and the members "formed an unincorporated association known as Machinists Union No. 68 composed of all the members of former San Francisco Lodge No. 68."

On Monday, March 11th, at the time and place of which notice had been given, no representative of the Lodge having appeared, the Executive Council found that the Lodge had violated the provisions of the Constitution of International, ordered the Lodge temporarily suspended, and the Grand Lodge to take charge of and administer the affairs of the Lodge until such temporary suspension should be lifted. Demand was made on the officers of the Lodge to turn over the books, records, money (about $20,000), property, and office quarters of the Lodge to International. This being refused, this suit was brought, and an application made for an injunction pendente lite, as above set forth, which on hearing was granted.

The question here is whether or not International is entitled to the money, property, etc., of the Lodge (for convenience it will be referred to herein by the single word "property"), and involves primarily the construction of certain clauses in the Constitution of "the Grand Lodge, District and Local Lodges." Both parties agree that the local union is a unit in a hierarchy of organizations and that the Constitution and by-laws of the union constituted a contract between International and the Lodge, and that both parties are bound by the terms of the contract. See Scott v. Donahue, 93 Cal.App. 126, 269 P. 455.

The Constitution has two parts, one, apparently, covering the Grand Lodge, and the other, the local lodges. In the Constitution for Local Lodges appears Article B, section 14 (p. 66): "In case of the *suspension, revocation of the charter, expulsion, lapsing, or disbanding* of any local lodge for any cause or reason whatsoever, it shall be the duty of the recording secretary, acting in conjunction with the trustees, to send all funds and property belonging to such local lodge to the General Secretary-Treasurer of the Grand Lodge to be held by him, intact, for a period of at least six (6) months. If within that period application is made therefor by at least fifteen (15) members in good standing in that locality, such local lodge shall, with the approval of the International President and the Executive Council, be reopened and the funds and property returned thereto. And in the event that such local lodge is not reopened, all funds and property shall belong to and become the property of the Grand Lodge." (Emphasis added.)

Appellants contend their action at the meeting of March 10th constituted a withdrawal or secession of their local as a unit, and therefore does not fall within any of the conditions enumerated in section 14, and therefore International is not entitled to any of the Lodge's property. Respondents' position on this question, sustained by the lower court, is that the word "disbanding" in section 14 includes withdrawal and secession. Respondents also contend that the proceedings taken at the March 10th meeting were void because of lack of authority in the officers who called the meeting, and invalidity of the notice given. If section 14 covers a secession by the local lodge, it becomes unnecessary to consider the validity of the secession proceedings for the reason that International would be entitled to the Lodge's property under that section, whether the proceedings to secede were regular or irregular.

This suit is brought by the officers on behalf of the members of International. Neither the Lodge nor its members as such are joined as plaintiffs. (It appears that over nine hundred members of the Lodge are still loyal to International and are paying their dues to it.) Appellants contend that International must stand on the strength of its own title, and as this is a proceeding to declare a forfeiture, the property can only be forfeited if the contract so provides. "* * * when the right for forfeiture is claimed under contract, the condition involving the forfeiture must be strictly interpreted against the party for whose benefit it is created * * *." Scott v. Donahue, supra, 93 Cal. App. 126, 131, 269 P. 455, 457; Civil Code, sec. 1442.

Assuming that the Lodge has seceded from International, the only word in section 14 we are concerned with is the word "disband." Having in mind the rule above stated that the contract must be strictly interpreted against International, does that word include "secession"? In determining the question, it is not sufficient to take abstractly the definitions in the dictionaries, but the word must be construed in its relationship to the other portions of the Constitution, and in view of the entire relationship between International and the Lodge as shown in the Constitution. The preamble provides (p. II): "Believing that * * * it is impossible for those who toil to obtain the full reward of their labor other than through *united* action; * * * Now, Therefore; We, The International Association of Machinists, pledge ourselves to labor *unitedly* in behalf of the principles herein set forth, *to perpetuate our Association* on the basis of *solidarity* and justice * * *." (Emphasis added.) The government and superintendence of all local lodges is vested in International "as the supreme head of all such lodges." Article I, sec. 3, p. 1. The International President has the direction and supervision of all local lodges, with full authority *to suspend individual members* and may revoke charters. Article III, sec. 5, pp. 12, 13. The General Secretary-Treasurer of International shall audit the books of any local whenever in his opinion an audit is advisable and upon his demand any local unit shall turn over to him all books, vouchers, bills, receipts and records of such local. Members of local lodges are also members of International. Members are entitled to receive strike or lockout donations from International. Article XI, sec. 1, p. 28. Death benefits to members of local lodges are paid by International. Article XI, sec. 4, p. 30. Strikes or other grievances between employer and lodge members must be sanctioned by International, and if carried on without such sanction constitute cause for suspension of the lodge. Article XIII, secs. 2 and 3, pp. 36, 37. International finances strikes. Article XIII, sec. 5, p. 38. International can fine or expel a member from both the local lodge and International for certain offenses. Article XXI, sec. 1, p. 49, and sec. 3, p. 50. Also "Any member or members of any local lodge who attempt to inaugurate or encourage secession from the Grand Lodge or any local lodge, or who advocate, encourage, or attempt to inaugurate any dual labor movement, or who violate the provisions of the Constitution of the Grand Lodge, or the constitution for local lodges, shall, upon conviction thereof, be deemed guilty of conduct unbecoming a member and subject to fine or expulsion, or both." Article XXI, sec. 2, pp. 49, 50. Amendments to the Constitution must be voted on by the individual members. Article XVIII, p. 44. "A local lodge shall consist of not less than fifteen (15) persons in any locality, qualified for membership and organized as a local lodge under a charter issued by the Grand Lodge of The International Association of Machinists." Article A, sec. 1, p. 60. Persons applying to International for a local lodge charter pledge "ourselves individually and *collectively* to be governed by the Constitution, laws, rules and usages of" International. (Emphasis added) Article B, sec. 3, p. 62. By-laws of local lodges must be submitted to International for "examination, correction, and approval before being adopted." Article B, sec. 8, p. 64. In case of merger of local lodges the property and funds of such merged lodges shall be sent to the International and after being there balanced "such balance as remains" shall be returned to the local lodge created by the merger. Article B, sec. 15, p. 66. Members to qualify as officers of the local must be free of delinquency to International. Article C, sec. 3, p. 67. Each lodge remits a per capita tax to International and a statement of the dues paid by each member to the local. International issues a "due stamp" which the local lodge gives to each member as a receipt for the dues paid by him. Article D, sec. 4, p. 69, and Article F, sec. 8, p. 78. Members in good standing of one local lodge may transfer to any other local lodge. Article F, sec. 13, p. 80. It is the duty of "any member who has information of the violation of any provisions of the Constitution" of International, as well as of local lodges, to prefer charges against the violator. Article K, sec. 1, p. 87. No fine in excess of $50 can be assessed against a member unless it is first approved by International. Article K, sec. 7, p. 89.

A study of these and other parts of the Constitution shows a closely integrated relationship between the International and the local lodges, and between International and the individual members, and that while some of the duties and relationships of members and local lodges to and towards International are contained in the "Constitution for Local Lodges," the two Constitutions form one integral whole. They evidence the fact that International holds a tight rein over the locals and that they have no being separate and apart from International. Moreover, it is clear that International is given a rather broad control of the property of the local lodges. Witness, that in case of a merger of locals, their property must first be sent to International, and by it returned to the new lodge. The members of the local have responsibilities and obligations, not alone to their individual association (the Lodge), but to the superstructure governing it, and to fellow organizations. A member of one local can transfer to another local upon changing employment, and have the same rights in the new local that he had in the old. There is thus an inter-organization relation which cannot be ignored. The individual is a member of the local, but he has a dual relationship, as he is a member of International as well.

Taking the Constitution by its four corners, it is apparent that one of the chief purposes of the organization is to accumulate funds for the purpose of maintaining members of locals on strike, and that a united action and a common interest of members and locals and the International is contemplated. The common purpose and the common obligation is so fully set forth that it could only be a breach of trust, and a violation of the Constitution, for any lodge to hand over its funds and to join a rival organization of which no member of the Lodge could become a member without forfeiting his membership in International.

Section 14 is headed "Grand Lodge Control Over Property." It obviously concerns the relationship of the local with the International, not the local with its own members. The first three conditions—"suspension, revocation of the charter, [and] expulsion," can only come by action of the International for some dereliction of the local. The next condition, "lapsing," is a situation to be brought about by action or inaction of the local as between it and the parent organization. It is not concerned with lapsing as between the individual members and the local, but a lapsing of the local with the International. So, also, "disbanding" treats, not with the disbanding of the local, as between it and its members, but a "disbanding" between the local and the International. When this fact, namely, that the section is dealing exclusively with the relationship of the local to the International, is kept in mind, it readily appears that "disbanding" must be given a much broader definition than appellants apply to it, namely, a dissolution of the local by the individual members. Construing the word "disbanding" thus in regard to the relation between the local and the International as disclosed by the entire Constitution, "secession" is included. Both parties refer to Webster's New International Dictionary, page 741 (1941) for definition of the word "disband": "To break up the organization of; * * * To disunite the parts of * * *." Appellants cite Funk & Wagnalls New Standard Dictionary (1940), p. 720: "1. To discharge from further united service, or to break up the organization of; especially, to discharge from military service. 2. To dismiss or dissociate (an individual) from an organization or connection; discharge * * *." Certainly the Lodge here broke up its organization with and disunited as a part of International. Again, it discharged itself from further united service with its parent organization. Both Webster and Funk & Wagnalls give further definitions of "disband" but mark them as rare or obsolete. Webster (supra): "To loose the bonds of; to release; * * * To be released from a bond, tie, or obligation." Funk & Wagnalls (supra): "To set free, as from a bond * * *. To disintegrate." Roget's International Thesaurus—The Complete Book of Synonyms and Antonyms in American and British Usage—as late as its 1946 edition, under the general heading of "disjunction," 44.11, shows that "disband" has the meaning we have placed on it, for it is there said to be synonymous with "part, part company, separate, disperse, * * * split up, split out [coll.], divide, break it up [slang], leave, take leave, quit, go away; alienate, estrange, break with, split [coll.]; demobilize, demob [slang]."

[1] While there appears to be no express provision in the Constitution to the effect that a local may not withdraw or secede, the whole framework evidences that the locals and their members are so integral a part of the International that they cannot do so and still maintain their property. Article XXI, sec. 2, p. 49, makes it a very serious offense against the organization for any member "to inaugurate or encourage secession from the Grand Lodge or any local lodge, or * * * [to] advocate, encourage or attempt to inaugurate any dual labor movement * * *." A quite peculiar result would be obtained, were we to hold that the Constitution intends that, while advocating secession is a most serious offense for a member, subjecting him to both fine and expulsion from the International, and while, if a local's members peacably dissolve their own local (the contingency which appellants claim is the only one included in the word "disband") the property of such local shall go to the International, nevertheless, if the members commit that serious offense and secede, the funds and property of the local remain theirs to use in opposing, if they should see fit, the International and its lodges, and even to provide sinews of war to a rival labor group. In view of the complete control by International over the locals, and the relationship between them and it, the only reasonable construction to be given to the word "disbanding" is that it was intended to cover any severance by the lodge of its tie with International, including withdrawal or secession.

Appellants rely principally upon the case of McCarty v. Cavanaugh, 224 Mass. 521, 113 N.E. 271, 272. In that case "Pride of the Forest Circle No. 134" unanimously voted to secede from its parent organization, "Companions of the Forest of America," a fraternal beneficiary association. The constitution governing subordinate lodges of the order provided: "In the event where a circle is about to *disband*" (emphasis added) a certain method of taking the vote of the members should be followed, and if the vote were in favor of disbanding, the moneys in the sick, funeral, and benevolent funds of the Circle would go to the Supreme Circle of the order. The members of the Circle, after voting to secede, refused to turn these moneys over to the Supreme Circle and an action in equity was brought by the latter against the former to recover these funds. The court held that the section above quoted "applies to a case where a circle is about to 'disband' but does not refer to a circle which *secedes* from the association." (Emphasis added.) There was another section of the Constitution which provided: "In the event of the *dissolution, seceding or disbanding* of a circle, any beneficial member of the circle who voted in the minority against their circle *disbanding or seceding*" (emphasis added) could pay dues thereafter to the Supreme Circle and be entitled to sickness or death benefits. The court held that this provision did not apply where *all* the members of a circle withdrew leaving no minority to be protected, and then went on to say (page 273 of 113 N.E.): "There is no provision of the constitution or by-laws of the Supreme or Grand Circles governing subordinate circles, which forbids the latter from withdrawing or seceding as a whole from the association. Under these circumstances all the members of Circle 134 could rightfully secede or withdraw from the association * * * and without subjecting the property of such subordinate circle to forfeiture, and could continue * * * 'as an association for similar purposes but unaffiliated with any state or national organization.'" While this case flatly holds that "seceding" is not included in the word "disbanding," it was in connection with the particular constitution then before the court. There was no provision against seceding, as in our case where the members are forbidden to even advocate secession. There the Constitution itself expressly made a difference between these words, by using the words in one sentence in another part of the document "dissolution, seceding, or disbanding." The very fact that these three words are used in the same sentence requires that a different construction be given each of them. Moreover, this case is in exact contrast to a later California case, Subsidiary H. Ct. A.O.F. v. Pestarino, 41 Cal.App. 712, 183 P. 297.

In this case the Corte Christoforo Colombo No. 8229, A.O.F., by unanimous vote of its members, terminated its existence as a court of the Ancient Order of Foresters, surrendered its charter, and returned its books, regalia and paraphernalia. The funds in its treasury were transferred to a corporation organized by members of the former court and designated "Corte Christoforo Colombo, No. 1, Universale Ordine dei Foresters." This corporation had no connection with the Ancient Order of Foresters, and was not sanctioned by that order. When, after demand, the officers and members of the former court refused to pay over the funds to the sick and funeral fund of the high court, action was brought by the latter to recover these moneys. The Constitution provided: "No court shall voluntarily surrender its charter so long as nine members in good standing object to its surrender, nor shall the funds of said court ever be divided among its members, but on its *dissolution* all funds, books and other property shall be immediately delivered to the Permanent Secretary and applied to the High Court Sick and Funeral Fund." (Emphasis added.) The position of the respondents in that case was just the reverse of that of the respondents here. There they contended that they had not "dissolved"—they had "disbanded." The court held: "To dissolve means to disorganize; to break up; to separate. When applied to a fraternal order of this nature it means *to surrender the charter; to disband.* The section quoted prohibits the voluntary surrender of a charter so long as nine members in good standing object. Thus, if nine members do not object, a subordinate court may surrender its charter and thereby become dissolved, disbanded, or disorganized. It is the voluntary surrender of the charter that the section quoted refers to, and it is such a voluntary dissolution that is contemplated in the latter part of the section which prohibits the distribution of the funds among the members of the court, and requires the delivery to the High Court of all funds, books, and other property." (Emphasis added.)

Thus the actions of the local in seceding from the parent body and setting up a rival organization were determined by the court to be a disbandment and a dissolution. Since the Lodge in the present case adopted the same procedure, it follows that its acts likewise are a disbanding within the provisions of section 14 of the Constitution for Local Lodges.

The words "disband" and "secede" have been used by law writers interchangeably. For example, 10 C.J.S., Beneficial Associations, § 63, p. 306, action such as taken by the Lodge in the case at bar is referred to as "disbanding." "* * * where the members of a subordinate lodge disband and turn over the funds of the lodge to another society in violation of the laws of the grand lodge, those assisting in the actual disposition of the funds are jointly and severally liable to the grand lodge for the whole fund; and, where the disbanding members of a subordinate lodge form a new order and turn over the funds to it, the new order may be compelled to account for such funds." And "The power of the majority of the members of a subordinate lodge to bind the minority by a vote to secede as a body from the society is likewise governed by the laws of the association and the charter and constitution of the subordinate body, and, in the absence of provision therefor in such laws, a majority may not disband the local as against the dissent of the minority."

In Rosenthal v. Reinfeld, 48 Misc. 652, 96 N.Y.S. 199, the majority members of a union voted to consolidate with another association. The Constitution of the union provided: "This Union shall not be disbanded as long as ten members have voted to continue its existence." The court held that the attempted amalgamation and consolidation with another association constituted a "practical disbandment."

In Henry v. Cox, 25 Ohio App. 487, 159 N.E. 101, at a meeting of Summit County Klan, No. 27, a majority of its members voted to withdraw as a subordinate branch of the Knights of the Ku Klux Klan and to transfer all of the funds and property of Klan No. 27 to an organization called Protestant Service League. In a suit brought to determine whether the majority or minority group was entitled to these funds and property the court uses the word "disbandment" as characterizing the action of the majority members although it holds that it was not a legal disbandment, because not the unanimous action of the members.

In Koerner Lodge, No. 6, K. of P. v. Grand Lodge K. of P., 146 Ind. 639, 45 N. E. 1103, the local lodge seceded as a subordinate lodge of the order, organized a new society and turned the property of the lodge over to it. In a suit by the Grand Lodge to recover this property, the court uses the terms "secession", "disbanding" and "dissolution" interchangeably.

In Low v. Harris, 7 Cir., 90 F.2d 783, the Constitution of the United Mine Workers of America used the word "disband." Under circumstances similar to those in our case, the local union of that organization claimed its action to be one of secession rather than a disbanding. The court did not discuss this distinction between words, but assumes that the word "dissolution" covers the action of the local in seceding, forming another organization, and transferring the local's property to it. In this action between the secedents and the loyal minority, the court held that there could be no dissolution of the local unless joined in by all the members.

In Grand Lodge, International Ass'n of Machinists v. Reba, 97 Conn. 235, 116 A. 235, the court held that under the charter of International at the time (1922), where the International revoked the charter of a subordinate lodge, the International was not entitled to the local's property, as the only constitutional provision concerning property provided "In case of a lodge lapsing" and that "lapsing" did not include "revocation." Since that time the Constitution has been amended to read as hereinbefore set forth.

[2] Appellants argue that because Article B, section 14, provides a certain penalty for any member who advocates secession, such is the only penalty permissible for secession, and cite Dingwall v. Amalgamated Ass'n, etc., 4 Cal.App. 565, 88 P. 597. That was a case in which the Constitution of a street railway union provided expulsion for any member who divulged certain information and a fine for all other offenses. The association tried to expel a member for conspiring against its welfare. The court held (page 569 of 4 Cal.App., page 599 of 88 P.): "The parties to the association having by agreement thus limited and declared the penalty to be imposed for all offenses, it was not within the power of the appellant to impose a different penalty for the offense with which the respondent was charged." But our case is not one in which any attempt is being made to impose upon the individual member a

different penalty than that imposed by the Constitution. It is a question of the rights between the International and the Lodge to be determined by an examination of the Constitution as a whole. It by no means follows that the word "secession" in the clause concerning individual members is not included in the word "disband" in the clause concerning the Lodge's relationship to the International. The clause prohibiting members from advocating secession is in the Constitution for International. Article XX, section 3, p. 49, provides that International shall provide a Constitution for the government and control of local lodges. It is in this Constitution for local lodges that the clauses appear which provide for the funds of the local going to International in case of merger (section 15) and under the conditions mentioned in section 14 hereinbefore quoted. The strong hold that International has over the members is emphasized by the placing of the secession inhibition in the International Constitution, although, of course, as agreed by both parties, the Constitutions together must be considered as the contract between the local, its members, and International.

The situation in Grand Council Provincial Workmen's Ass'n v. McPherson, 8 Dom. L.R. 672 (Canada, 1912), in an action brought by the parent organization against one of its locals, was almost identical with that in the case at bar. There the relationship between the Grand Council of the Provincial Workmen's Association and the subordinate lodge was similar to the relationship between International and the Lodge, as were the rules binding the subordinate lodge. Instead of the word "disbanding" in the clause relating to the disposition of the lodge property, the word "dissolution" was used. Also there was a statute of the Dominion which provided for the disposition of the lodge's property on "dissolution." The local lodge there attempted to secede and join a rival organization and to transfer its property to trustees to be held for later disposition. The court characterized the action as "secession." The same contention was made there as here, that the action of the local was not a "dissolution." The court, however, held that this action of secession was a dissolution and that a labor organization which owes allegiance to a grand body of which it is a subordinate member cannot, upon secession from the association, dispose of its assets to a rival organization where there is a provision of the grand body that upon the "dissolution" of any subordinate lodge its property is vested in the grand body. As pointed out in Subsidiary H. Ct. v. Pestarino, supra, 41 Cal.App. 712, 713, 783 P. 297, "dissolve" "When applied to a fraternal order * * * means *to surrender the charter, to disband.*" (Emphasis added.)

An examination of all of the cases discussing the relationship of the parent organization to the local, either in the case of a fraternal society or a labor union, shows that the determination by the courts of that relationship depends upon the terms of the particular constitution and the correlation between the two.

We have not deemed it necessary to consider the question which appears in a number of the cases cited on other points as to whether a secession from the parent organization can be effected by only a majority of the members of the local. Article A, section 1, p. 60, provides that a local lodge shall consist of not less than fifteen persons. Here the loyal members remaining comprise more than nine hundred. In a case where that question is directly raised in a contest between the parent organization and the local union or lodge, it has been held that there is no secession, unless all members vote to secede. Koerner Lodge No. 6, K. of P. v. Grand Lodge K. of P., supra, 146 Ind. 639, 45 N.E. 1103. See also M. and M. Wood Working Co. v. Plywood & Veneer W.L.U. No. 102, D.C.Or., 23 F.Supp. 11. There are a number of cases holding to the same effect in actions between the minority and majority members of the seceding local. Low v. Harris, supra, 7 Cir., 90 F.2d 783; Henry v. Cox, supra, 25 Ohio App. 487, 159 N.E. 101; Di Silvestro v. Sons of Italy Grand Lodge, 129 Misc. 521, 222 N.Y.S. 203; Harris v. Backman, 160 Or. 520, 86 P.2d 456; Local No. 2508, Lumber & Sawmill Workers v. Cairns, 197 Wash. 476, 85 P.2d 1109; Lumber and Sawmill, etc., v. International

W. W., etc., 197 Wash. 491, 85 P.2d 1099; Local No. 2618, Plywood, etc., Workers v. Taylor, 197 Wash. 515, 85 P.2d 1116; Brownfield v. Simon, 94 Misc. 720, 158 N.Y.S. 187; State v. Postal, 215 Minn. 427, 10 N.W.2d 373.

Nor have we considered the question of the rights of minority members of S. F. Lodge No. 68 who remained loyal to it and to International. Neither side here has seen fit to join them as parties to this litigation. There is substantial authority to the effect that International in receiving the property of the Lodge receives it in trust for the minority members.

[3] However, in view of the constitutional provision, respondents have a better title to the property than appellants. Whether that title is in trust for the loyal members cannot be raised here. Appellants have not cited a case which holds that where there is a constitutional provision providing for forfeiture to the parent organization, such parent organization cannot recover the forfeited property. O'Neill v. Delaney, Sup., 158 N.Y.S. 665, cited by appellants on this point, expressly holds that there was no provision in the Constitution under which the property of the locals could become the property of the parent union.

Walters v. Pittsburgh & Lake Angeline Iron Co., 201 Mich. 379, 167 N.W. 834, 1 A. L.R. 624, is not in point as it deals with a fund held by an iron company as trustee for its employees, which the court ordered to be distributed to the employees in proportion to their contribution to it.

One other question is left for determination. The lower court enjoined defendants from using the name "Machinists' Union No. 68." Appellants contend that this is erroneous, first, because the seceding local is still the same entity as it was before and during its connection with International, and secondly, a number like "68" is not the subject of appropriation. Machinists' Union No. 68 was an entity when it first joined International. While its chartered name then became "San Francisco Lodge No. 68, I.A.M." it continued to use the name and be known as "Machinists' Union No. 68" as well as to use and be known under the new name. The letter to its members, after secession, states: "Your Union will continue under the name 'Machinists' Union No. 68' as it has been known for many years." The court below, in its opinion, said: "The names are not substantially different; they are the same. Unquestionably such an appropriation would be calculated to and would have the natural tendency to result in confusion, conflict, disorder and chaos, and would seriously impair the functioning of the International as well as that of the loyal local union. The confusion likely to follow from the use of this name by the seceding local is the reason for denying to it the right to such use rather than the existence of any vested right in the organization (Plaintiffs') objecting to the use of the name." There can be no question but that there would be great confusion in having two unions in San Francisco, one called "Machinists' Union No. 68" and the other "San Francisco Lodge No. 68, I.A.M." even though the latter name is longer and has added to it both "San Francisco" and "I.A.M." Machinists' Union No. 68 lost its identity as an entity separate from the I.A.M. when many years ago it joined that organization. Over the years, its identity has been merged with "San Francisco Lodge No. 68, I.A.M." and even though it now attempts to maintain that entity, it cannot keep a name which for years has identified it with the Lodge and the I.A.M. and which, now that it no longer wants to be so identified, would lead to great confusion.

[4] It is true that "Machinists' Union No. 68" consists of generic terms, and that generally the courts will not enjoin the use of a name consisting solely of generic terms. American Auto. Ass'n v. American Auto. Owners Ass'n, 216 Cal. 125, 13 P.2d 707, 82 A.L.R. 699. But where its use would be confusing and misleading the rule is different. In the case last mentioned, upon which appellants strongly rely, the fact that this rule has exceptions is recognized, for the court says (page 131 of 216 Cal., page 710 of 13 P.2d, 82 A.L.R. 699): "No claim is made as to the right of monopoly by reason of copyright or trade-mark of the letters AAA, or as to the exclusive right of appellants to appropriate the words 'American

Automobile,' for the reason that these words are in common use and are regarded by the law as common property, which may be used by others in combination with other descriptive words, provided they are not used in combination with such other words or symbols or designs *as to render it probable that they would mislead persons possessing ordinary powers of perception.*" See also Fidelity, etc., Co. v. Federal, etc., Co., 217 Cal. 307, 317, 18 P.2d 950, also cited by appellants. It is more than probable that persons possessing ordinary powers of perception would be confused and misled by two machinists' unions in the same area, both numbered 68. In Hoyt Heater Co. v. Hoyt, 68 Cal.App.2d 523, 157 P.2d 657, a man named Hoyt was enjoined from using his own name in advertising his water heater business because it confused and misled the public into thinking it was the same business as the already established Hoyt Heater Co. There are many cases which support the proposition that an injunction will issue to restrain the use of a name which will mislead the public, particularly where the court finds, as it did here, that "defendants deliberately seek to mislead, confuse and to stultify the public." Among others—Faisan v. Adair, 144 Ga. 797, 87 S.E. 1080, Ann.Cas.1918A, 243, where the "Ancient Arabic Order of the Nobles of the Mystic Shrine" enjoined the use of the name "Ancient Egyptian Arabic Order of the Nobles of the Mystic Shrine of North and South America"; International Committee Y.W.C.A. v. Young Women's C.A., 194 Ill. 194, 62 N.E. 551, 56 L.R.A. 888, where a group seceding from the Y.W.C.A. were restrained from using the name "International Committee of the Young Women's Christian Association"; Salvation Army in U. S. v. American Salvation Army, 135 App.Div. 268, 120 N.Y.S. 471, where the Salvation Army restrained the use of the name "American Salvation Army"; Society of War 1812 v. Society of War 1812 in N. Y., 46 App.Div. 568, 62 N.Y.S. 355, where the first named society enjoined the defendant from using its name plus the words "in the State of New York."

In Purcell v. Summers, 4 Cir., 145 F.2d 979, the Methodist Episcopal Church, the Methodist Episcopal Church South and the Methodist Protestant Church united to form Methodist Church. One of the group, claiming to be the only true Methodist Episcopal Church South, seceded and attempted to take the church property and the church with them. The Methodist Church brought suit to restrain the seceding members from using the name Methodist Episcopal Church South. In a similar action the Supreme Court of South Carolina (Turbeville v. Morris, 203 S.C. 287, 26 S.E.2d 821) had found that the united church, in adopting the short name "the Methodist Church," had abandoned the name "Methodist Episcopal Church South" and refused to grant an injunction. The federal court in the Purcell case declined to follow the South Carolina court. On the grounds that the names were so similar that their use would cause great confusion the court enjoined the dissident members from using the old name. " 'The close similarity raises an inference of resulting confusion.' " (page 985 of 145 F.2d) Here, as in the case at bar, the defendants had originally had the name, gone into the plaintiff organization as a unit, and withdrawn as a unit. "In any case the ground of relief is the element of 'passing off' or implied misrepresentation which enables the one using the name to appropriate to itself the standing and good will which rightfully belong to another; and this is just as truly present when seceding members use the name of an organization which has recently merged with another under a new name as when the use of the old name has been continued." (page 986 of 145 F.2d)

"It is said that the words 'Methodist' and 'Episcopal' are generic terms and that defendants have the right to use them for that reason; but defendants are not proposing to use either of these words in a new name so different from the old that no confusion could result. They are using the precise name of the old church; and the question is, not whether they have the right to use 'Methodist' or 'Episcopal' in a new name so constructed as to avoid confusion, but whether they have the right to use the old name in a way that amounts, as we think it does, to implied misrepresentation to the damage of plaintiffs. The rule applicable is that applied ordinarily in cases of unfair competition and is thus stated in Nims on Unfair Competition, 3d ed. 962:

> " 'To establish a cause of action for unfair competition it is not necessary to prove an exclusive right in plaintiff, i. e., that no one else ever has used the mark in the past or that no one else is using it now. The issue is not one of title or exclusive right but of representation, viz., what does the mark as used by plaintiff represent or mean to the public, and what in contrast, does the mark used by the defendant represent.' " (page 988 of 145 F.2d)

The case of State Council, Jr. O.U.A.M. v. National Council, Jr. O.U.A.M., 71 N.J. Eq. 433, 64 A. 561, cited at length by appellants in their closing brief, while authority for the proposition that appellants' action constituted a secession, with which contention we agree, is not authority for the proposition either that appellants had the right to secede or to retain its former name. In that case state council was an incorporated body of New Jersey which entered into a voluntary affiliation with other state councils, under a national council composed of delegates from the various state councils. When the national council attempted to change the purposes of the organization without the vote required by its Constitution the New Jersey State Council seceded. The court held that under the framework of the national organization the state council had the right to withdraw and maintain its original entity. The case illustrates the fact that each case depends upon the situation as disclosed by the particular constitution and the particular facts. In this respect it is interesting to note that in Di Silvestro v. Sons of Italy Grand Lodge, supra, 129 Misc. 521, 222 N.Y.S. 203, under a somewhat similar situation to that in the last mentioned case, the court held that the subordinate lodge could not secede as such action would impair and destroy the contractual relations between the parent order and its members and the local lodges. To the same effect, M. and M. Wood W. Co. v. Plywood & Veneer W.L.U. No. 102, supra, D.C.Or., 23 F.Supp. 11.

[5] Appellants cite Freundschaft Lodge, No. 72, D.O.H. v. Alchenburger, 235 Ill. 438, 85 N.E. 653, on this question, in which the court refused to enjoin the seceding lodges from using titles containing words similar to those in the title of the parent organization. However, the case was decided simply upon the basis that the parent had no exclusive right to the words in question. There was no discussion of the fact that their similarity might have been misleading or confusing. Respondents are entitled to the injunction here, not because of any exclusive right to its name, but because of the confusion and misleading that must necessarily follow from two similarly named organizations in the same locality, one of which has so long been identified with the other that the general public would have difficulty in determining which was which.

The order appealed from is affirmed.

PETERS, P. J., and WARD, J., concur.

GALE et al. v. WITT et al.

Civ. 3625.

District Court of Appeal, Fourth District, California.

May 22, 1947.

Hearing Granted July 17, 1947.

1. Judgment ⚷443(1)

To obtain equitable relief from judgment, fraud relied on must be extrinsic or collateral to questions examined or determined in prior proceeding and a good equitable excuse must be shown for not having there raised the issue.

2. Judgment ⚷443(1)

A violation of confidential relations which has the effect of preventing a party from presenting his case may be sufficient to constitute extrinsic fraud justifying equitable relief from judgment.

3. Executors and administrators ⚷75

Executor not only is under duty of disclosing true facts regarding execution of will to court, but he acts as trustee for beneficiaries of estate.

4. Judgment ⚷443(1)

If executor, as alleged, concealed true fact that witness added her signature to will after testatrix' death, and falsely represented that the will had been properly attested, executor violated his duty to court and to beneficiaries, and the alleged fraud would be "extrinsic" justifying equitable relief from judgment probating will and distributing property.

See Words and Phrases, Permanent Edition, for all other definitions of "Extrinsic Fraud".

5. Judgment ⚷433

The fact that heirs had notice of probate proceedings did not preclude them from obtaining equitable relief from decree of distribution on ground that executor falsely represented that will had been properly attested, where heirs had no knowledge of alleged fact that witness added her signature after testatrix' death until some months after entry of decree of distribution.

◆

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Action in equity by Roy A. Gale and another against John H. Witt, individually and as executor of the estate of Ada L. Gale, deceased, to recover, on trust theory, property distributed in a prior probate proceeding to the defendant. From a judgment of dismissal, the plaintiffs appeal.

Reversed.

Ray Miller, of San Diego, for appellants.

Monroe & McInnis, of San Diego, for respondents.

BARNARD, Presiding Justice.

This is an action in equity to recover, on the usual trust theory, property distributed in a prior probate proceeding to the defendant Witt. The plaintiffs are the sons and only heirs of the deceased, who left a will naming Witt as her executor, giving him her residence property, and leaving the remainder of her estate to the plaintiffs.

The attesting witnesses appearing on the will were the defendant Witt, the attorney who represented him in the probate proceedings, and this attorney's secretary Mrs. Geiger. The will was admitted to probate and seven months later a decree was entered distributing the property in accordance with the terms of the will. There was no contest of the will and no opposition to the petition for distribution, and the orders made in the probate proceedings have become final.

This action was filed more than six months after the real property was distributed to Witt. The attorney was joined as a defendant but the court later dismissed the action as to him, and no appeal was taken from that order. Briefly stated, the complaint charges that the will was executed by the deceased with Witt and this attorney as the only witnesses; that Mrs. Geiger added her signature as a witness after the death of the testatrix; that the defendants procured this additional signature because they realized the insufficiency of the will to pass the real estate to Witt; and that they fraudulently presented the will in its final form, representing to the court that it had been properly executed. It is then alleged that the plaintiffs had no knowledge of the true facts and did not discover anything in connection with the fraud until more than three months after the decree of distribution was entered.

A demurrer to the complaint was overruled and an answer was filed by Witt. When the case went to trial an objection to the introduction of any evidence was sustained, on the grounds that the order admitting the will to probate and the decree of distribution had become final and could not be collaterally attacked except for extrinsic fraud, and that the fraud alleged was intrinsic and not extrinsic in character. A judgment of dismissal was entered and this appeal followed.

[1] The sole question presented is whether or not such fraud as that here charged is extrinsic in character. It is well settled that in such a case the fraud relied on must be extrinsic or collateral to the questions examined or determined in

the prior proceeding, and that a good equitable excuse must be shown for not having there raised the issue. Hammell v. Britton, 19 Cal.2d 72, 119 P.2d 333. The respondent contends that no such excuse was here shown; that the appellants were heirs and had notice of the probate proceedings; that the issue as to the proper execution of this will was necessarily passed upon, both when the will was admitted to probate and when the petition for distribution was heard; and that the appellants, having failed to present the matter at that time, are bound by the determination then made.

The appellants rely mainly on the decision of this court in Crow v. Madsen, 111 P.2d 7, which was not reported in State Reports. Broadly speaking, it was there held that a violation of a confidential relationship, and of the duty owed by an executor to disclose the true facts and not to deceive the court, were sufficient to constitute extrinsic fraud. The respondent attempts to distinguish that case by contending that no violation of confidential relations or of any duty to the appellants here appears. He concedes that where another party is entitled to believe that the executor will protect his interest, instead of asserting a conflicting interest, there exists such a relationship of trust and confidence that the perpetration of a fraud might well be held extrinsic, as in the Crow case, since it would then operate to prevent the other party from appearing and protecting his own interest. It is then argued that a different situation here appears since it was apparent from the beginning that Witt intended to claim that Mrs. Geiger was a proper attesting witness; that the appellants must have known that this fact would be represented to the court, and that Witt was asserting his right to receive the property under the terms of the will; that from the outset his position, as a devisee, was antagonistic to the appellants' position as heirs; that they could not have believed that Witt was conducting his administration for the purpose of vesting title to the home property in them; that the fraud charged, representing that the will was properly executed, amounts to nothing more than a misrepresentation to the court with respect to the exact issue there involved; and that such fraud, under established rules, is intrinsic in character. The respondent relies upon Pico v. Cohn, 91 Cal. 129, 25 P. 970, 27 P. 537, 13 L.R.A. 336, 25 Am.St.Rep. 159, and other cases, in which it has been held, generally speaking, that the use of perjured testimony or forged documents constitutes intrinsic rather than extrinsic fraud, since defense thereto may be made in the action in which the fraud occurs.

[2] While it has been held, in a number of cases, that a judgment would not be vacated merely because it was obtained by forged instruments or perjured testimony, it does not necessarily follow that, under some circumstances, such things may not constitute extrinsic fraud. The basic distinction in such cases seems to be whether the fraud in question was such as to prevent a full and fair hearing, or whether it involved a situation where the injured party, having the opportunity so to do, has failed to present his case. The rule itself, distinguishing between intrinsic and extrinsic fraud, is designed not only to give finality to judgments, but to protect injured parties who have wrongfully been prevented from presenting their case, especially where a court has been imposed upon. Under the rule, a violation of confidential relations which has the effect of preventing a party from presenting his case may be sufficient to constitute extrinsic fraud.

The leading case defining extrinsic fraud is United States v. Throckmorton, 98 U.S. 61, 25 L.Ed. 93. The court there stated that the cases where relief would be granted are those in which "by reason of something done by the successful party to a suit, there was, in fact, no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud and deception practiced on him by his opponent, as by keeping him away from court, a false promise of compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing." Because of the examples given in this statement of the rule, some cases have limited its application to situations where the injured party has been kept in ignorance of the proceeding, or prevented from making a defense, by some representation made directly to him by the other party. The rule, by its terms, seems to go further than this and to cover any fraud or deception which prevents the other party from presenting his case. In other words, where the fraud was such that it prevented a real contest on the issue in question.

In Caldwell v. Taylor, 218 Cal. 471, 23 P.2d 758, 761, 88 A.L.R. 1194, fraud although largely the same as that involved in a previous will contest, was held to be extrinsic since the false statements made by the beneficiary of the will had prevented the plaintiff from setting up a real defense to the probate of his father's will. The court stated that the case was similar in principle to the one there cited, in which it was held that willful concealment of fraud was sufficient to warrant the aid of equity since the fact of such original fraud, if known, would have been a defense in the original action. In that case, the court said: "The main requirement to establish extrinsic fraud is that the unsuccessful party was prevented by his adversary from presenting *all* of his case to the court. One of the examples given is that of a party who is prevented from appearing in court. It would seem that the deceit practiced in the instant case was just as effective to prevent the proper presentation of the contest as if the plaintiff had been prevented from being present at the hearing." In Purinton v. Dyson, 8 Cal.2d 322, 65 P.2d 777, 779, 113 A.L.R. 1230, there was involved a situation where an executor, who was also a beneficiary of the estate, failed to inform a pretermitted heir of the death of her ancestor with the intention of gaining an increased share in the estate. In holding that the suppression of this information constituted extrinsic fraud, the court said: "However, it is difficult to see how fraud could be practiced more directly upon one entitled to present his rights to a court than by keeping him in ignorance of the proceedings." After pointing out that most such cases have involved direct representations that it was unnecessary for the other party to appear in the proceedings, the court further said: "But the rule allowing the maintenance of an action in equity for extrinsic fraud should not be limited so strictly as to require as a basis evidence of representations made directly to the one defrauded." The court further quoted from Bankers' Trust Co. v. Patton, 1 Cal.2d 172, 33 P.2d 1019, as follows: "It is assumed that the willful suppression in bad faith of material facts in probate proceedings by which the plaintiff and other creditors would be deprived of property and assets * * * would constitute an extrinsic fraud against which equity could grant relief by charging the distributees as trustees, even though the decree of distribution itself be not disturbed."

In other cases, the concealment of material matters and the suppression of the truth with the intent to mislead the court have been held to constitute extrinsic fraud on the general ground that they have in fact prevented the injured party from presenting, or fully presenting, his case in the original action. (Wingerter v. Wingerter, 71 Cal. 105, 11 P. 853; Wickersham v. Comerford, 96 Cal. 433, 31 P. 358; Curtis v. Schell, 129 Cal. 208, 61 P. 951, 79 Am.St. Rep. 107; Sohler v. Sohler, 135 Cal. 323, 67 P. 282, 87 Am.St.Rep. 98; Campbell-Kawannanakoa v. Campbell, 152 Cal. 201, 92 P. 184, 187.) In several of these cases confidential relations between the parties with a consequent duty to reveal the true facts was also relied on as supporting the theory of extrinsic fraud. In some of them the offending party had also acted as executor of the estate, and there had been a breach of the resulting duty to disclose the facts to the court. In the last case cited, where a pretended sale of the property of the estate was put through in order to circumvent an illegality in the will, the court held that the entire proceedings, including the sale and the distribution of its proceeds, were a mere sham, an imposition on the jurisdiction of the court and an attempt, by concealing the real facts from the court, to use that jurisdiction for the purpose of depriving the plaintiffs of their rights under the law. It was held that this was "an imposition upon the jurisdiction of the court, to the injury of the absent property owners, from the nature of the transaction was concealed and who were wholly in ignorance thereof, and could not have learned concerning the same from anything appearing on the face of the purported proceedings, by one who was their trustee for the proper administration of the affairs of the estate * * *." The court held that these acts constituted a fraud upon the plaintiffs as well as upon the court and that "the extrinsic character of the fraud is even clearer here" than in the ordinary case "where a party was in a former proceeding simply deprived by some fraudulent artifice or breach of fiduciary duty on the part of the prevailing party of his opportunity to be heard upon the issues there presented and determined."

[3, 4] Applying the established rules to the alleged fraud here in question it must be held that the same is extrinsic in character. Something more appears than the mere fact that what amounts to a forged instrument, with perjured testimony, was employed and used in the original proceedings. There was a fiduciary relationship between these parties since the respondent executor not only was under the duty of disclosing the true facts to the court but he was acting as a trustee for the appellants as beneficiaries of the estate. Bacon v. Bacon, 150 Cal. 477, 89 P. 317. By concealing the true facts and falsely representing that this will had been properly attested, under the allegations of the complaint, he violated his duty to the court and to the appellants and effectively prevented a contest or a real hearing. The pretended due execution of this will was as much a sham as was the pretended sale in the case above cited. As was said in Bacon v. Bacon, 150 Cal. at page 492, 89 P. at page 323:

"To deny relief where the fact is technically in issue, though, by reason of the mistake or fraud, not controverted or contested at the trial or hearing, would be to destroy the equitable remedy in a large class of cases in which it has been hitherto administered."

[5] It is idle to say that the appellants, being heirs, had notice of the proceedings and could have there brought out the true facts. They had no knowledge of the facts until some months after the entry of the decree of distribution, which it is claimed is conclusive of the issue. From the nature of the case the appellants had no way of knowing that this will, vouched for by the executor, was not in fact executed before the witnesses whose signatures were attached thereto, with all of the earmarks of having been actual attesting witnesses. Such a fraud would naturally be more deceptive than a mere forgery, in which some possibility of detection may be inherent. These signatures were genuine, leaving no possible sign of the concealed fraud. There was nothing on the face of the proceedings which would have informed the appellants of the true situation, which would arouse their suspicion or which should have prompted them to make an investigation. They were entitled to rely upon the representations made to the court and to them by the executor, who was acting officially for the court and as trustee for them in the proper administration of the estate. Not only was an imposition and fraud practiced upon the court by the executor as an officer of the court, but it operated directly to mislead the appellants, and it was intended to and did have the practical effect of preventing a real contest on this issue and of depriving the appellants of an opportunity to be heard. It would be difficult to imagine a form of fraud which would more directly affect the rights of the appellants or more effectively prevent them from having a real hearing, than the presentation of such an instrument under such circumstances by one having the duty to disclose the true facts, both to the court and to them. It follows that the fraud in question is extrinsic in character, and that the judgment of dis-

missal should be reversed to the end that the truth or falsity of the charges made may be fairly heard and determined.

The judgment is reversed.

MARKS and GRIFFIN, JJ., concur.

80 Cal.App.2d 48

DEMETER et al. v. ANNENSON et al.

Civ. 13322.

District Court of Appeal, First District, Division 1, California.

May 28, 1947.

Hearing Denied July 24, 1947.

1. Courts 🔑97(1)

Even if Supreme Court cases purporting to state federal common law on subject of the right to give exclusive privilege of soliciting taxicab patronage at railroad stations had been subsequently overruled by Erie v. Tompkins, such factor would not render Supreme Court cases on the subject of right to give exclusive privilege of soliciting taxicab patronage at railroad station any less potent as argumentative authorities in determining California common law on the subject.

2. Contracts 🔑116(5)

A contract by railroad granting taxicab company exclusive franchise to solicit patronage at railroad station did not violate "public policy" insofar as general common law of state was concerned.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Policy".

3. Automobiles 🔑104

A decision by the State Railroad Commission on right to give exclusive privilege of soliciting taxicab patronage at railroad station, though not constituting a binding precedent, was persuasive as reflecting view of body charged with regulation of intrastate carriers.

4. Carriers 🔑13(1)

The various statutory prohibitions against discriminatory agreements and practices by common carriers only relate to their public duty as carriers, and do not relate to incidental relationships they may enter into with third parties in carrying on their public service activity. Gen.Laws, Act 6386, § 17(a) 2, (b); Civ.Code, § 2170; Const. art. 12, § 21.

5. Carriers 🔑13(1)

A contract by railroad granting taxicab company exclusive franchise to solicit patronage at railroad station was not violative of any of the constitutional or statutory provisions prohibiting discriminatory agreements and practices by common carriers. Gen.Laws, Act 6386, § 17(a) 2, (b); Civ.Code, § 2170; Const. art. 12, § 21.

6. Frauds, statute of 🔑143(1)

The statute of frauds could not be invoked to have unwritten contract declared void by one who was not a party to the contract.

7. Appeal and error 🔑1152

A judgment, permanently enjoining defendants from directly or indirectly soliciting taxicab patrons within railroad station grounds and parking their taxicabs thereon for purpose of soliciting such patronage in violation of exclusive franchise granted to plaintiff by railroad, was modified to limit injunctive relief to duration of the exclusive privilege contract.

◆

Appeal from Superior Court, Santa Clara County; M. G. Del Mutolo, Judge.

Action by John P. Demeter and another, doing business under the name and style of Yellow Cab Company, against Harry Annenson and another, doing business under the name and style of Indian Cab Company, Elvis Dixon, doing business under the name and style of Black & White Cab Company, and another, to enjoin defendants from soliciting taxicab patronage or from parking their taxicabs for soliciting of patronage on the station grounds of the Southern Pacific Company, in Palo Alto. From a judgment for plaintiff, the defendant Elvis Dixon, doing business under the name and style of Black & White Cab Company, alone, appeals.

Judgment modified, and, as so modified, affirmed.

Nathan C. Finch and Howe & Finch, all of Palo Alto, for appellant.

Crist & Beene and Frank L. Crist, all of Palo Alto, for respondents.

PETERS, Presiding Justice.

Plaintiffs, John Demeter and Evelyn Knapp, doing business as the Yellow Cab Company, brought this action against defendants Harry Annenson and Theodore Brown, doing business as the Indian Cab Company, Larry Borba, doing business as the Royal Cab Company, and Elvis Dixon, doing business as the Black and White Cab Company, to enjoin these defendants from soliciting taxicab patronage, or from parking their taxicabs for the purpose of soliciting patronage, on the station grounds of the Southern Pacific Company in Palo Alto, it being alleged that plaintiffs have a contract with the Southern Pacific Company granting them the exclusive privilege of soliciting such patronage on the station grounds.

The complaint alleged and the trial court found that in June of 1939 the assignors of plaintiffs and the Southern Pacific Company executed a contract granting the Yellow Cab Company the exclusive right, in return for a fixed rental, to solicit the patronage of prospective passengers on the railroad's station grounds at Palo Alto; that that agreement was subsequently renewed and extended on substantially the same terms and conditions as set forth in the original agreement, and was in force and effect when the complaint was filed; that defendants, knowing of these exclusive rights granted to plaintiffs, nevertheless have parked their taxicabs on the railroad's station grounds for the purpose of soliciting passengers and have solicited such patronage on such grounds. Based on these findings the trial court entered its judgment enjoining the defendants from directly or indirectly soliciting taxicab patrons within the station grounds and from parking their taxicabs thereon for the purpose of soliciting such patronage. From this judgment Elvis Dixon, doing business as the Black and White Cab Company alone appeals.

Appellant's main contention is that the exclusive privilege contract between the Southern Pacific Company and respondents is invalid because, so it is asserted, it violates public policy and is expressly forbidden by the California Constitution and statutory law. It is asserted that there is no California appellate court decision directly in point, so that the question raised is one of first impression in this state. Appellant concedes, as he must, that the majority of cases in other jurisdictions are overwhelmingly against him, but urges that the "better reasoned" common law authorities are to be found in those cases adopting the minority view, and urges this court to follow the minority view.

The cases on both sides of this issue are collected and commented on in an annotation appearing in 15 A.L.R. 356 entitled "Right to give exclusive privilege of soliciting patronage at railroad stations or on trains." It there appears that in 1921, when the annotation was prepared, the United States Supreme Court, Colorado, Connecticut, Georgia, Kansas, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Ohio, Oregon, Rhode Island, Texas, Utah, Virginia, West Virginia, England and Canada had adopted the view that such contracts are valid, while but Indiana, Illinois, Kentucky, Mississippi and Montana had adopted the view that such contracts were invalid. It is the views expressed in the cases from these five states that appellant urges are the "better reasoned," and contends should be here adopted. It further appears that Michigan, Missouri and Pennsylvania have cases both ways on the subject, usually the later cases being in favor of the majority view. Since the annotation was written, three more states have been added to the majority column—Alabama, in Wright v. City of Anniston, 26 Ala.App. 109, 154 So. 597; Florida, in State ex rel. Postal Telegraph Cable Co. v. Wells, 96 Fla. 591, 118 So. 731, 60 A.L.R. 1072, and Iowa, in Red Top Cab Co. v. McGlashing, 204 Iowa 791, 213 N.W. 791. Louisiana, at least by dicta, has joined the majority group. Kansas City, S. & G. Terminal Co. v. Interurban

Motor Transp. Co., 152 La. 1093, 95 So. 258. In addition, the United States Supreme Court in Black & White Taxi Cab & Transfer Co. v. Brown & Yellow Taxi Cab & Transfer Co., 276 U.S. 518, 48 S. Ct. 404, 72 L.Ed. 681, 57 A.L.R. 426; Missouri, in Canary Taxicab Co. v. Terminal Ry. Ass'n, 316 Mo. 709, 294 S.W. 88, and Red Top Taxicab Co. v. Terminal R. Ass'n, 322 Mo. 463, 15 S.W.2d 758, and New York, in Long Island R. R. Co. v. Summers, 263 App.Div. 889, 32 N.Y.S.2d 430, have, since the annotation was prepared, reaffirmed their allegiance to the majority view. No cases, other than those cited in the annotation, have been found adopting the minority view.

The first two paragraphs of the annotation read as follows (15 A.L.R. 356):

"While there is no question that a common carrier may not lawfully exclude from its station grounds a passenger's own carriage, or a carriage hired by him, and it is well settled that all hackmen and baggage expressmen may be prohibited from soliciting patronage on station grounds, there is a decided conflict of opinion upon the question of the right of a railroad company to grant such a right to a favored solicitor of patronage to the exclusion of all others of like vocation.

"However, the more modern and seemingly the better-reasoned doctrine, including that of the Supreme Court of the United States, is to the effect that, in the absence of controlling statute to the contrary, such an exclusive privilege lawfully may be granted."

A reading of the opinions in the five states that have adopted the minority view discloses that the courts there involved were of the opinion that such contracts are discriminatory, stifle competition and subject the railroad's passengers to the inconvenience of having to use cabs of the railroad's choosing rather than of their own choosing. One of the leading cases adopting this view is Montana Union Ry. Co. v. Langlois, 9 Mont. 419, 24 P. 209, 8 L.R.A. 753, 18 Am.St.Rep. 745. At page 431 of 9 Mont., at page 211 of 24 P., the court stated: "It is a rule of universal application that the public is entitled to whatever competition may grow out of the public demands, on the one hand, and the contest of others to supply such demands, and receive the compensation therefor. Are not the conditions here sought to be so controlled by the plaintiff as to stifle the natural development of such competition?" And again at page 433 of 9 Mont., at page 212 of 24 P., the following appears: "But has the railroad company, in dealing with its passengers, and exercising a control over their movements and the conditions which surround them for the time being, a right to place one hackman in their midst, with exclusive control over the common conveniences and facilities of the place at which the passenger may land, or from which he may depart, so that, if the passenger obtain the use of these conveniences and facilities he must purchase the privilege from such hackman or suffer discrimination?"

A reading of this case indicates that the Montana court was passing on a different point than the one involved in the instant case. In that case the plaintiff railroad company sought not only to enjoin the defendant cab company from entering its premises to solicit patronage, because an exclusive privilege had been granted another company, but also sought to restrain the defendant from entering the railroad premises to pick up a passenger who desired service, and to prevent defendant from depositing a passenger headed for the depot nearer than fifty feet from the station. In the instant case the respondent does not seek such drastic relief. Respondent expressly conceded at the trial that appellant had the legal right to enter the depot premises to pick up a passenger who had telephoned for such service, and to enter the depot premises to deposit a passenger who had hired appellant to drive to the depot. The injunction simply prohibits appellant from soliciting passengers on the depot premises and from parking on such premises for the purpose of such solicitation.

The majority view holds that the granting of the exclusive right of solicitation is not discriminatory and does not violate any public policy. This view was clearly expressed by the United States

Supreme Court in Donovan v. Pennsylvania Company, 199 U.S. 279, 295, 26 S.Ct. 91, 95, 50 L.Ed. 192, where it is stated: "We cannot say that that arrangement was either unnecessary, unreasonable, or arbitrary; on the contrary, it is easy to see how, in a great city, and in a constantly crowded railway station, such an arrangement might promote the comfort and convenience of passengers arriving and departing, as well as the efficient conduct of the company's business. The record does not show that the arrangement referred to was inadequate for the accommodation of passengers. But if inadequate, or if the Transfer Company was allowed to charge exorbitant prices, it was for passengers to complain of neglect of duty by the railroad company and for the constituted authorities to take steps to compel the company to perform its public functions with due regard to the rights of passengers. The question of any failure of the company to properly care for the convenience of passengers was not one that, in any legal aspect, concerned the defendants as licensed hackmen and cabmen. It was not for them to vindicate the rights of passengers. They only sought to use the property of the railroad company to make profit in the prosecution of their particular business. A hackman, in nowise connected with the railroad company, cannot, of right and against the objections of the company, go upon its grounds or into its station or cars for the purpose simply of soliciting the custom of passengers; but, of course, a passenger, upon arriving at the station, in whatever vehicle, is entitled to have such facilities for his entering the company's depot as may be necessary."

In a later case considering the validity of the identical type of contract, Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 at page 526, 48 S.Ct. 404, 406, 72 L.Ed. 681, 57 A.L.R. 426, the court said: "The railroad company is under no obligation to transport passengers or baggage from its station. [Citing case.] It is not bound to permit those engaged in such transportation to use its property, to solicit patronage, park their vehicles or otherwise to carry on their business. The contract does not relate to the railroad company's business as a common carrier. [Citing case.]" The court then commented on the split of authority as to the validity of this type of contract, and, in accordance with the weight of that authority, holds the "exclusive privilege" may validly be given. The court stated, at page 528, of 276 U.S., at page 407 of 48 S.Ct.: "The station grounds belong to the railroad company, and it lawfully may put them to any use that does not interfere with its duties as a common carrier. The privilege granted to respondent does not impair the railroad company's service to the public or infringe any right of other taxicabmen to transport passengers to and from the station. * * * The carrying out of such contracts generally makes for good order at railway stations, prevents annoyance, serves convenience and promotes safety of passengers. * * * It would be unwarranted and arbitrary to assume that this contract is contrary to public interest."

[1] Appellant argues that these cases can no longer be considered valid precedents for the asserted reason that in Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487, it was decided that federal courts, in deciding a common law question, are bound by the common law of the state where the litigation arose. It is undeniably true that, insofar as the two cited cases purport to state the federal common law on the subject, they have been overruled by the Erie Railroad Company case. But this factor does not render them any less potent as argumentative authorities. The reasoning in such opinions is just as sound as it was prior to the decision in the Tompkins' case. The rationale of such opinions may properly be considered by this court in determining which of two opposing policies this state should adopt.

It would unduly and unnecessarily extend this opinion to attempt to analyze the many state authorities that have announced the majority rule. Suffice it to say that most of the decisions are based upon reasoning substantially similar to that used by the United States Supreme Court.

Although the precise point involved in the instant case has not heretofore been passed upon by a California appellate court, there are several significant cases in this state that unmistakably indicate the attitude of the California courts on this subject. In Matter of Application of Barmore, 174 Cal. 286, 163 P. 50, L.R.A.1917D, 688, the Supreme Court passed upon the validity of an ordinance which prohibited solicitation of passengers in certain places, including railroad depots. In upholding the ordinance the court stated at page 288 of 174 Cal., at page 51 of 163 P.: "In enacting this ordinance the city council may well have thought that active solicitation of patronage within depots would interfere unduly with the peaceable and convenient use of such depots by arriving and departing passengers. We cannot say that such a view is unreasonable, or that the prohibition of such solicitation is not a proper means of promoting the comfort and convenience of the traveling public, and protecting it from the annoyance of importunate requests for employment."

In the case of In re Stratham, 45 Cal.App. 436, 187 P. 986, there was involved the validity of an ordinance prohibiting solicitation of passengers on the premises of a railroad company without the written consent of the railroad. In upholding the ordinance the court said, at page 440 of 45 Cal.App., at page 988 of 187 P.: "Now it is common experience, and nothing is suggested to the contrary, that the convenience of passengers arriving at transportation stations is promoted, and their business facilitated, by having a single agency at hand to which they can apply for service; whereas, competitive solicitation of such business has been found to be a cause of much disorder and inconvenience. * * * A person engaged in the business of carrying passengers and baggage from public transportation depots has not, in that capacity and in the absence of any contract right, a vested right to solicit business on such depot premises. This being so, the prohibition of such solicitation without written consent of the owner of the premises, while there is no prohibition to those who have such consent, is not an arbitrary and unlawful discrimination. The advantage given to the favored person (if any such there be) is only incidental to the regulation, which is enacted for the convenience and safety of travelers, and not for the purpose of discriminating between persons equally entitled to transact such business on premises devoted to public transportation business."

[2] Appellant argues that these cases are not persuasive for the asserted reason that the power of a municipality to determine a public policy by ordinance is different from the power of individual persons to contravene public policy by private contract. The two cases are important, however, in that they recognize that the comfort and convenience of the traveling public can be contributed to by such exclusive privilege arrangements, and that such arrangements are, in fact, beneficial to the public. We must conclude, therefore, that, so far as the general common law of this state is concerned, such contracts do not violate public policy.

Appellant also argues that, regardless of general public policy, such exclusive privilege contracts are violative of state constitutional and statutory provisions, such as Art. XII, § 21, of the Constitution and § 17 (a) 2, of the Public Utilities Act (2 Deering's Gen.Laws, Act 6386), which prohibit discrimination in charges or facilities by railroad companies. Appellant also might have included § 2170 of the Civil Code which is to the same effect. These arguments are now new. Similar statutory provisions exist in most of the states adopting the majority view. In the A.L.R. annotation heretofore mentioned the state of the law on this subject is summarized as follows (15 A.L.R. at p. 363): "* * * a question has been raised as to whether statutes, which, in general, prohibit discriminations by common carriers, render unlawful exclusive privilege contracts of the kind under consideration in this annotation. Here, again, we find a decided conflict of opinion, although in the main the decisions are to the effect that such statutes do not prohibit the granting of exclusive rights to solicit patronage on railroad premises at stations."

A reading of the cases cited in that note in support of the above quoted statement indicates that the majority of courts consider that the statutory discrimination prohibitions apply only to the business of the carrier as such, and that the granting of an exclusive solicitation privilege is not done by the carrier in performance of its duties as a carrier.

[3] The precise point involved has been presented to the Railroad Commission in this state in the case of Red Line Tourists Agency v. Southern Pacific Company and Union Transfer Company, 3 Opinions and Orders of the Railroad Commission of California, p. 526. That case, while not constituting a binding precedent, is persuasive as reflecting the views of the body charged with the regulation of intrastate carriers. The Commission first held that contracts of the type here involved are valid, in that limiting solicitation of passengers to one company is for the convenience of the railroad passengers. It then passed on the question as to whether such contracts violated § 2170 of the Civil Code. That section provides that: "A common carrier must not give preference in time, price, or otherwise, to one person over another." In holding that exclusive privilege contracts did not violate this section the Commission stated (p. 533): "It is evident that section 2170 of the Civil Code cannot be construed so broadly as to mean that a common carrier can not in any of its dealings give any preference to one person over another. If this construction were to be given to the section, it would be impossible for a railroad company to buy supplies for its commissary or ties for its track or stationery for its office use in any way in which a preference might be held to be given to one firm or company or individual as against another. It seems clear that this section must be interpreted in the light of the railroad company's duty to the public, and that it was not intended to apply to any transactions of a railroad company other than those performed in connection with the carrier's duty to the public."

The Commission also considered the possible application of the anti-discrimination provisions of Art. XII, § 21, of the Constitution, and § 17(a) 2, of the Public Utilities Act (2 Deering's Gen.Laws, Act 6386), and held that such provisions were not violated by such a provision. At p. 532 the following appears: "It seems clear that the foregoing constitutional and statutory provisions do not apply to the question now before this Commission. Both provisions refer to the transportation of passengers and property by the railroad company, and do not apply to the transportation by a baggage or transfer company from or to the railroad company's depot * * *."

The appellant in the instant case also refers to § 17(b) of the Public Utilities Act. 2 Deering's Gen.Laws, Act 6386. It provides: "* * * no public utility shall charge * * * a greater * * * compensation for * * * any services * * * rendered, than the rates, * * * specified in its schedules on file * * * nor extend to any corporation or person any form of contract or agreement or any rule or regulation or any facility or privilege except such as are regularly and uniformly extended to all corporations and persons * * *."

[4, 5] The reasoning adopted by the Commission in discussing the other provisions is sound and equally applicable to this last quoted section. The various statutory prohibitions against discriminatory agreements and practices by common carriers only relate to their public duty as carriers, and do not relate to incidental relationships they may enter into with third parties in carrying on their public service activity.

[6] Appellant also contends that there is no evidence in the record that, on the date judgment was entered, May 24, 1946, there was a valid contract in existence between respondent and the Southern Pacific Company. This contention is based upon the following facts: The complaint was filed January 10, 1946. The case was tried on May 14, 1946. The evidence at the time of trial showed that the last written extension of the exclusive privilege contract had expired March 31, 1946. Before judgment respondent was permitted to amend to conform to proof to allege "that on or before

March 31, 1946, said agreement was extended and is now in full force and effect," and it is the finding based on this allegation that is now challenged. The finding is supported. Worth Prine, manager of respondent, was called as a witness and identified the original contract between the Yellow Cab Company and the Southern Pacific Company, and the last written extension which expired March 31, 1946. He then testified that at the "present time," i. e., May 14, 1946, his company had an oral extension; that his company had signed the formal lease and that it was in the possession of the Southern Pacific Company; that all the terms of the formal lease had been agreed upon. At the oral argument, upon agreement of counsel, there has been filed with this court as part of the record the formal lease which had been signed June 1, 1946. By its express terms the agreement was made effective from April 1, 1946.

Appellant makes various contentions in connection with this state of the record, all based on the fundamental argument that the oral extension was invalid. Even if it were the fact (which it was not) that the oral extension was required by the statute of frauds to be in writing, that point cannot be raised by appellant, who is not a party to the contract. The rule is elementary that the statute of frauds can be invoked only by the parties to the unwritten contract, and is not available to third persons who are not parties to it. Wood Estate Co. v. Chanslor, 209 Cal. 241, 286 P. 1001; Burns v. Peters, 5 Cal.2d 619, 55 P. 2d 1182; see cases collected 25 R.C.L. 732, § 380; 12 Cal.Jur. 925, § 95; 49 Am.Jur. 896, § 589; 37 C.J.S., Frauds, Statute of, § 220, page 715; Browne, Statute of Frauds, 5th Ed., p. 164, § 135. These rules are peculiarly applicable to the present case where the evidence as to the oral extension came in without objection, where the case was tried and decided on the theory that a valid oral extension had been made, and where appellant, not a party to the contract, seeks to raise the point for the first time on appeal.

[7] The last contention of appellant is that the judgment is erroneous for the reason that the injunction, by its terms, is permanent, while the exclusive privilege contract was limited as to time and, so it is argued, any injunctive relief against interference therewith should have been limited to the duration of that contract. In view of the issues before the trial court it must be conceded that the judgment is somewhat ineptly drawn. It provides that "the defendants * * * are restrained and enjoined from in any way directly or indirectly soliciting taxicab patrons within and upon the passenger station and premises immediately appurtenant thereto of Southern Pacific Company in the City of Palo Alto, and from parking their taxicabs on said premises for the purpose of soliciting said passengers." It seems quite clear that, under the findings and evidence, the restraint imposed was intended to apply only for the term covered by the exclusive privilege contract then or thereafter in existence. The injunction merely protected respondent's contract rights. Upon the expiration of those rights the injunction would become functus officio. Inasmuch as the Southern Pacific Company is not a party to this proceeding, and its rights are not protected by injunction or otherwise, the only reasonable meaning attributable to the judgment is that appellant is restrained from interfering with respondent's contract rights. Out of an abundance of caution, however, and in view of the findings and evidence, the judgment is modified to provide that the restraint imposed is limited to the duration of plaintiff's contract rights. By that is meant the period of the existing contract or any lawful extension thereof.

The judgment is modified as above indicated, and as so modified is affirmed; respondent to recover costs on appeal.

WARD and BRAY, JJ., concur.